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DIGESTED TREATISE

AND

COMPENDIUM OF LAW

APPLICABLE TO

TITLES TO REAL ESTATE

IN THE

STATE OF NEW YORK

By JAMES W. GERARD,

COUNSELLOR AT LAW.

FIFTH EDITION.—REVISED AND ENLARGED.

BY

ROBERT LUDLOW FOWLER AND JAMES H. HICKEY.

COUNSELLORS AT LAW.

NEW YORK: BAKER, VOORHIS & COMPANY, 1909.

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PREFACE TO FIFTH EDITION.

It is now some thirteen years since the Fourth Edition of this work appeared. The changes in the substantive law have since been great, and the output of Statutes and Reports has been larger than ever before. Consequently, a new edition of the late Mr. Gerard's work has often been demanded of its publishers.

The editors, however, believe it to be the wish of the profession that such new edition should strictly preserve the familiar arrangement designed by the original author of this work. Therefore, in preparing this edition, they have adhered closely to that arrangement. They have thus been able to avail themselves of the labors of their several predecessors. They have not, however, been content to rest there, but have ventured to insert much new matter while revising the text and bringing the authorities as nearly as possible down to date. As a result, no other State of this country, as they believe, possesses so complete a record of its purely local law of real property.

The editors desire to acknowledge their obligations to Walter Lindner, Esq., of this city, for his valuable suggestions in the preparation of Chapter XLVIII, relating to searches.

49 Exchange Place,

New York, N. Y., January 1, 1909.

R. L. F. J. H. H.

Note.—It is proper for me to add that when I was asked to prepare this edition, I made it a condition of my acceptance that I should have the cooperation of a collaborator of my own selection. Although this edition has been planned in common, and revised by both of us, and although I have also furnished considerable new matter to the several chapters of this work, yet I feel it incumbent on me to state that nearly all the active work of editing has been performed by my associate, James H. Hickey (A. B., LL. B., Harv.), of the New York Bar. Whatever merit this edition possesses is therefore justly due, not to me, but to the assiduous labors of my associate.

R. L. F.

PREFACE TO SECOND EDITION.

This volume is an amplification of one of a similar but informal character, printed in 1869, and which, at the request of the publishers, and upon the suggestion of many members of the profession, reappears in its present form.

The present edition includes many subjects of importance connected with realty not previously considered, and is otherwise much extended.

The aim, in compiling the book, has been the exposition of the principal features of the real estate law of this State in a practical shape, under clearly distinguishing heads, and within the compass of a single volume. Such a succinct treatment of the real estate system of this State — now grown to formidable proportions under the mass of statute law that has been appended to the revision of 1830 — will explain the somewhat terse style necessarily adopted in the reduction of the subject-matter into a comparatively small compass.

Since the production of the valued commentaries of Blackstone and Kent, and the disquisitions of the English common law writers of the earlier portion of this century, the jurisprudence of this State has undergone great change and increase, imposing new labors on the profession. Real estate law, particularly under the effect of legislation breaking away further and further from the common law system, and abolishing or modifying ancient principles under modern requirement, has grown into a system requiring not only study as such, but direction and guidance in its minute and special changes and provisions.

In connection with the extended statutory law bearing on real estate, we have, in this State, a vast number of decisions expounding or interpreting it — decisions which have given the profession the accumulated mass of reports under which it is now laboring — often, under our modern elective system, the result of crude judicial thought, but which, whatever their various merits, the profession is required to recognize.

In carrying out the purpose of plain condensation of the above statutory and adjudicated law, the literary treatment of the subjects under review has been practical, with an endeavor to avoid unnecessary verbiage, and without aim at theoretic disquisition or more comment than is necessary for explanation.

A feature of the present volume is that it relates merely to the law of real estate in this State, with but an occasional reference to the adjudications of other States of the Union. Each State has now its statutory system, more or less variant from that of others, with local decisions interpreting it. A review of the entire real estate law of the several States, however facile a task it might have been some years since, would be now one of extraordinary labor, and would result in a work so cumbrous in volume and confused in treatment as to be of little practical value.

Of course in a compendium of this nature, wherein very many subjects of importance are reviewed, it has been impossible to treat them exhaustively or profoundly. The general features only of the subjects under consideration have been, in the main, presented; and to save space, much has been merely indicated that in a larger work, or in special treatises, would be properly considered at length. Beside the general principles affecting real estate, and an exposition of the various sources of title to land in this State, and of the instruments or legal agency by which lands vest or are transferred, the legal incidents of estates have been considered, together with the different liens to which land has been made subject.

It has been the pleasure of recent legislatures to add to the burthens of real estate and the perplexity of the profession, by placing many quite obscure liens upon realty—legal pitfalls, into which even the experienced conveyancer is in danger of falling, as he gropes his way through the tortuous mazes of a modern "Title to Real Estate." Such liens have been, it is hoped, fully indicated in this volume; how and when they arise, and how they may be removed. Though often petty in their nature, the laws governing them are necessarily a branch of legal knowledge concerning realty.

Although this volume is more particularly adapted to the wants of the Conveyancer, it is supposed that it may be also of service to those in other walks of legal life; and with reliance upon the indulgence of the members of that laborious profession, whose cares and toil it is hoped this volume may somewhat relieve, it is to them deferentially submitted.

JAS. W. GERARD, JR.

AUTHOR'S PREFACE TO THE FIRST EDITION.

THE object designed for the following volume is to facilitate labor in a troublesome branch of practical law — the examination of Titles to Real Estate.

The want of a book of this nature has been generally expressed by the Bar; and although the writer makes no pretension to have fulfilled the requirement, it is hoped that the book may be found of service.

The practical aim of the work has been to provide, in succinct form, and under appropriate divisions, digested memoranda of the various Sources of Title to land in this State, and of the Instruments and Legal Agency by which lands vest or are transferred, with reported decisions bearing upon the subjects.

The nature and incidents of the various estates in land have also been considered, together with the different liens to which land is subject in the State,—how such liens are created and how removed.

The volume is intended to operate as a practical manual to facilitate the labors of the profession in the examination of Titles, by having all matters connected therewith concentrated in one volume, and by affording a ready means for the instruction of students, clerks, and other assistants of conveyancers.

The future usefulness of the book would be much promoted, if designation were made by gentlemen of the profession of all errors that may be discovered, as well as of additional matter that may be desirable.

New York, January, 1869.

MEMORANDA.

The initials. "R. L." in the work refer to the Revised Laws of 1813.

There had been a prior revision in 1801.

The initials "R. S." refer to the Revised Statutes, which in most of their provisions, and unless the contrary was specified in the law of Dec. 10, 1828, took effect on the 1st of January, 1830. This act also made important provisions as to the construction of the Revised Statutes. A "generally repealing act," repealing a large number of previous acts, which are specified at length, was also passed on the 10th of December, 1828, the repeal to take effect on the 31st December, 1829. The act was not to be construed as repealing statutes consolidated and published in the Revised Statutes, nor any act passed since 9th September, 1828, unless the act were consolidated in the Revised Statutes. The law also provided that the statutes of Great Britain should not be laws of this State, nor deemed to have any effect since the 1st May, 1788; and no statutes of the late colony were to be deemed laws of the State. This act also contained important provisions as to the effect of the Revised Statutes in the revival or repeal of prior acts. It also repeals an act of December 24, 1827, as to the Revised Statutes. Unless there is specification to the contrary, the reference to the Revised Statutes is to the 1st edition.

The initials "G. L." refer to the recent General Laws.

The words "Co. Proc." refer to the Code preceding the present Code of Civil Procedure.

The words "Co. Civ. Proc." refer to the present Code.

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TITLE I. OF THE SOURCE OF TITLE TO LAND IN THIS STATE.1

The original title to land on the American continent, as between the different European nations, was founded on the international right of discovery and conquest; a principle of title acquiesced in by all civilized Powers. The title thus derived is the exclusive right of acquiring the soil from the native, and of establishing settlements on it.

This title, to be perfect, has to be consummated by possession. and the discovery has to be made by persons under the authority of, or recognizing the government claiming. The discovered region thereupon becomes a part of the national domain, and is subject to disposal as such.

The discovery of North America was claimed to have been made under commission from the English Crown; and the first settle-

year 1609.

Hudson, it was claimed, af whatever it was, to the Dutch. it was claimed, afterward purported to sell his right of discovery,

¹The editors of this edition have thought it best to let this chapter stand much as it was originally written by Mr. Gerard. It presents his view of the legal effect of certain national acts of primary importance. Those who are curious enough to examine such points in detail will find further references to the original authorities in Fowler's Real Property Law (2d ed.), 50–75; History Law of Real Property in New York, Chapters I and II.
²Newfoundland and the main continent were discovered, 1497, by Sebastian Gabato, a Venetian in the service of Henry VII.
On the 10th of April, 1606, King James I issued the great North and South Virginia patents, one giving leave to the patentees to colonize between the 34th and 41st degrees of latitude, and the other between the 38th and 45th. In 1608 Henry Hudson, under a commission from the English crown, discovered what is now Long Island, New York and the Hudson river, up which river, under a commission from the Dutch East India Company, he afterward sailed, in the year 1609.

ment was made by the English, with a public declaration that thev claimed, by virtue of that discovery and settlement, possession from the thirty-ninth to the forty-fifth degree of latitude. The subsequent Dutch invasion of part of the present State of New York was considered by the English to be in hostility to their rights:3 and the subsequent occupation by the latter was claimed to be in vindication and under authority of their original title.

Although the Dutch occupation of a portion of the State was in opposi-

Although the Dutch occupation of a portion of the State was in opposition to the claim of the English, it is chronicled that, as early as 1613, the superintendent of the Dutch agency, at New Amsterdam, paid (by compulsion) a small tribute to the governor of Virginia. The government of Holland, however, refused to recognize the jurisdiction of the English over the Dutch settlement. The government of the Province was conferred by charter (1621) on the Dutch West India Co., who took actual possession in 1622. Portions of the State, particularly what is now the city of New York, also Albany, and other territory on the Hudson, were actually subject to the Dutch government from their earliest known history, about 1609, down to 1664, when the Colony and Dutch possessions were surrendered to the English, by whom it was governed until August, 1673, when the Dutch, by conquest, resumed possession. In November, 1674, the English re-established their rule and possession, which they continued until the Independence of the State.

Under the Dutch the Province was known as "Nieuw Nederland." New York became a British Colony August 30, 1664. Overbagh v. Patrie,

Although the early Dutch occupancy of the Island of Manhattan and other territory was considered by the crown of England an usurpation of right, and in opposition to the English paramount title, resulting from prior conquest and discovery of the general coast, the Dutch patents and grants, both those to municipal bodies and to individual residents, were respected and confirmed by the English authorities. The Dutch title, also, whatever its validity, passed by specific treaty to the English crown. When Holland and England made peace with each other on February 19, 1674, under the Treaty of Westminster, the island of Manhattan was ceded to the English Crown, together with all other possession of the Dutch on this continent; and, thereby, all title in the Dutch West India Company became divested.

Charles II granted the Province to the Duke of York, 1664, also by Patent 1674. On the latter's accession to the throne in 1685 as James II, the sovereignty of the crown was resumed by merger jure coronæ. Vide, Patents to the Duke of York, Office of Secretary of State, vol. i; also Smith's History New York; 1 Col. Laws of New York, 1, 104. By the above merger all personal ownership and privileges of the Duke of York were extinguished. New Amsterdam first became an actual British Colony on 30th August, 1664.

The position of the Dutch authorities on this disputed point is presented in Fowler's Real Property Law (2d ed.), 50, 51; Fowler's Hist. Law of Real Property in New York, Chapter I; Fowler's Introduction to N. Y. Laws of 1694, Chapter I.

Overbagh v. Patrie, 8 Barb. 41. Up to that date the political and municipal government of all the region had been de facto Dutch. It is maintained, also. that the Dutch were also in possession, de jure, and not in opposition, merely, to any prior and paramount title in favor of England, by reason of her claim to any prior and paramount title in favor of England, by reason of her claim of original discovery. That discovery was not followed up by actual settlement, possession, or continuous occupation, as was the case with the Dutch. Hence, it has been urged that the subsequent English dominion was not original but derivative from military conquest, and began only from the time they took possession, i. e., 1664; and, as a corollary, that the system of jurisprudence, with its customs or common law prevailing in the United Provinces of the Netherlands, was the system in force during the Dutch administration of New Nederland. See Canal Comm'rs v. The People, 5 Wend. 423, also 17 id. 571; Bogardus v. Trinity Church, 4 Paige, 178; Humbert v. Trinity Church, 24 Wend. 587, declared overruled, 45 Hun, 371, and Cathcart v. Robinson, 5 Pet. 280; Paige v. Schenectady Railway Co., 84 App. Div. 91, 178 N. Y. 102.

N. Y. 102.

If desirable to pursue this subject vide Mortimer v. N. Y. E. R. R. (Superior Court), 6 N. Y. Supp. 898, 17 Abb. N. C. 491, affd., 137 N. Y. 546; American State Papers, Foreign Relations, Vol. II, 663, also Vol. IV; Campbell v. Hall, 20 State Trials, 239. See also Campbell v. Hall, Cowper, 204, as to a claim made by some jurists that the Dutch law remained in force (by acquiescence) after the conquest until it was specifically changed; also Wheaton's Internat'l Law (8th ed., Dana's note), 169; Halleck's Internat'l Law; U. S. v. Percheman, 7 Pet. 86; Mitchell v. Peters, 9 id. 734; Strothers v. Lucas, 12 id. 435; Leitersdorfer v. Webb, 20 How. 176; Am. Ins. Co. v. Cantor, 1 Pet. 511. As to capitulation to the English, see 2 Laws, 1813, Amendix 4

Appendix.4

The Duke of York's Charter .- By letters patent above mentioned, issued March 12, 1664, by Charles II, to his brother the Duke of York, his heirs and assigns, a large territory was granted. including a large part of the present States of New York and New Tersey and all the appurtenant rivers, harbors, lakes, waters, etc., with all the rights, royalties, profits, and all the royal estate, right, title and interest in free and common socage, with power to the duke, his deputies, agents, etc., to govern the inhabitants according to such laws, ordinances, etc., as might be by the duke established; or in defect thereof, according to the discretion of his deputies, etc.; the said laws to be agreeable to the laws of England; and, reserving an appeal to the crown, with power to appoint and revoke appointment of governors.

Other full powers are given. This patent was to be exclusive of any other patents not consistent with it. (I Col. Laws of N. Y., 1-5.)

A code of laws was established by the duke, called "The Duke's Laws." (1 Col. Laws of N. Y., 6-100.)

The patent to the Duke of York was for all that part of New England beginning at a place called St. Croix, next adjoining New Scotland, in America, and from thence extending along the sea-coast unto a place called Pennaquie or Pennaquid, and so up the river thereof to the furthest head

⁴ Cf. Fowler's Real Property Law (2d ed.), 50, 63, 64.

of the same as it tendeth northward, and extending from thence to the river Kimbequin, and so upwards by the shortest course to the river Canada northward. And also that island or islands called Meitowacks or Long Island, situate west of Cape Cod, and the narrow Higanssetts, abutting upon the main land between the two rivers, there called by the several names of Connecticut and Hudson's river, together also with said river called Hudson's river. And all the land from the west side of Connecticut river to the east side of Delaware Bay, and also all these several islands called Martin's Vineyard or Nantuck's, or otherwise Nantuchet, together, &c.

Upon the conclusion of the second treaty of peace with the Dutch, in 1674. the duke obtained a new patent from the Crown confirming the above; it being supposed that the first patent became void by reason of the reoccupation of the Dutch in 1674, and the treaty of Westminster.

It is held that, under the above named patents, the estate and rights of the king passed to the duke in the same condition in which they had been held by the Crown, and upon the same trusts. They were not to be held or enjoyed by the duke as private property, apart from and independent of the political character with which he was clothed by the charter. Martin v. Waddell, 16 Peters, 368.

A charter "Of Liberty and Privileges" was granted by the Duke of York, through Gov. Dongan, on October 30, 1683, to the Province of New York, regulating the administration of the government through a Governor or Council, and a General Assembly, determining the various rights and liberties of the inhabitants of the Province. (Vide Revised Laws of 1813, Appendix II: I Col. Laws of N. Y., 111.)

The Charter granted by the Duke of York to the Province, it has been held, was abrogated at the English revolution of 1688—so far, at least, as its general provisions were concerned. Vide Jackson v. Gilchrist, 15 Johns. 89. But this Charter was annulled by the king, 1685. 3 Col. Doc. 322, 370.

The first Colonial Assembly, under the above Charter of 1683, met October 17, 1683. After the revocation of the charter, laws were passed by the Governor and Council. Subsequently, under William and Mary, the legislative power was vested in the Governor and an Assembly. See as to this Charter of 1683, its abrogation and the laws passed under it. Jackson v. Gilchrist, 15 Johns. 89, distinguished 63 Hun, 527; Van Winkle v. Constantine, 10 N. Y. 425, also 15 Johns. 93, 24 Wend. 625. All laws passed under it were subsequently declared void by the Assembly held after the abdication of James II in 1691; but the Governor does not seem to have approved of this act. See some of the laws of 1683 in explanatory note to R. L. of 1813.5

By the English common law, the King was the paramount proprietor and source of title to all land within his dominion, and it was considered to be held mediately or immediately of him. After the independence of the United States, the title to land formerly possessed by the English Crown in this country passed to the People of the different States where the land lay, by virtue of the

⁶ Mr. Gerard refers here to a resolution of the lower house of Assembly on 9 April, 1691. The effect of this declaratory resolution on the prior Colonial laws has been much questioned. See Introduction to the Grolier reprint of Bradford's N. Y. Laws of 1694, lxxviii seq.

change of nationality and of the treaties made. The allegiance formerly due, also, from the people of this country to Great Britain was transferred, by the Revolution, to the government of the States.

On the above subjects reference may be made to the following cases: Fletcher v. Peck, 6 Cranch, 87; Johnston v. McIntosh, 8 Wheat. 543; Martin v. Waddell, 16 Pet. 367; Clark v. Smith, 13 id. 195; Lattimer v. Poteet, 14 id. 4; Shanks v. Dupont, 3 id. 242; Mackinnon v. Barnes, 66 Barb. 91.

Declaratory Act of 1779.—By a declaratory act of the Legislature, passed Oct. 22, 1779 (I Green. 31), all lands, properties, rights, etc., held by the Crown prior to 9 July, 1776, were declared vested in the People of the State. By the treaties between Great Britain and the United States (1782-3, and Nov. 19, 1794), which followed the American Revolution, the right to the soil, which had been previously in Great Britain, passed definitely to these States.6

The actual paramount ownership of land, therefore, in this State, was vested in the Crown of England previous to the Revolution, and in the People of the State afterwards; and has been, from time to time, made the subject of grant, through letters patent, to individuals. The right of Indian occupancy in the various States has been, in general, protected by the political power, and respected by the courts, until extinguished by treaty, or otherwise.⁷

On the above subjects reference may be made to the following leading cases: United States v. Arredondo, 6 Pet. 691; Martin v. Waddell, 16 id. 367; Clark v. Smith, 13 id. 195; Lattimer v. Poteet, 14 id. 4; Jackson v. Ingraham, 4 Johns. 163; Jackson v. Waters, 12 id. 365; Le Frambois v. Jackson, 8 Cow. 590; Rogers v. Jones, 1 Wend. 237; Lansing v. Smith, 4 id. 9; Johnson v. McIntosh, 8 Wheat. 543; The People v. Trinity Church, 22 N. Y. 44. As to the Indian occupancy, vide infra, Chap. III.

Various Colonial Acts as to Titles and Citizenship .- If questions of title under the colonial government should arise, reference may be desirable to the following acts: "An act for settling and confirming unto the towns, etc., in this province, their several grants, patents, etc.," passed May 6, 1691 (1 Van Schaick, 22). "An act for the better settlement and assurance of lands in Schaick, 22). "An act for the better settlement and assurance of lands in this colony," passed October 30, 1710 (1 Smith & L. 84; 1 Van Schaick, 82). "An act relative to inhabitants of foreign birth" (1 S. & L. 112) passed July 5, 1715, declaring that all persons of foreign birth in the colony, and dying seized of lands, etc., shall be deemed to have been naturalized, and providing for naturalizing Protestant inhabitants of foreign birth. An act of January 27, 1770, relative to naturalized citizens and aliens (2 Van Schaick, 561), applying sphicates by high or naturalization to inherit and hold real 561), enabling subjects by birth or naturalization to inherit and hold real estate, notwithstanding any defect of purchases made before naturalization within the colony.

⁶ Fowler's Real Prop. Law (2d ed.), 67.

⁷ Fowler's Hist, Law Real Prop. in New York, 3, 199.

Effect of Changes of Sovereignty.— It is a principle of international law, that the dismemberment or change of sovereignty of a nation works no forfeiture of previously vested rights of property; and that the cession of a territory, by its government, passes the sovereignty only, and does not interfere with the rights of individuals in property. Therefore titles to land of individuals were not changed when the new political sovereignty was established.

Orser v. Hoag, 3 Hill, 79, and cases cited; Brown v. Sprague, 5 Denio, 545; Strother v. Lucas, 12 Pet. 410; The People v. Livingston, 8 Barb. 253; Jackson v. White, 20 Johns. 313; Peck v. Young, 26 Wend. 613; M. A. Society

v. Watts, 1 Wheat. 279, 390.

The person claiming title under the new government, however, had to establish his allegiance by some act, at least of residence, otherwise the rights of citizenship are not acquired. Dawson v. Godfrey, 4 Cranch, 321; McIlvaine v. Coxe, id. 214, 1 Dall. 58; Munro v. Merchant, 28 N. Y. 9, revg., 26 Barb. 383; Inglis v. S. S. Harbor, 3 Pet. 99; Dent v. Emmeger, 14 Wall. 308.

As a general rule, the character in which the American ante nati are to be

considered, will be determined by the situation of the party, and the election made at the date of the Declaration of Independence, according to our rule, or the treaty of peace, according to the English rule, viz., Sept. 3, 1783. Persons born out of the United States before July 4, 1776, or born here, and Persons born out of the United States before July 4, 1776, or born here, and who left the country before July 4, 1776, and who continued to reside out of it, have been held aliens and incapable of taking by descent. Blight v. Rochester, 7 Wheat. 535; Inglis v. S. Snug Harbor, 3 Pet. 99; Dawson v. Godfrey, 4 Cranch, 321; Munro v. Merchant, 28 N. Y. 9, revg. 26 Barb. 383; Hunter v. Fairfax's Devisee, 7 Cranch, 603.

The right to inherit would depend upon the existing state of allegiance at the time of descent cast. Orr v. Hodgson, 4 Wheat. 453; Blight v. Rochester, 7 id. 535; People v. Conklin, 2 Hill, 67; Orser v. Hoag, 3 id. 79; Shanks v. Dupont, 3 Pet. 242; Dawson v. Godfrey, 4 Cranch, 321.

Infant's Right of Election.—An infant, however, might have the right of disaffirmance or election, when of age, if made within a reasonable time. Inglis v. S. S. Harbor, 3 Pet. 99; Munro v. Merchant, 28 N. Y. 9; Jones v. McMasters, 20 Howard (U. S.), 8; Ludlam v. Ludlam, 26 N. Y. 356, affg. 31 Barb. 486.

Vide infra, as to the effect of the Treaties of 1783 and 1794.

French Grants and Treaties .- Claims to land founded on French grants under the treaty of 1760 or of 1763, or otherwise, are not a legal title that can be recognized by the courts.

Jackson v. Waters, 12 Johns. 365; Le Frambois v. Jackson, 8 Cow. 590; Jackson v. Ingraham, 14 Johns. 163, 182.

Dutch Grants.—Grants from the Dutch Government, while in possession, are held indisputable sources of title.

Denton v. Jackson, 2 Johns. Ch. 320; North Hempstead v. Hempstead, 2

They were mostly confirmed by new grants or charters from the English Government, and generally reconfirmed by Gov. Andros' proclamation on the restoration of the English rule in 1675. By the articles of capitulation of

⁸ Fowler's Real Prop. Law (2d ed.), 7, 70, 80, and cases there cited.

1664, also by Gov. Nicolls, it was stipulated that the inhabitants should continue free denizens, and should enjoy and dispose of their lands as they pleased, and should enjoy their own customs as to inheritance. This compact was recognized by the Legislature. Act of July 5, 1715. The grants from the Dutch have been considered good, whether confirmed by the English or not. Their discovery and actual settlement has been deemed to have given them full ownership and sovereignty, in spite of the English claim or dis-

See the Duke's laws, Act of General Assizes, 1665, 1666, showing that old

Patents should be confirmed before April, 1667, or be deemed void.

The Dutch Government .- The Colony, when under the Dutch, was governed by a Director-general and council, the former being appointed by the "Statesgeneral" in Holland. A municipal government was subsequently granted to the city of New York, in 1652, under a "Schout, Burgomasters, and Schepens."

In 1623 the "Dutch States-general" made a grant to the "Dutch West India Company" of all the lands situated on the Island of Manhattan.9

The Indian Title Extinguished .- The Dutch West India Company, who had control of the settlement, under the dominion of the home government, in 1626. extinguished the Indian title to the Isle of Manhattan by purchase from the "Manhattoes," a tribe of the aborigines, for the sum of sixty guilders.

Form of Dutch Grants and Title.—The titles under the Dutch dominion, generally emanated from the above company, which was invested with most of the functions of a distinct and separate government; having authority to enact laws, to establish courts, to settle the forms of administering justice, to make Indian treaties, and to arrange the form of municipal government.

The Dutch grants, or "Ground Briefs," as they were also called, ran in the name of the "Director-general and Counsellors on behalf of the States-general, the Prince of Orange, and the Managers of the Incorporated West India Com-

pany, in New Netherlands residing."

They were signed by the Director-general and countersigned by the Secretary. They contained conditions of allegiance to the States-general and Managers, and submission to imposts, etc.

These original Dutch grants were usually made to settlers who claimed pre-emptive rights.

Confirmation of Dutch Grants.—The "Confirmatory" grant recited in the Ground Brief, and ratified and confirmed, is, in terms, to the patentee and his assigns "to have and to hold, to them, their heirs and assigns forever."

The condition of allegiance to the Dutch government was of course subsequently abrogated ipso facto, as submission to the English government was one of the conditions of capitulation by Nicolls on the surrender in 1664.

Governor Andros, in his proclamation in 1675, on the second surrender to

the English, confirmed all prior grants, concessions, and estates.

Under William and Mary, in 1691, a colonial act was passed, confirming prior charters and grants by former sovereigns. This act was valid. Brookhaven v. Strong, 60 N. Y. 56. Construction of Royal grants; vide Atkinson v. Bowman, 42 Hun, 404.

During the war between England and Holland in 1665, Gov. Nicolls ordered, in council, that the lands of all Dutch subjects who had not taken the oath of allegiance, should be confiscated to the English Crown. By decree of the Court of Assizes, in Sept., 1666, all former patents were to be brought in and confirmed, and those not renewed by the 1st April then next, were to be deemed invalid. Court of Assizes, II, Cal. MSS. 22, 89.

Under the laws established by the Duke, 1665, called "the Duke's Laws," deeds of land were inoperative unless there was a delivery of part possession, or unless the deeds were acknowledged and recorded. By such laws, all fines, escheats, except for high treason, and licenses and restrictions on alienation

were abolished, and new patents were to be taken out for all lands.

^a Cf. Fowler's Introduction to Grolier-Bradford's N. Y. Laws of 1694, i-xlii.

English Law of Descent .- Notwithstanding the Nicolls articles of capitulation of 1664, the English law as to descent and other incidents of land seems to have come into use after the surrender, and is recognized in the charter of liberties and privileges of 1683, supra. See Canal Appraisers v. The People, 17 Wend. 587; 61 Alb. Law Journ. 166.

The Change of Sovereignty and the Treaties made; Convention of 1776.— The act of the Convention of July 16, 1776, affirmed that all persons abiding within the State, and deriving protection from the laws of the same, owed allegiance to the said laws, and were members of the State.

Constitutional Provisions .- By the Constitutions of 1777; of 1822, Art. 7, § 14; and of 1846, Art. 1, § 18, and of 1894, Art. 1, § 17, all patents of lands in the State, granted by the Crown subsequent to Oct. 14, 1775, are declared null. This impliedly confirmed those prior to that date.

The People v. Clarke, 10 Barb. 120, affd., 9 N. Y. 349. By the Constitutions of 1846 and of 1894, subsequent charters or grants since made by the State, or those under its authority, were not to be affected by the above provision, nor were any rights of property, suits, or obligations to be impaired by it.

Treaty of 1783 with Great Britain.—By the Treaty of 1783 with Great Britain, it was provided (Art. VI) that there should be no further confiscations or prosecutions, by reason of the part taken by any person in the war; and that no person should, on that account, suffer any future loss or damage, either in his person, liberty, or property.

This treaty only embraced future confiscations, and had no retroactive effect.

Macgregor v. Comstock, 16 Barb. 427, affd., 17 N. Y. 162.

The case of Brown v. Sprague, 5 Den. 545, holds that the 6th article of the Treaty of 1783, not only barred the escheat of lands held by British subjects in this State, but gave them capacity to transmit them by descent; but the descent must be to a citizen. Also, that if a British subject holding lands here died previous to the Treaty of 1794 (vide infra), leaving no citizen heirs, his land escheated; and the provisions of the treaty did not pass his lands to alien heirs.

The Law of 1845 (infra, Chap. III) would not operate to confirm a title previously conveyed by an alien heir of one holding real estate.

Treaty of 1794 with England, after the Revolutionary War, as to Rights of Subjects .- By treaty of Nov. 19, 1794, with Great Britain (Art. IX), it was mutually agreed that British or American subjects holding lands in each other's countries, shall continue to hold them according to the tenure of their respective estates and titles therein; and may grant, sell, or devise the same to whom

they please, as if natives; and that neither they, nor their heirs or assigns, as respects said lands, and the legal remedies incident thereto, should be regarded as aliens.

As to the construction of this treaty reference may be made to the following Eases: Harden v. Fisher, 1 Wheat. 300; Blight, etc. v. Rochester, 7 id. 535; Hughes v. Edwards, 9 id. 689; Munro v. Merchant, 28 N. Y. 9, revg. 26 Barb. 383; Watson v. Donnelly, 28 id. 653; Strother v. Lucas, 12 Pet. 410; The People v. Livingston, 8 Barb. 253.

Such subjects could alienate lands as if citizens. The People v. Snyder, 51

Barb. 589; affd. 41 N. Y. 397.

But the title must have been in them at the time of the treaty. The treaty only provided for existing titles. Harden v. Fisher, 1 Wheat: 300; Orser v. Hoag, 3 Hill, 79. See also The People v. Snyder, supra.

The rule is, that if parties were resident here at the time of the Declaration of Independence, although born elsewhere, and they freely yielded express or implied sanction and allegiance to the new government, they became citizens. This right of election has been held to exist as to all the inhabitants of the State, and a reasonable time for its exercise was conceded.

McIlvaine v. Coxe, 2 Cranch, 280; 4 id. 209; Respublica v. Chapman, 1 Dallas, 33; Jackson v. White, 20 Johns. 313; Inglis v. The Trustees, etc., 3 Pet. 99.

It was held, even at first, that if a person was born here and left the country before the Declaration of Independence, and never returned, he had a right of

citizenship. Ainslee v. Martin, 9 Mass. 454.

The principle of this case has been overruled, however, and the more reasonable principle maintained that an ante natus never owed allegiance to the United States if he had removed prior to the Declaration of Independence, and had not become re-domiciled here prior to the treaty of peace. McIlvaine v. Coxe, 2 Cranch, 280; 4 id. 209; Gardner v. Ward, 2 Mass. 236; Kilham v. Ward, 2 id. 244; Calais v. Marshfield, 30 Maine, 511; Orser v. Hoag, 3 Hill, 79, overruling Jackson v. Lang, 3 John. Ch. 109.

The case of Blight v. Rochester, 7 Wheat, 535, holds that, in general, British subjects, born before the Revolution, are equally incapable with those born after, of inheriting or transmitting the inheritance of lands in this country, and that the treaties of 1783 and 1794 only provided for titles existing at the time those treaties were made; and not to titles subsequently acquired. Possession was not necessary, but the existence of the title. Also

held in Hughes v. Edwards, 9 Wheat. 489.

It has been distinctly held, also, that a British alien, holding land within the purview of the Treaty of 1794, possessed a capacity to transmit by descent to alien heirs, which an American citizen could not lay claim to. The case of Orser v. Hoag, 3 Hill, 79, holds, however, that the title of the alien heir would not prevail, if the ancestor died before the treaty was

The case of Jackson v. Wright, 4 Johns. 75; Orser v. Hoag, 3 Hill, 79; Fairfax v. Hunter, 7 Cranch, 603, and Munro v. Merchant, supra, hold that the construction of this treaty is, that lands embraced within the purview of the 9th article of the treaty were indefinitely and perpetually heritable and alienable to and among aliens of the two countries; in derogation of the laws respecting alienage, which were or should be established therein, until the lands should come to be held by citizens; after which they would lose the peculiar attribute imposed upon them by the treaty.

The case of Orr v. Hodgson, 4 Wheat. 453, also holds that the benefits of the treaty would not be extended to persons who were aliens to both governments, i. e., Great Britain and the United States.

The English courts consider this treaty to have taken effect at the date of the exchange of ratification, viz., Oct. 28, 1795, and hold that its provisions were continuous, and not abrogated by the War of 1812. Sutton v.

Sutton, 1 Russ. & M. 663.

Sutton, I Russ. & M. 005.

It has been held that although, as a principle of international law, as respects the rights of either government under a treaty, it is considered as binding from the date of its signature, and the exchange of ratifications have a retroactive effect confirming the treaty from its date, a different rule prevails where the treaty operates on individual rights. There it is not recruited as concluded until there is an exchange of ratifications. considered as concluded until there is an exchange of ratifications. Haver v. Yerker, 9 Wall. 32.

TITLE II. OF THE TITLE OF THE PEOPLE OF THE STATE.

As to the Period when this State Government had its Legal Inception.— When the people of this State, after the Revolution. took into their hands the powers of sovereignty, all estates, prerogatives, powers, and royalties which before belonged either to the Crown or Parliament, became immediately vested in the State. From the time they declared themselves independent, and not from the date of the treaty recognizing their independence, the rights and powers of the States are considered established as sovereign, and their colonial dependence and legal action as colonies ceased. Hence it is held that the laws or grants of the several State govern ments passed or executed after the Declaration of Independence were the acts of sovereign States and, as such, obligatory and effectual.

McIlvaine v. Coxe, 4 Cranch, 209; Bernett v. Boggs, 3d Cir. Ct. N. J., Baldw. 60; Crill v. City of Rome, 47 How. Pr. 398.

The organization and legal commencement of the government of this State took place on the 20th of April, 1777, when the Constitution was adopted. Vide Jackson v. White, 50 Johns. 313.

Constitution of 1777.— By this Constitution (as infra, Tit. III) grants made by the Crown subsequent to Oct. 14, 1775, are declared void. So also provided in Constitutions of 1822, 1846, and 1894.

Act of 1779, Vesting Colonial Property in the State.— By Act of the State, of Oct. 22, 177910 (I Green. 31), it was declared that the absolute property of all lands and hereditaments, and of all rents, royalties, franchises, prerogatives, privileges, escheats, forfeitures, debts, dues, duties, and services, and all right and title to the same, which next and immediately before 1776 did vest in or belong, or was or were due to the Crown of Great Britain, be "and

¹⁰ Referred to p. 5 supra; N. Y. Laws (ed. of 1886), 178, sec. 14; Fowler's Real Prop. (2d ed.), 67.

the same and each and every of them are hereby declared to be, and ever since the said 9th of July, 1776, to have been and forever hereafter shall be vested in the People of this State, in whom the sovereignty and seigniority thereof are and were united and vested on and from said 9th day of July, 1776."

It is held that a right to impeach a patent for fraud would not pass under this law. People v. Clarke, 9 N. Y. (5 Seld.) 349.

See, as to the change of the title to the People, People v. N. Y., etc., Ferry Co., 68 N. Y. 71.

Declaration of the Title of the People.—By early enactment and constitutional declaration in this State, the people of this State, in their right of sovereignty are deemed to possess the original and ultimate property in and to all land within the jurisdiction of the State, and all lands, the title to which may fail from defect of heirs, revert or escheat to the people.

1 R. L. of 1813, 380, § 2; 1 R. S. 718, § 1; Constitution of 1846, Art. 1. § 11; of 1894, Art. 1, § 10.

Lands Allodial.—All lands within the State are declared to be allodial, the entire property thereof being vested in the owner, subject to the liability to escheat to the People, and all feudal tenures and their incidents are abolished, such abolition, however, not to discharge rents or services certain imposed.

See above Constitutions. 1 R. L. 70; 1 R. S. 718.

Mines.— The State has also, through its right of sovereignty, all mines of gold and silver in the State, and other mines on lands of aliens; also certain other mines on lands of citizens containing, on an average, less than two-thirds of copper, tin, iron and lead, etc.; also mines, minerals and fossils on land of the People of the State. See G. L., Chap. XI, L. 1894, Chap. 317; L. 1901, Chap. 416; L. 1902, Chap. 503.

1 R. S. 281.

All patents are to contain a reservation of all gold and silver mines. Id. 198.

Various provisions are also made by statute as to bounties and the preemptive rights of working discovered mines of gold and silver. Id. 281.

As to the rights of parties having a grant of minerals and mining in lands, vide the law thoroughly reviewed, in Marvin v. Brewster Co., 55 N. Y.

SUMMARY.— It results from the above review that the title of all lands in this State must have originally emanated from the existing sovereign power in the State, whether through grants from the Dutch or English officials administering the government by authority of their home government, or by letters patent or charter directly from those governments, or else by grant from the "People" of this State, after their sovereignty was established.

The absolute property of all land, and all right and title to the same, that on the oth of July, 1776, were vested in or belonged to the Crown of Great Britain, became, from that date, vested in the People of this State in their sovereign capacity. But with respect to lands that, before October 14, 1775, had been legally granted to individuals by the Crown, or to which the title had been legally acquired by individuals, in any other way, neither the Revolution, nor the change of the form of government, nor the declaration of the sovereignty of the People, worked any change or forfeiture in the ownership of such property.

Treaties with other Nations as to Citizenship .- A great many of such treaties have been made. See Statutes of U.S., treaties.

Alien Laws of the State.— As to these, vide infra, Chap. III.

TITLE III. TRANSFER OF TITLE FROM THE COLONIAL AND STATE GOVERNMENTS.

Transfer from the State.— It is well settled by authority that a State has the right to dispose of the unappropriated lands within its own limits, and that when a grant has been made the title becomes vested, without any power in the State to rescind the grant for fraud, or otherwise, when the land granted has passed into the hands of a bona fide purchaser for value, without notice.

Nor, unless fraudulent, can it be revoked at all if its conditions are performed.

Fletcher v. Peck, 6 Cranch, 87; Terret v. Taylor, 9 id. 52; Town of Pawlet v. Clark, Id. 292; Dartmouth College v. Woodward, 4 Wheat. 518; Benson v. Mayor, 10 Barb. 223; People v. N. Y., etc., Ferry Co., 68 N. Y. 71.

Mode of Transfer of Title.—Property of a State is transferred usually by charter or by letters patent.

A grant, however, may be made by a law, as well as by letters patent, pursuant to a law - a confirmation, also by a law, is as fully a grant as if it contained a grant in terms.

Rutherford v. Green, 2 Wheat. 196; Strother v. Lucas, 12 Pet. 410; Ryan v. Carter, 3 Otto, 78.

It is not a valid objection to a patent that it is not signed by the Governor, provided the great seal is attached. It is the great seal which authen-

ticates the patent, and the fact of the seal being attached is prima facie evidence that the patent was approved by the Governor and issued by his direction. The People v. Livingston, 8 Barb. 253; Langdon v. Hanes, 21 Wall, 521.

Grants where the State has no Title.— Where the State has no title to the thing granted, the grant is void. State grants are not considered as warranties, and no estate would pass to the grantee except what was at the time in the State. Nor can a State constitutionally confirm a void patent so as to divest a title legally acquired before the attempted confirmation.

The Mayor, etc. v. The United States, 10 Pet. 662; Polk's Lessees v. Wendell, 5 Wheat. 293; Green v. Watkins, 7 id. 27; Rice v. Railroad Co., 1 Black, 358; United States v. Arredondo, 6 Pet. 738; People v. Schermerhorn, 19 Barb. 540; People v. Van Rensselaer, 9 N. Y. 291; Sherwood v. Fleming, 25 Texas (Supp.), 408; Wright v. Hawkins, 25 Texas, 452; Coffee v. Groever, 123 U. S. 1.

Grants from the sovereign are to be construed strictly, and an intent will not be presumed. DeLancey v. Piepgras, 138 N. Y. 26.

When Patents from the State take effect.—A patent takes effect from the time it is approved by the Land Office, and passes the office of the Secretary of State. Its date is not conclusive.

Jackson v. Douglas, 5 Cow. 458.

Colonial Grants.— During the English colonial rule, the colony, as a part of the King's dominions, was subject to the control of the British Parliament; but its more immediate government was vested in a Governor, Council and General Assembly.¹¹

The Governors were appointed by the King's commission, under the Great Seal of Great Britain.

The Governor's Council was appointed by the Crown, or confirmed on the Governor's nomination. All temporary vacancies were to be filled by the Governor.

By the royal commissions to Governors, the Governor, with the advice of the Council, was authorized to make grants of the public lands on such terms as might be deemed proper; which grants, on being sealed with the colonial seal and recorded, were to be effectual. See Town of Brookhaven v. Strong, 60 N. Y. 56.

The Colonial Act Restricting Grants by Governors. - By a colonial act passed in May, 1699, it was declared that all future grants of government lands by any Governor, for a longer term than his own term of government, lands by any Governor, for a longer term than his own term of government, should be null and void. This act was repealed by another act passed on November 27, 1702, but this repealing act was disaffirmed and annulled by Queen Anne, in Council, in June, 1708, who thereupon confirmed the Act of 1699. 1 Van Schaick, Laws, 31, 51.

It is considered, however, that acts done under the law before being annulled by the Crown were valid and effectual. People v. Rector of Trinity Church, 22 N. Y. 44; Bogardus v. Trinity Church, 4 Sand. Ch. 721, 727 overruled 45 Hun. 371

737, overruled 45 Hun, 371.

¹¹ Cf. Fowler's Introduction to Grolier-Bradford's N. Y. Laws of 1694, Chap. II.

Presumption of Authority as to Colonial Grants.— The grants of Colonial Governors, before the Revolution, have always been taken as plenary evidence of the grant itself, as well as of authority to dispose of the public lands. The actual exercise of the authority without any evidence of disavowal, revocation, or denial by the Crown, and its consequent acquiescence and presumed ratification, are sufficient proof, in the absence of any to the contrary. of the royal assent to the exercise of the Crown's prerogative by its local Governors. Courts do not require proof that there exists authority in the officers or tribunal who exercise it, by making grants; and it is considered that it is fully evidenced by occupation, enjoyment, and transfer of property, had and made under the grants without disturbance by any superior power, and respected by all co-ordinate and inferior officers and tribunals throughout the State. colony, or province where the land lies.

See United States v. Arredondo, 6 Pet. 728; Bogardus v. Trinity Church, 4 Paige, 178, affd., 15 Wend. 111; People v. Livingston, 8 Barb. 253; People v. Schermerhorn, 19 id. 540; Rogers v. Jones, 1 Wend. 237.

The death of the king before the patent was issued will not vitiate it. 4 Sand. Ch. 63.

Confirmatory Act.—In May, 1691 (1 Van Schaick, 2), an act was passed by the Governor and Assembly, confirming all prior patents, charters, and grants to bodies and individuals in the Colony under prior kings—notwith-standing deficiencies of form or nonfeasance. Saving rights to be asserted in five years, and rights of infants, lunatics and married women.

This act was passed at the first Assembly held after the English Revolutions.

tion of 1688.

Patents under the English Crown subsequent to 1775.—By the Constitution of 1777, § 53, Constitutions of 1822, 1846, and 1894, all grants of lands in the State granted by the king, or those under him, subsequent to October 14, 1775, are declared null and void: no prior grants or charters, however, were to be considered affected; nor any grants or charters since made by the State, or those under its authority. This impliedly confirmed those prior to that date. The People v. Clark, 10 Barb. 120, affd., 9 N. Y. 349. By the Constitution of 1846 subsequent charters or grants since made by the State, or those under its authority, were not to be affected by the above provision, nor were any rights of property, suits or obligation to be impaired by it.

by it.

Constitution of 1894, Art. I, § 17.

Presumption of Validity.—The patents are evidence prime facie that they were regularly issued, and that all preliminary requisites have been complied with.

The validity of patents cannot, in general, be impeached in collateral actions; yet, objections showing that they were issued without authority, or were absolutely void from the beginning, or prohibited by law, would be considered. In a collateral action they cannot be assailed for any other cause.

Brady v. Begun, 36 Barb. 533; The People v. Mauran, 5 Den. 389; The People v. Van Rensselaer, 9 N. Y. 291; The People v. Livingston, 8 Barb.

Seals and preliminaries of law will be presumed. Williams v. Sheldon, 10 Wend. 654; De Lancey v. Piepgras, 138 N. Y. 26.

Patents to Persons Deceased before 1826.—By Law of 1826, Chap. 320, these were made valid.

Effect out of the State.—A conveyance by virtue of a statute cannot strictly operate beyond the local jurisdiction, although its effect may be extended by State comity. Oakey v. Bennett, 11 How. 33; Van Horn v.

Dorrance, 2 Dall. 304.

So held with respect to a transfer of real estate out of the United States, by virtue of the Bankrupt Act. Oakey v. Bennett, 11 How. 33; vide infra. Chap. XXXII.

Grants to Public Corporations.—Although the legislative body is considered to have continual control over the action of public corporations, and has a right to alter or modify their delegated powers and authority, it is a principle of law, that grants of property, and of franchises coupled with an interest, even to public or political corporations, are beyond legislative control or interference, equally as in the case of property of private corporations. The decisions in this State, however, seem to have much deviated from this doctrine, and, in many cases, political or civic corporations are held to be mere trustees for the people at large.

The People v. Platt, 17 Johns. 195; Dartmouth College v. Woodward, 4 Wheat. 697-700; Hooper v. Scheimer, 23 How. 235; Benson v. The Mayor, 10 Barb. 223; vide infra, "Franchises," and Chap. II, "Eminent Domain."

Boundaries of Towns and Cities .- These may be constitutionally changed by the legislature. 18 Gratt. 583.

Establishment of Counties.—See Vol. 2, Brodhead's Hist. of New York; also R. L. of 1813, appendix No. 3.

Presumption of Title in the State.—The declaration of the Constitution, in asserting that the people are deemed to possess the original and ultimate property in all lands, merely affirms a principle of bolitical sovereignty, and is not a rule of evidence establishing a legal presumption of title in favor of the people against the actual occupant of the land until it is shown that the possession has been vacant within forty years.

The fact of possession presumes a grant from the sovereign power of what once belonged to the State.

Wendell v. Jackson, 8 Wend. 183; The People v. Dennison, 17 id. 312; The People v. Rector of Trinity Church, 22 N. Y. 44.

Effect of a Patent as to Patentee's right to take.— A patent to persons or their descendants, not qualified to take, would confer the right upon them,—e. g., as to heirs of an alien, etc. Vide infra, Chap. III, "Aliens." Jackson v. Etz, 5 Cow. 314; Goodell v. Jackson, 20 Johns. 703.

So a patent to a body of men gives them a quasi-corporate capacity. People v. Schermerhorn, 19 Barb. 540.

Conclusiveness of Patent.—A patent appropriates the land called for, and is conclusive against rights subsequently acquired; but when an equitable right, which existed before the date of the patent is asserted, it may be examined. Brush v. Ware, 15 Pet. 93.

The patentee can only maintain such action as the People might. Code

Civ. Proc., § 363.

Such a patent is conclusive as against a title founded on mere adverse occupancy, or those wrongfully in possession. Gibson v. Choteau, 13 Wall. 92; Parmelee v. Oswego, etc., R. R. Co., 6 N. Y. 74.

State Boundaries .- For the State boundaries, see the State Law, G. L. Chap. II, L. 1892, Chap. 678.

Title against the State by Adverse Possession.—By the Code of Procedure (Chap. II, §§ 75-77), Code of Civil Procedure (§ 362) the People of the State will not sue any person with respect to real property unless their right has accrued within forty years, or unless they or those from whom they claim, shall have received some rents thereof within forty years. This limitation was also enacted, in substance, by Laws of 1788 (2 Green, 93), and of 1801 (1 Web. 619).

There is no presumption of title in favor of the People against the actual occupant of land until it is shown that the possession has been vacant, some

time within forty years. If the premises are vacant the legal presumption, however, is that the people are the owners.

On this subject see The People v. The Rector of Trinity Church, 22 N. Y. 44; The People v. Van Rensselaer, 9 id. 291, revg. 8 Barb. 189; The People v. Clarke, Id. 349; The People v. Arnold, 4 N. Y. 508; The People v. Live

ingston, 8 Barb. 253.

A party cannot claim by adverse possession against the State, if he took under a conveyance recognizing the public right. Bridges v. Wyckoff 67 N. Y. 130.

Grants Where Land is under Adverse Possession .- It is supposed that States have no more right to convey and pass title to lands held adversely than has an individual, and that such sale would be illegal. Woodworth, Janes, 2 Johns. Cases, 417; Whitaker v. Cone, Id. 58.

A contrary opinion is hinted in Candee v. Hayward, 37 N. Y. 653. Vide infra, Chap. XXXIV, "Adverse Possession."

Conditions in Patents.- No one but the State can take advantage of an omission to comply with the conditions of a grant from the State.

Williams v. Sheldon, 10 Wend. 654; Welsh v. Silliman, 2 Hill, 491.

Deed by a Public Officer.—A deed by a public officer in behalf of a State is the deed of the State, although the officer is the nominal party.

Sheets v. Selden, 2 Wall. 177.

Forfeiture under Letters-Patent, and Vacation thereof .- By the Code of Civil Procedure (§ 1957) an action may be brought by the Attorney-General to vacate letters-patent from the State where there has been fraud, or concealment, or mistake, or ignorance of facts; or where there has been a forfeiture of the patentee's interest by noncompliance with the terms or conditions thereof, or otherwise.

Where letters-patent are vacated, a copy of the judgment-roll is to be filed with the Secretary of State, and an entry shall be made in the records of the Commissioners of the Land Office, who may dispose of the property (§ 1959).

Actions of forfeiture of property to the people, or for their use, must be brought in courts having jurisdiction, by the proper officer (§ 1962). The above proceedings to forfeit and vacate letters-patent are held to be applicable only to letters-patent granted by *The People* of the State, and do not extend to letters-patent granted by the King of Great Britain before the Revolution. The People v. Clarke, 10 Barb. 120, affd., 9 N. Y. (5 Seld.)

Proceedings to enforce a forfeiture must be strictly followed.

Further as to Forfeiture, vide infra, Ch. XXXIII.

And as to actions by The People or their grantees, see Code Civ. Proc., § 364.

Commissioners of the Land Office of this State. - As to grants by these officials, vide infra. Ch. XLIV.

Record of Patents. - By Laws of April 28, 1845, Chap. 110, letters-patent from the State granting lands may be recorded in the county where the lands are situated, in the same manner and with the like effect as are deeds when duly acknowledged.

Acts Appropriating Public Property, etc.—By the Constitution of 1846 (Art. VII, § 14), as amended 1874 (Art. III, § 21), on the final passage in either House of the legislature, of every act which imposes, continues, or revives any appropriation of public or trust money or property, or releases, discharges, or commutes any claim or demand of the State, the question shall be taken by ayes and noes, which shall be duly entered on the journals; and threefifths of all the members elected to either House shall in all such cases be necessary to constitute a quorum therein. This provision is also in the Constitution of 1894 (Art. III, § 25).

Amendments to such acts must be passed in the same manner.

Amendments to such acts must be passed in the same manner.

The presumption is that such a law was correctly passed as above. By the Law of May 12, 1847, Chap. 253, no bill is to be deemed passed as above required unless so certified by the presiding officer of each House. In the publication of laws where the act is so as above certified, the words "three-fifths being present," are to be added to the act, and shall be presumptive evidence that the bill was so certified, and their omission shall be presumptive evidence to the contrary. Repealed, Law of 1892, Chap. 682, \$ 40, as to the words "and their omission." The fact that the bill was negative than the presumptive evidence that the bill was a required may be shown by other evidence than that required by passed as required may be shown by other evidence than that required by

Chap. 253, Laws of 1847. The People v. The Supervisors, 8 N. Y. (4 Seld.) 317; Matter of Estate of Stickney, 110 App. Div. 294.

An attempt to make the certificate of the presiding officers conclusive evidence on the point of the number of members voting would exceed legislative authority. Matter of Estate of Stickney, 110 App. Div. 294.

Bills for Private or Local Purposes.—By the Constitutions of 1846 (Art. I, § 9) and of 1894 (Art. III, § 20), the assent of twothirds of the members elected to each branch of the Legislature shall be requisite to every bill appropriating the public moneys or property for local or private purposes.

The words "private purposes," within the above act, are held to be purposes for the benefit of an individual, or a limited number of men, and "local purposes" are for the benefit of a particular place or limited locality. The purpose need not be necessarily for the universal benefit of the whole community, though it may be considered so if there is no restriction as to the use. To bring the purpose within the act, the direct benefits flowing from the improvement must be exclusively and necessarily local. Neuendorff v. Duryea, 69 N. Y. 557.

An appropriation for the improvement of the navigation of a river is, within the above principles, held not to be for a local purpose under the

within the above principles, held not to be for a total purpose under the above act. The People v. Allen, 1 Lans. 248. See also People v. City of Rochester, 50 N. Y. 525; People v. Briggs, Id. 553.

So, also, if a statute applies to the State at large, but contains local provisions not disclosed in the title, the latter are void. Local or private bills. can embrace but one subject, which must be expressed in the title. Constitution of 1894, Art. III, § 16.

Franchises .- Under the head of grants from the State, franchises may be briefly alluded to. They are privileges or immunities of a public nature, conferred generally by legislative grant or action, such as the right to build and operate railroads, wharves, toll-bridges, markets, ferries, etc.

These rights, it is held, cannot be extended by implication, and are not the subjects of assignment or transfer.

The grant of a franchise, it has been generally understood, contained an implied covenant, on the part of the government, not to invade the rights vested; and, on the part of the grantees, to execute the conditions and duties prescribed in the grant.

The government, it has been held, cannot resume franchises at pleasure, or do any act to impair the grant, without a breach of contract. Where, therefore, in an act of the legislature granting a franchise, no right of repeal is reserved, a subsequent act repealing the first has been held unconstitutional, as impairing the obligation of a contract.

Every interference with a franchise, so as materially to impair its value, was held in violation of the grant, as by granting a competing franchise. Remedy would lie on the case, or by injunction in chancery.

McRoberts v. Washburne, 10 Minn. 23; Yard v. Ford, 2 Saund. 172; Keeble and Hickeringill, Holt, 20; Newburgh Turnpike Co. v. Miller, 5 Johns. Ch. 101; 4 id. 160; Dartmouth College v. Woodward, 4 Wheat. 518; Huzzy v. Field, 2 Cromp. Mees. & Ros. 432; Minturn v. La Rue, 23 How. U. S. 435.

In the cases of roads, ferries and bridges, however, the general rule has undergone modifications, as suggested or required by public convenience or necessity; and particularly within, or in the vicinity of, large towns. The legislature, by the grant of one franchise, is held, by recent decisions, not restricted by any implication from the creation of another, where public convenience or necessity requires. The more modern doctrine is further extended to hold that nothing passes under them against the State by implication, and that franchises are to be construed according to their terms.

Auburn, etc., P. R. Co. v. Douglass, 9 N. Y. 444; Dyer v. Tuscaloosa Bridge Co., 2 Porter (Ala.), 296; Jones v. Johnson, 2 Ala. (N. S.) 746; The People v. The Mayor, 32 Barb. 102; The Fort Plain, Bridge Co. v. Smith, 30 N. Y. 44; Charles River Bridge v. Warren Bridge, 11 Pet. (U. S.) 420; Tuckahoe C. Co. v. Tuckahoe R. R. Co., 11 Leigh (Va.), 42; Enfield Toll Bridge Co. v. Hartford & N. H. R. R., 17 Conn. 454; Thompson v. N. Y. & H. R. R., 3 Sandf. Ch. 625; Oswego Falls Bridge Co. v. Fish, 1 Barb. Ch. 547; East Hartford v. Hartford Bridge Co., 10 How. (U. S.) 511; Richmond R. Co. v. Louisiana, 13 How. (U. S.) 71; In re Hamilton Av., 14 Barb. 405; Boston, etc., R. R. v. Salem R. R., 2 Gray, 1; Toledo Bk. v. Bond, 1 Ohio, 622; Shorter v. Smith, 9 Geo. 517; Benson v. The Mayor, 10 Barb. 223; Gales v. Anderson, 13 Ill. 413; Norris v. Farmers' Co., 6 Cal. 590; Bush v. Peru Bridge Co., 3 Ind. 21; Ninth Av. R. R. Co. v. N. Y. E. R. R. Co., 3 Abb. N. C. 347.

It is held, however, by the courts, that if a company receive an exclusive privilege, within a locality specified for the exercise of its franchise, it is a contract on the part of the State, and inviolable. It is otherwise, however, if the privilege is not specified as exclusive. The Binghamton Bridge, 3 Wall. 51; The Turnpike Co. v. State, 3 id. 210; In re Central Park, 63 Barb. 282; In re City of Brooklyn, 143 N. Y. 596. Vide, infra, also, Chap. II, "Eminent Domain."

The grant of a franchise for the building and operating of railroads, and other internal improvements in a State, must emanate from the sovereign -i. e., the State. A competing road, therefore, established by others not so authorized will be enjoined.

Raritan R. R. Co. v. Delaware Co., 3 Green (N. J.), 546.

By Constitutional amendment, 1874, the legislature is prohibited from granting to any private corporation, association, or individual, any exclusive privilege, immunity, or franchise whatever, or (by the Constitution of 1894) the right to lay down railroad tracks. See Const. 1894, Art. III, § 18.

Contracts by a State.—As to contracts made by a State, it is held that if the contract when made was valid, by the Constitution and laws of a State, as then expounded by the highest authorities. whose duty it was to administer them, no subsequent action by the legislature or judiciary can impair its obligation.

Gelpcke v. City of Dubuque, 1 Wali. 175; Havemeyer v. Iowa Co., 3 id. 294; Thompson v. Lee Co., Id. 327.

Effect of Treaties.— By the Constitution of the United States. Article VI, § 2, the Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.

Under this provision of the Constitution, a treaty is held to be the supreme law of the land; and, when addressed to the courts.

supplies the rule governing their proceedings.

An act of Congress, passed subsequent to a treaty, cannot affect titles acquired under it, and Congress is held to have no power to settle rights under treaties in cases purely political. The construction of them is the peculiar province of the judiciary, in a case arising between individuals.

Matter of Metzer, 1 Edm. (N. Y. Sel. Cases) 399; Wilson v. Wall, 6 Wall. 83; People v. Stout, 81 Hun, 336.

As regards the binding effect of treaties as laws upon the parties to them, and affected by them, in the case of Ropes v. Clinch, 8 Blatch. 304, a different opinion has been promulgated from that hitherto entertained by jurists in this country. In that case it is held, that Congress may pass any law, otherwise constitutional, notwithstanding it conficts with an existing treaty with a foreign nation, and that the courts are bound to follow such legislation of Congress in preference to the provisions of the treaty. The only rights or remedy left to parties injured by a violation of a treaty, therefore, under this novel view of the obligation of parties to such solemn compacts, are the reclamations that may be made by the injured government or its subjects, through political channels or by active belligerency. belligerency.

There will appear, if the above decision is upheld, a remarkable inconsistency in the action of our legal tribunals in not extending protection to compacts made between such high contracting parties as nations, when, as between individuals, the judicial ægis is ever earnestly interposed to preserve the inviolability of contracts, and save them from legislative inter-

This question, however, cannot be here fully considered; but reference is made to Chap. III, Tit. I.

Rights of the United States, and of the Public as Controlling State Action.— The right of the public is considered superior to that of the State, where a nuisance or encroachment is authorized, as where there is an abridgement of the common right of navigation.

In a proper case of excess of action by the State in authorizing encroachments, for example, on the common water highway, there would be a remedy in the United States courts in behalf of the public against official bodies or others, and for the abatement of an undue encroachment as a nuisance.

Under the Constitution of the United States, the proprietary right of the State, and its grantees, is subject to the authority of Congress over navigation and navigable waters.

This is a restriction on the State power.

Congress may interpose, whenever it shall be deemed necessary, by general or special laws: and whenever State laws militate against its constitutional provisions or authority for the regulation of commerce they will be deemed inoperative by the United States courts, at the instance of individuals, corporations, or States, where damage is shown.

In the absence of legislation by Congress, a State statute which authorizes the erection of a dam in a navigable river which is wholly within the State limits, is not unconstitutional. Pound v. Turck, 5 Otto, 459; People v. N. Y. & S. I. F. Co., 68 N. Y. 71.

v. N. Y. & S. I. F. Co., 68 N. Y. 71.

Offending bridges, or other obstructions over navigable waters, may be enjoined or removed by judicial action. Gibbons v. Ogden, 9 Wheat. 1; The People v. The Rensselaer, &c., R. R. Co., 15 Wend, 114; The People v. Tibbets, 19 N. Y. 523; Hart v. The Mayor, 9 Wend. 571; Fort Plain Bridge Co. v. Smith, 30 N. Y. 44; Baird v. Shore Line R. R., 6 Blatch. 276; U. S. v. Duluth, 1 Dill. 469; Siliman v. The Hudson R. B. Co., 4 Blatch. 395; People v. N. Y. & S. I. F. Co., 68 N. Y. 71. See the Passenger Cases, 7 How. (U. S.) 283; State of Pennsylvania v. Wheeling Bridge Company, 9 id. 647, and 17 Wheaton, 518, and also 18 How. (U. S.) 421; Renwick v. Morris, 2 Hill, 621, affd., 7 Hill, 575; People v. Central R. R. of New Jersey, 42 N. Y. 283.

An act of Congress declaring a bridge a lawful structure legalizes it and

An act of Congress declaring a bridge a lawful structure legalizes it, and it cannot be removed as obstructing navigation. Gray v. Chicago R. R., 2

Woolw. 63.

As to when a bridge would be considered as obstructing navigation, see

Gilman v. Philadelphia, 3 Wall. 713; The Passaic Bridges, 1d. 782.

The Legislature of a State, however, it is held, may, in the absence of any restraint by congressional legislation, authorize the erection of a bridge

over its navigable waters, subject to any prohibition by Congress, or direction, as to what facilities may be afforded for the navigation of the river.

The mere grant of power by the Constitution to Congress, to regulate commerce among the several States, is not considered per se, and without any exercise of the power by Congress, an absolute inhibition of all State legislation, which may interfere with the interstate commerce of the United States. Munn v. Illinois, 94 U. S. 113.

The State also has the power to legislate in regard to turnpike roads, railroads, ferries, and the public health, and generally in regard to the internal commerce and police of the State. Woodman v. The Kilbourne Manfg. Co., 1 Abb. U. S. 188; Siliman v. The Hud. R. B. Co., 4 Blatch. 395; Crill v. City of Rome, 47 How. Pr. 398.

It is held, also, that although the United States Courts have exclusive jurisdiction over maritime torts, and placing obstructions in navigable

waters is such a tort, still, the State legislature may confer upon municiwaters is such a tort, shill, the State legislature may coller upon municipalities where navigable waters and harbors exist, police authority over the same, and the violation of a regulation adopted by the municipal authority within the power conferred is within the jurisdiction of the State courts. City of Ogdensburgh v. Lyon, 7 Lans. 215.

See this subject further considered, Chapter XLIII, Title III, infra; G. L., Chap. II; L. 1892, Chap. 678, as to State Boundaries, cessions to United

States, etc.

City of New York; The Dongan and Montgomerie Charters .- The Dongan charter of 1686 confirms all grants made to inhabitants of the city of New York by former officials of the Province, or from the mayor, etc., by deed or otherwise. It also confirms all previous grants, franchises, etc., to the

The Montgomerie charter of January 15, 1730, ratifies and confirms the above, and all grants, etc., to inhabitants and freeholders, their heirs and

assigns,12

The above charters were confirmed by the confirmatory act of October 14, 1732, and also by the first Constitution of 1777, and its successor Constitutions. See Sage v. The Mayor, etc., of New York, 154 N. Y. 61.

Counties .- As to the division of the State into Counties, see "Red Book" of the legislature and Vol. II, Broadhead's History. See, also, this title, supra.13

The Public Lands.—Congress is invested by the Constitution with the power of disposing of the public lands belonging to the United States, and making needful rules and regulations respecting them; and a State has no power over the public lands within its limits. Title passes from the United States by letters-patent issued under authority of an act of Congress, or by its confirmation, accompanied by a sufficient description or survey.

THE COMMON LAW OF ENGLAND AND THE COLONIAL TITLE IV. LAWS, AND THEIR EFFECT IN THIS STATE.

By a declaratory statute of May 6, 1601 (1 Brad. 2), 14 the legislative power of the Colony was declared to be in a Governor-in-Chief and council, appointed by the Crown, and in the People, by their representatives in general assembly.

The colonial laws passed by the provincial legislature under the English sovereignty, were passed through the houses of Council and Assembly, subject to the Governor's veto, and approval by the King.

¹² The "Dongan" and the "Montgomerie" charters were in 1836, prepared by Chancellor Kent for publication with notes. This publication is a standard work. See also Hoffman's Estates and Rights of the Corporation of New York, N. Y., 1862, for reference to these ancient charters. See Chap. 410, Laws of 1882, Chap. 378, Laws of 1897, and Chap. 466, Laws of 1901, for modern charters of the city of New York.

13 For a reference to the leading authorities on the counties of New York, see Grolier-Bradford, N. Y. Laws of 1694, note 16.

14 The "Bradford Laws of 1694" were republished in 1894, with an "Introduction," by Mr. Fowler, dealing with the prior laws, constitution and government of the Province of New York; they were also republished by the State in the year 1894. See 1 N. Y. Col. Laws, 223, seq.

The commissions to the different governors gave them power to make laws and ordinances for the peace and good government of the province, by and with the consent of the Council and Assembly; said laws were not to be repugnant to the Statutes of Great Britain. Within three months after the making, they were to be transmitted to the King for approval. If the laws were disapproved by the King, and the disapproval was signified to the Governor, then and from thenceforth the law was to be void.

The colonial statutes, therefore, had the force of laws without the expressed approval of the home government, and until they were annulled or disapproved. The power of assenting to or withholding assent to colonial statutes was conferred on the governors. If approved by them, they were to be transmitted to the home government for examination, with the proviso, however, that they were to be valid and binding until disapproved and rejected by the Crown.

See 3 Colonial Doc., 331; 5 id. 94, 393; 1 Smith's History of New York, 102, 353 (ed. of 1830), as to the repeal of the Act of 1691.

See opinion of counsel in the Lauderdale Peerage Case; and the case reported, Abbott New Cases, Vol. XVII, 439, as to the Colonial laws passed by the Colonial Assembly, before September 4, 1686.

All grants made and actions done and titles vested under any act ad interim, and before it was annulled by the Crown, would not be void or become divested in consequence of the subsequent disapproval by the Crown. The People v. Trinity Church, 22 N. Y. 44.

Declarations as to the Colonial and Common Law in the State Constitutions. - By the Constitution of 1777, § 35, such parts of the common law of England, and also of the statutes of Great Britain and the colonial legislature, as formed the law of the Colony on April 19, 1775, also all colonial resolutions, shall be the law of the State, subject to alterations and provisions by the legislature.

All temporary and sectarian acts, however, and those concerning any allegiance to the Crown, are made null.

By the Constitution of 1822, such parts of the common law and of colonial laws as formed the law of the Colony on April 19, 1775, and also the resolutions of the Congress of said Colony, and of the Convention in force on April 20, 1777, the laws of the State legislature not expired, repealed or altered, or repugnant to the Constitution, are declared laws of the State, subject to alteration by the legislature.

This was repeated in the Constitution of 1846, Art. I, § 17, and Constitution of 1894, Art. I, § 16. But all such parts of the common law or said acts as are repugnant to the Constitution were abrogated.

Any repealing act, however, would not disturb rights vested under those laws.

By the Law of 27 Feb. 1788 (2 Green. 116), and by the Law of March 30, 1801, Chap. 90, § 28, it was provided that none of the statutes of Great Britain or England should be considered as laws of this State; and by the Law of Dec. 10, 1828, that they should not be deemed to have had any force or effect in the State since May 1, 1788; so also by the Law of April 5, 1813, Chap. 56, they were not to be laws of the State; nor were the laws of the late Colony. Law of 1828, supra. See also L. 1892, Chap. 677, § 30, Chap. I, General Laws, cited below.

It is held that only such parts of the common law as, with the acts of the Colony in force on April 19, 1775, formed part of the law of the Colony on that day were adopted by the State; and only such parts of the common and statute law of England were brought by the colonists with them as suited their condition, or were applicable to their situation. Such general laws thereupon become the laws of the Colony until altered by common consent, or by legislative enactment. The principles and rules of the common law as applicable to this country are held subject to modification and change, according to the circumstances and condition of the people and government here.

Morgan v. King, 35 N. Y. 454; Meyers v. Gemmel, 10 Barb. 537; Bogardus v. Trinity Church, 4 Paige, 178; Depeyster v. Michael, 2 Seld. (6 N. Y.) 467; Dubois v. Kelly, 10 Barb. 496.

Courts take judicial notice of the English common law at the time of separation; and the presumption is that it still exists. Stokes v. Macken,

62 Barb. 145.

As to when certain statute laws ceased to be binding in the Province, see Vol. I, Smith's History N. Y. 243; Dane's Abridg't, VI, 606; Levy v. Levy, 33 N. Y. 97. See also as to Provincial laws, 1 Tuck. Black. Com., 393.

During the colonial period, it seems, that the statutes of the English Parliament suitable to the Province, the prerogative ordinances of the Crown, and the acts of the Assembly, comprised the statute laws of the Province.15 See as to the Dutch laws remaining in force, 17 Wend. 587, and 2 Brod. Hist'y, 65, and supra, this chapter; as to the organization of law courts in the Province and State, see Judge Daly's Introduction to 1 E. D. Smith's Com. Pleas R.; Malone v. Sts. Peter's & Paul's Church, 172 N. Y. 269, 274,

Laws of England and the Colony of New York .-- Acts of the Legislature of the Colony of New York have been declared to be of no force or effect in this State since Dec. 29, 1828. Also that

¹⁵ Cf. Fowler's Real Prop. (2d ed.), 50-72.

the resolutions of the Congress of the Colony and of the Cenvention of the State of New York should not be deemed henceforth laws of the State.

Laws of 1828, 1829, Chap. 21, § 4; Chap. I, Gen'l Laws (L. 1892, Chap. 677, § 30), am'd L. 1894, Chap. 448.

CHAPTER II.

THE RIGHT OF EMINENT DOMAIN, AND ITS EXERCISE.

I .- GENERAL PRINCIPLES BEGULATING EMINENT THE BIGHT OF DOMAIN.

II .- CONSTITUTIONAL PROVISIONS.

III.— JUDICIAL INTERPRETATION OF THE RIGHT AND ITS EXERCISE. IV.— RAILROADS AS PUBLIC IMPROVEMENTS.

TITLE I. GENERAL PRINCIPLES REGULATING THE RIGHT OF EMINENT DOMAIN AND ITS EXERCISE.

The theory of the right of eminent domain is based upon the fact of sovereignty in the People, and their supreme power to act for the public interest, safety, or advantage, and is a right necessarily incident to all government. It recognizes the existence of sovereign power in the People of the State, as authorizing them to resume possession of private property for public use in cases not only where the public safety and interest, but even where the public convenience is concerned.

The common law recognized the right of eminent domain in the maxim: "Princeps et respublica ex justa causa possunt rem meum auferre." 12 Rep. 13. This eminent right grows out of the necessities and functions of the State.

Dominium eminens or "eminent domain" is contrasted with "public domain" to distinguish the right to take private property for a public use from the public property in possession. This right to take is quite distinct from the right of the State to tax, to destroy or to employ private property for the public safety. See Lewis Em. Dom., §§ 4, 5, 6, 7, 8; Howell v. City of Buffalo, 37 N. Y. 267.

In a republic the exercise of this right is referable to the general welfare: Salus populi suprema lew. Heyward v. The Mayor, 7 N. Y. 314, 324. There is always an implied assent on the part of every member of political society that in case of necessity his own welfare shall yield to that of the community. While both the common law and our American Constitution recognize the sacredness of private property and its just immunities, yet the right of private property is subject to the one paramount limitation just denoted. 1 Bl. Com. 139; 2 Kent Com. 339.

To justify the exercise of the right, there must be a necessity, or at least an evident purpose of utility on the part of the public. It is also a principle controlling this right, that land, under its exercise, cannot be taken and donated for private benefit. It must be taken and applied for a public use and for no other purpose.

The right is exercised either directly through the legislature, when a public improvement is made by the State, or through the medium of a corporation (and it may be even a foreign corporation, infra, Title IV), or others, to whom may be delegated the power of making the selection and appropriation of the land required.

Matter of Union El. R. R. Co., 112 N. Y. 61.

It is in the exercise of this right, by delegation, that municipal and other bodies appropriate private lands for highways, streets, canals, railroads, wharves, ferries, bridges, etc.

By the general law of European nations, and the common law of England it is a qualification of the right of eminent domain that compensation should be made for private property thus taken or sacrificed for public use; and the Constitutional provisions of the United States, and of the several States, which declare that private property shall not be taken for public use without just compensation, were intended to establish this principle beyond legislative control.

By the common law the rights of the owner of property are regarded as vested rights entitling him to compensation if it be taken for a public use. 1 Bl. Comm. 139; Heyward v. The Mayor, 7 N. Y. 314, 324. Cf. In re Clark v. Water Commissioners, 148 N. Y. 1.

At the threshold of civil government in New York, we find that one of the earliest acts of the Colonial Legislature, passed in the year 1691 (Bradford's N. Y. Laws (ed. of 1694), 43; 1 N. Y. Col. Laws, 269), recognizes the right of eminent domain and confers upon the mayor, alderman and common council of the city of New York the right to condemn lands for streets or city purposes but only upon payment or tender of damages, as assessed by a jury, to the owners. In our present policy (Heyward v. The Mayor, etc., 7 N. Y. 314, 324. Cf. In re Clark v. Water Comm'rs, 148 N. Y. 1) this right of owners of property to compensation for property taken for public uses has received a stronger and more fundamental guarantee, contained in the very constitutions of civil government. Vide infra. Thus the government itself is rendered powerless to take property for public use except it pays for it.

This power of the legislature in respect to taking private property, therefore, is limited to ordaining that it may be taken upon compensation. The legislature is to judge of the necessity of the taking, but the amount of the compensation or value of the land is to be determined by consent of the parties, or through modes prescribed by the legislature within the Constitution. The compensation to be made must be represented by money or its equivalent. But when compensation is ascertained in the constitutional way, what review by appeal shall be permitted rests with the legislature. Matter of De Camp, 151 N. Y. 557.

Under our parliamentary system of government an act of the Congress, or the State Legislature in its own particular sphere, is the expression of the sovereign power and determines when and how the right of eminent domain

shall be exercised. People ex rel. Herrick v. Smith, 21 N. Y. 595; Secombe v. Railroad Co., 23 Wall. 108; Kohl v. U. S., 91 U. S. 367; U. S. v. Jones, 109 id. 513, 518. But these legislative bodies are circumscribed in this very power: they cannot authorize the taking of private property for a private power: they cannot authorize the taking of private property for a private use, but only for a public use (Matter of Deansville Cemetery Association, 66 N. Y. 569; Embury v. Conner, 3 N. Y. 511, 517), and then only upon just compensation to the owner. State Const. 1894, Art. I, §§ 6, 7; 1 R. S. 94, § 13; U. S. Const. Amendt., Art. V; Matter of Mayor, 99 N. Y. 569 577; Smith v. City of Rochester, 92 id. 463, 484. And an act of the Const. 1894, are the constant of the compensation. Legislature which does not provide for compensation is unconstitutional. Page v. City of Brooklyn, 89 N. Y. 189, 195; Brewster v. J. & J. Rogers Co., 42 App. Div. 343; Conolly v. Van Wyeth, 35 Misc. 746.

The exercise of the right.—The power of the State to exercise the right

The exercise of the right.—The power of the State to exercise the right of eminent domain is dormant until expressed in some legislative act; and those who attempt to enforce such a right must be able to point to some legislative act to justify it. Matter of Peughkeepsie Bridge Co., 108 N. Y. 475; Erie Railroad Co. v. Steward, 170 id. 172, 61 App. Div. 480. The Legislature may, and usually does, delegate the right of eminent domain to some person (Moran v. Lydecker, 11 Abb. N. C. 298; Matter of Townsend, 39 N. Y. 171, 174; Matter of Central Park Extension, 16 Abb. Pr. 56; Matter of Kerr, 42 Barb. 119), or corporation, formed to carry on a public utility or business. Matter of Union El. R. R. Co., 112 N. Y. 61. But such a corporation must be one de jure and not only one de facto. Matter of Union El. R. R. Co., 112 N. Y. 61; Matter of N. Y. Cable Co., 104 id. 1, 43. It may be a foreign corporation. Matter of Peter Townsend, 39 N. Y. 171; N. Y., N. H. & H. R. R. Co. v. Welsh, 143 id. 411.

For a verification of the above general principles, reference may be made to the following cases: Livingston v. Mayor, 8 Wend. 85; Bloodgood v. Mohawk, etc., R. R., 18 id. 9; Beekman v. Saratoga, etc., R. R. Co., 3 Paige, 45; Matter of Central Park, 16 Abb. 56; Buffalo and N. Y. R. Co. v. Brainard, 9 N. Y. 100; The People v. Smith, 21 id. 595; Taylor v. Porter, 4 Hill, 140; In re Townsend, 39 N. Y. 171; Commissioners Central Park, 51 Barb. 277; Thatcher v. Dartmouth B. Co., 18 Pick. 501; Embury v. Conner, 3 Conn. 511; Secombe v. R. R. Co., 23 Wall. 108; Hartwell v. Armstrong, 19 Barb. 166; Matter of Fowler, 53 N. Y. 60; McCaffrey v. Smith, 41 Hun, 117; Matter of E. R. B. & C. I. S. T. Co., 26 id. 490; Matter of Comm'rs of Wash. Park, 52 N. Y. 131; In re City of Brooklyn, 143 id. 596. of eminent domain is dormant until expressed in some legislative act:

143 id. 596.

The Practice and Proceedings .- The exercise of the right of eminent domain is now regulated by L. 1890, Chap. 95, as amended, with certain exceptions, however. This law, known as the "Condemnation Law," as amended, constitutes Chap. XXIII., Tit, I., of the Code of Civil Procedure.

The Condemnation Law comes into operation and provides the method of procedure, in those cases where by virtue of the provisions of some other law, the exercise of the right of eminent domain has been conferred for public purposes. Rochester Ry. Co. v. Robinson, 133 N. Y. 242; County of Orange v. Ellsworth, 98 App. Div. 275.

The object in thus making the legal proceedings for the exercise of the right

The object in thus making the legal proceedings for the exercise of the right of eminent domain, a part of the Code of Civil Procedure, was to assimilate it to the practice in civil actions. Manhattan R. Co. v. O'Sullivan, 6 App. Div. 571, 574; Village of Canandaigua v. Benedict, 13 id. 600, 602. Public use.—Private property can be taken for public uses only. Vide Infra et Traction Co. v. Mining Co., 196 U. S. 239, 251. It has been judicially stated that it is difficult to define a "public use," and that it is easier to say what is not a public use than what is such. Matter of Niagara Falls Whirlpool R. Co., 108 N. Y. 375, 386. In the State of New York a public

use means a public utility (Bloodgood v. The Mohawk & Hudson River R. R. Co., 18 Wend. 9, 14), of which the public, as a public without distinction, have a common law right of user. Matter of Appl'n Eureka Basin, etc., Co., 96 N. Y. 42; Matter of S. R. C. R. Co., 128 id. 408; Matter of Burns, 155 id. 23; Pocantico Water Works v. Bird, 130 id. 249. If the end proposed is not a utility it is not a public use even though the public may have a right to use the property condemned. Matter of Niagara Falls & Whirlpool R. Co., 108 N. Y. 375; Matter of Split Rock Cable Road Co., 128 id. 408.

The Legislature, being restricted to such uses as are public uses, if its act erroneously transcend the line between public and private uses it is void. Matter of Appl'n of E. B. W. & M. Co., 96 N. Y. 42, 48; Matter of S. R. C. Matter of Appl'n of E. B. W. & M. Co., 96 N. Y. 42, 48; Matter of S. R. C. R. Co., 128 id. 408. The question whether a use is public or private is a judicial one to be determined by the courts. Waterloo W & M. Co. v. Shanahan, 128 N. Y. 345; Pocantico W. W. Co. v. Bird et al., 130 id. 249; Matter of Deansville Cemetery Association, 66 N. Y. 569; Matter of Mayor, etc., 99 N. Y. 569; Matter of Niagara Falls & Whirlpool R. Co., 108 N. Y. 375; Matter of Peter Townsend; 39 N. Y. 171, 174. The question when and how the right of eminent domain, or condemnation for a public use, shall be exercised is a legislative one to be determined by the Legislature. Matter of Theory Co. 98 N. Y. 139, 153; Hayward v. The Mayor, 7 id. 314 be exercised is a legislative one to be determined by the Legislature. Matter of Union Ferry Co., 98 N. Y. 139, 153; Heyward v. The Mayor, 7 id. 314, 325; Matter of Peter Townsend, 39 id. 171, 174; Matter of Niagara Falls & Whirlpool R. Co., 108 id. 375, 383; Eldridge v. City of Binghamton, 120 id. 309, 314; Matter of De Camp, 151 id. 557. Thus sub modo land may be presently taken for a future public use. Matter of Staten Island Rapid Transit Co., 103 N. Y. 251; In Matter of N. Y. C. & H. R. R. Co., 77 id. 248; In re N. Y. & H. R. R. Co. v. Kip, 46 id. 546.

Public Use.— Land of the public, or of a citizen, cannot be taken and transferred, or donated to another individual, even for a full compensation.

It must be applied to the use of the public and their interest or advantage must be promoted by the transfer; otherwise such action would be void.

Wilkinson v. Leland, 2 Peters, 653; Varick v. Smith, 5 Paige, 147; Embury v. Connor, 3 Coms. 511; Powers v. Bergen, 6 N. Y. 358; Taylor v. Porter, 4 Hill, 140; White v. White, 5 Barb. 474; Rice v. Parkman, 16 Mass. 330; Coster v. Tide W. Co., 3 Green (N. J.), 54; Smith v. City of Rochester, 92 N. Y. 463; Matter of Eureka Basin Warehouse Co., 96 id. 42; Erie Railroad Co. v. Steward, 170 id. 172; Traction Co. v. Mining Co., 196 U. S. 239; Hatfield v. Strauss, 18 App. Div. 909.

The owner of the land, however, might waive his right, and consent to the transfer. His assent might be shown by parol, or by acts evidencing

it. Baker v. Braman, 6 Hill, 47; Embury v. Connor, 3 Coms. 511.

But where an act only authorizes taking by consent, lands of an infant cannot be taken, for the infant cannot consent, nor can any one do so for him, and there can be no condemnation. Battell v. Burrill, 50 N. Y. 13.

See for a broad interpretation of the term "public use," Clark v. Nash,

198 U. S. 361; Strickley v. Highland Boy Gold Mining Co., 26 Sup. Ct. R. 301. Land taken for the United States.—It is held that the use of the United States is such a public use as will enable a State to take private property for it. Redall v. Bryan, 14 Md. 444; Gilmer v. Lime Point, 18 Cal. 229; Morris Canal Co. v. Townsend, 24 Barb. 658; Matter of Petition of U. S., 26 N. Y. 227.

The United States possesses this right, also. Kohl v. U. S., 1 Otto, 367; U. S. v. Gettysburg Electric Ry. Co., 160 U. S. 668.

The United States discharges its whole duty when it pays the award into court. U. S. v. Dunnington, 146 U. S. 338.

The right does not permit the dismemberment of a State. Barrett v. Palmer, 135 N. Y. 336.

As to the authority left in the State after taking of land by the United

The Use to be of a General Nature. - The use must be for the people at large; it must be compulsory, also, with the public, and not optional with the delegated person or corporation. A mere convenience, therefore, such as the taking of property to enable a company to build railroads to han, load and unload their freight has been held not such a necessity as would authorize the exercise of the powers. Memphis Freight Co. v. Memphis 4 Cold. (Tenn.) 419; Matter of E. B. U. & M. Co., 96 N. Y. 42; Matter of Deansville Cem. Asso., 66 id. 569; In re City of Brooklyn, 143 id. 596.

May be exercised, it seems, by a receiver. Moran v. Lydecker. 11 Abb.

N. C. 298.

As to necessity in case of a ferry company. See Matter of Union Ferry

Co., 98 N. Y. 139.

But the use may be for the public benefit though confined to a particular community. B. & R. G. L. Co. v. Richardson, 63 Barb. 437; Hartwell v. Armstrong, 19 id. 166.
Or individuals. Pocantico W. W. Co. v. Bird, 130 N. Y. 249.

May be exercised with respect to the public as well as the private rights of the citizen. People v. B. & O. R. R. Co., 117 N. Y. 150; Kaukauna Water Power Co. v. Green Bay & M. Can. Co., 142 U. S. 254.

Streets and Roads .- No new street or road can be laid out without the authority of the Legislature, and whenever it has been necessary to open any new street or avenue not laid down on a city map authorized by the Legislature, or otherwise permitted by statute, an act of the Legislature is necessary, and the limits of the street or road are to be fixed by the act. Commissioners of Central Park, 51 Barb. 277. See as to streets in villages, General Laws, Chap. XVI (Laws 1897, Chap. 414).

Mill Purposes.—Authorizing the flowing of land for mill purposes, under certain circumstances, has been held a public use. Olmstead v. Camp. 33 Conn. 532.

To be Strictly Exercised.—A corporation can exercise the power to take private property only so far as the statute strictly confers it. East St. Louis v. St. John, 47 Ill. 463; Hatch v. Cincinnati R. R. Co., 18 Ohio, 92; Matter of Widening Carlton St., 78 N. Y. 362; Matter of Water Comm'rs, 96 id. 357; People v. Pres., etc., of Whitney's Point, 102 id. 81; Matter of Marsh, 71 id. 315; Matter of Comm'rs of Wash. Park, 52 id. 131; Eric Railroad Co. v. Steward, 170 id. 172.

Franchises. Franchises may be taken under this right, but they cannot be vacated, under claim of a public use, without just compensation. Alabama, etc., R. R. v. Kenney, 39 Ala. 307; Harding v. Goodlet, 3 Yerger, 41; Albang v. Watervliet Turnpike & R. R. Co., 108 N. Y. 14. See Mathews v. Board of Corp. Com'rs., 106 Fed. Rep. 7.

Easements.— Easements may be taken under this right. Sixth Av. R. R. Co. v. Kerr, 72 N. Y. 330; Story v. N. Y. E. R. R. Co., 90 id. 122, 86 Hun, 405; Long Island R. R. Co. v. Garvey, 159 N. Y. 334. See, also, Chap. XXXVI.

Disabilities of Owner. The right to exercise the power of eminent domain is not restricted by any disabilities of the owner whose land is taken. East Tennessee v. Law, 3 Head (Tenn.), 63.

Change of a City's Limits.— To extend the boundaries of a city, by which taxation is imposed on the new part for city debts and taxes, is not a taking of private property for public purposes. Wade v. Richmond, 18 Gratt. (Va.) 583.

Statutes Regulating the use of Property.—Statutes of the order of police or sanitary regulations, prescribing or regulating the use of landed property, e. g., wharves for the general good, are held not to be acts depriving owners of the use of property, nor limiting or changing its use. Roosevelt v. Godard, 52 Barb. 533.

As to Board of Health Regulations in New York city. Laws 1901, Chap. 466.

Public Health Law, G. L., Chap. XXV; L. 1893, Chap. 661 amd. L. 1894; L. 1895, Chaps. 203, 398.

Use of Roads, etc., by the United States.—Under the authority in the Constitution given to Congress, to establish post roads, and to regulate commerce, etc. (Const. U. S., Art. I, Sec. VIII), it is held, that Congress has power to make, repair, keep open, and improve post roads in the different States. But in the exercise of the right of eminent domain on this subject, the United States have no right to adopt and use roads, bridges, and ferries owned by States or individuals without their consent or without compensation. Otherwise the roads, etc., are used as if by individuals, subject to tolls and other regulations. Dickey v. Turnpike Co., 7 Dana, 113.

Miscellaneous.—The following general laws and decisions illustrate condemnation proceedings in particular instances:

Public Parks.—Act for locating and acquiring land in the city of N. Y. Laws 1901, Chap. 466; in villages, G. L., Chap. XXI; L. 1897, Chap. 414.

Public Lands. - G. L., Chap. XI, Laws 1894, Chap. 317.

Streets, Avenues and Parks in City of N. Y .- Laws 1901, Chap. 466.

Driveways.- Laws 1894, Chap. 758.

Canals. G. L., Chap. VIII, L. 1894, Chap. 338.

Railroads, see infra, Title IV.

Corporations in General.—As to powers of various corporations to acquire and condemn land, see *infra*, Corporations, Chap. XXIV.

Villages — As to Condemnation of Land by Villages.— G. L., Chap. XXI, L. 1897, Chap. 414.

Municipal Corporations.—As to condemnation of real property by municipal corporations, see G. L., Chap. XVII; L. 1892, Chap. 685.

Transportation Corporations (other than railroads) authorized to condemn land. G. L., Chap. XL; L. 1890, Chap. 566.

Telegraph, etc., Poles in Streets.—As to obtaining privileges. See G. L., Chap. XL; L. 1890, Chap. 566.

Tramway Corporations.— L. 1890, Chap. 566.

Pipe Line Corporations. L. 1890, Chap. 566.

Water-works Corporations .- L. 1890, Chap. 566.

Turnpike, Plankroad and Bridge Corporations.- L. 1890, Chap 566.

Water Companies.— L. 1890, Chap. 566; Re City of Brooklyn, 73 Hun, 499; Matter of New Rochelle Water Co., 46 id. 525.

Armories. G. L., Chap. XVI; L. 1898, Chap. 212.

Drains of Agricultural Lands.— Constitution, 1894, Art. I, § 7; by Colleges, L. 1895, Chap. 630.

Militia.— Methods for condemning for camps of instruction. For rifle ranges. L. 1889, Chap. 540; L. 1890, Chap. 278; L. 1891, Chap. 11; L. 1892, Chap. 372; L. 1894, Chap. 369; L. 1896, Chap. 444.

Canals.— Methods for condemning. G. L., Chap. XIII; L. 1894, Chap. 338; Waterloo W. M. Co. v. Shanahan, 128 N. Y. 345; Hayden v. State of N. Y., 132 id. 533.

Cemeteries.—Methods for condemning. L. 1870, Chap. 760, Am'd. 1873, Chap. 452; L. 1875, Chap. 206; L. 1892, Chap. 518.
Cemetery lands may be retaken for public purposes. In re St. John's Cemetery, 183 N. Y. 329. See, also, Chap. XXIV, infra.

Piers and Wharves .- In re Mayor, etc., 135 N. Y. 253.

Quarantine.— L. 1893, Chap. 661. Also, Pub. Health Law. G. L., Chap. XXV; L. 1893, Chap. 661, and L. 1901, Chap. 29.

Market Places.—See L. 1888, Chap. 540; L. 1901, Chap. 466; Matter of Mayor, 28 Hun, 115.

Poles on Highways.—Blashfield v. Empire State Tel. & Tel. Co., 71 Hun, 532.

Pipes in Highways.—G. L., Chap. XIX; L. 1890, Chap. 568, § 14; City of Syracuse v. Benedict, 86 Hun, 343. Also, L. 1897, Chap. 204.

Pipes in Streets.—L. 1890, Chap. 566; Construed, Village, etc. v. New Rochelle Water Co., 143 N. Y. 532.

Sewerage.—In re Yonkers, 117 N. Y. 564; Swikehard v. Michels, 81 Hun, 325, affd., 144 id. 684.

Other important principles and distinctions that govern or restrict the exercise of this right will now be briefly adverted to, with the adjudicated cases which recognize them. The constitutional provisions that effect the right will be first given.

TITLE II. CONSTITUTIONAL PROVISIONS.

Constitution of the United States.—The amendments to the Constitution of the United States of 1789, Art. V, provided that no person should be deprived of life, liberty, or property, without due process of law; nor should private property be taken for public use without just compensation. The 14th amendment also provides that no State shall deprive any person of life, liberty or property, without due process of law; nor deny to any person

within its jurisdiction, the equal protection of the laws. Ratified, July 20, 1868.

The earlier provisions are held to be restrictive and applicable only upon the general government and its officers. Livingston v. The Mayor, 8 Wend. 85; Winters v. Buck, 20 How. (U. S.) 84.

The State Constitution of 1822.—The Constitution of 1822 contained a clause, Art. VII, that no member of the State should be deprived of any of the rights or privileges secured to any citizen thereof, unless by law of the land or the judgment of his peers. The trial by jury, in all cases theretofore used, should be inviolate forever. It also provided that property should not be taken without due process of law, nor private property be taken for public use without just compensation.

State Constitution of 1846, 1894.—By the provisions of these Constitutions, Art. I, § 6, no person shall be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation. The right of trial by jury was also reserved, as above, Art. I, § 2.

By section 7, when private property shall be taken for any public use, the compensation to be made therefor, when such compensation is not made by the State, shall be ascertained by a jury or by not less than three commissioners, appointed by a court of record, as shall be prescribed by law. Private roads may be opened in the manner to be prescribed by law; but in every case the necessity of the road, and the amount of all damage to be sustained by the opening thereof, shall be first determined by a jury of freeholders, and such amount, together with the expenses of the proceedings, shall be paid by the person to be benefited.

Amendments to Constitution of 1846, as to Roads, Swamps, etc.—By an amendment to Art. III (adding § 18 to that article), adopted in 1875, the Legislature is forbidden to pass local or private acts, "laying out, opening, altering, working, or discontinuing roads, highways or alleys, or for draining swamps."

This is held not to apply to city streets. Matter of Lex. Ave., 29 Hun, 303,

afid., 92 N. Y. 629; Matter of Woolsey, 95 id. 135.

Deprivation of property without due process of law is inhibited by both the Federal and State Constitutions. Re City of Brooklyn, 87 Hun, 54. See The People v. Haverstraw, 151 N. Y. 75.

Constitutionality of Statute.— This question cannot be raised for the first time in the Appellate Court. Dodge v. Cornelius, 168 N. Y. 242.

Agricultural Lands.—Drainage of, may be provided for by general acts. Constitution of 1894, Art. I, § 7.

As to constitutionality, see Swikehard v. Michels, 81 Hun, 325, affd., 144 N. Y. 684.

Public Parks, etc. Shoemaker v. United States, 147 U. S. 282.

TITLE III. JUDICIAL INTERPRETATION OF THE RIGHT.

Determination as to the Necessity or Utility of the Exercise of the Right.- It belongs to the legislature to determine whether the benefit to the public from a proposed improvement is of sufficient importance to justify its right to the exercise of the power of eminent domain, in interfering with the private rights of individuals. The legislature also is sole judge as to what extent the public use requires the extinguishment of the owner's title, e. g.. as to whether a fee or an easement should be taken. have no power to review either determination. They may, however, inquire if the intended use is public or private, but where it is ascertained that the purpose is public, there the judicial inquiry stops. The expediency or policy of the taking is held not a judicial question, but one of political sovereignty, to be determined by the legislature, either directly, or by delegating the power to public agents, proceeding in such manner and form as may be prescribed within the Constitution.

Therefore, where the power has been delegated to a municipal corporation, the policy of an improvement contemplated is a matter resting in the discretion of the corporation — neither the commissioners nor the courts have anything to do with it.

Assuming that a use is public the Legislature is the power which determines the exent and the mode in which the eminent domain shall be exercised in its behalf, supra. A person or corporation exerciseing the delegated rights must act strictly within its authority. In Matter of City of Buffalo, 78 N. Y. 362; Matter of Citizens' Water Works Co., 32 App. Div. 54; Matter of Water Com'rs of Amsterdam, 96 N. Y. 351, and if they do not their proceeding is void. People ex rel. v. Presdt, etc., Whitney's Point, 102 N. Y. 81. But this does not mean that substance is to be sacrificed to form, and a substantial compliance is enough. Matter of Com'rs of Washington Park, 52 N. Y. 131.

Although the Legislature or its delegates, are the exclusive judges of the degree and quality of interest which are necessary to be taken, the courts may

degree and quality of interest which are necessary to be taken, the courts may judge as to the necessity of the appropriation of the lands taken, and to what extent, and as to whether the use is public or private.

In re City of Buffalo, 139 N. Y. 422; Waterloo W. M. Co. v. Shanahan, 128 id. 345; Pocantico W. W. Co. v. Bird, 130 id. 249; Varick v. Smith, 5 Paige, 137; Beekman v. Sar. R. R., 3 id. 45; Bloodgood v. Mohawk, etc., R. R., 18 Wend. 9; Harris v. Thompson, 9 Barb. 350; The People v. Crowell, 36 id. 177; In re Peter Townsend, 39 N. Y. 171; DeVarigne v. Fox, 2 Blatch. 95; The People v. Smith, 21 N. Y. 595; The Rensselaer & Sar. R. R. Co. v. Davis, 43 id. 137

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The Brooklyn Park Commissioners v. Armstrong, 45 N. Y. 234; In re N. Y. & Har. R. R. v. Kip, 46 N. Y. 546; Clarke v. Blackmar, 47 id. 150; Matter of Suburb. Rap. Trans. Co., 16 Abb. (N. C.) 152, affd., 38 Hun, 553; Matter of Cent. Park, 63 Barb. 282; Matter of N. Y. C., etc., R. R. Co., 67 id. 426; Havemans v. Troy, 50 How. Pr. 510; Matter of Deansville Cem. Asso., 66 N. Y. 569; Wash. Cem. v. P. P. & C. I. R. R. Co., 68 id. 591; Matter

of Marsh, 71 id. 315; Matter of N. Y. C. & H. R. R. Co., 77 id. 248; Matter of Water Com'rs of Amsterdam, 96 id. 351, 357; Matter of Appl'n Mayor, etc., 99 id. 569; Matter of Union Ferry Co., 98 id. 139; Matter of Fowler, 53 id. 60; Matter of N. Y. C. & H. R. R. Co., 66 id. 407; L. I. R. R. Co. v. Garvey, 159 id. 334; Erie Railroad Co. v. Stewart, 170 id. 172.

Necessity may not be immediate. Matter of Staten Island Rapid Transit Co., 103 N. Y. 251.

The necessity must, however, be clearly and specifically alleged under §§ 3360, sub. 3, 3369, of the Code of Civil Procedure. Matter of Meagher, 35 Misc. 601.

The quantity of land taken has sometimes been held to be a legislative and not a judicial question. U. S. v. Gettysburg Electric Ry. Co., 160 U. S. 668.

For limited use by a few, held not authorized. In re S. R. Cable R. Co., 128 N. Y. 408.

As to City of N. Y .- See Charter.

The State or People are not bound by a statute, unless expressly named, or included in its terms by necessary implication. In re City of Utica, 73 Hun, 256.

Taxation and Assessment.—It has been questioned whether assessment for benefit, on the opening, or paving, or grading of streets, was constitutional, inasmuch as it apparently operated, under lien and sale of property, to compel payment of the assessment by a taking of property, for a public use, without just compensation.

The cases, however, which upheld this position, viz., The People v. The Mayor, etc., 5 Barb. 209; The People v. The Same, 9 id. 535, and others, were overruled by the decision in the second of said cases, decided in the Court of Appeals, in 4 Comstock (4 N. Y.), 419. It is considered that where the value of the land taken for a public use is set off against the benefit assessed on the remaining land of the same owner specially benefited by the assessed on the remaining land of the same owner specially benefited by the improvement, the compensation is made. This assessment on taking of property for a public improvement is an important province of the right of eminent domain. Under the right of taxation, no return compensation is specifically made; otherwise, under the right of eminent domain special compensation is intended. The general tax-payer, however, receives, or is supposed to receive, just compensation in the benefits conferred by government, and in the proper emplication of the tay or assessment. and in the proper application of the tax or assessment.

The general power to tax and to exercise the sovereign right of eminent domain implies the power to apportion the tax or assessment as the legislature shall see fit, in the exercise of a sound discretion. It may be general, so as to embrace all taxable persons, or it may be apportioned, according to the benefit which each tax or assessment-payer is supposed to receive from the object on which the tax is expended. Under the above principles, also, a statute authorizing a municipal corporation to appropriate private property for opening a street, square, etc., in which provision is made for compensating the owners, is constitutional, if it be required by public convenience, although the moving cause be to promote the benefit of a portion only of the community. The expense, also, of such improvements which, though for public use, may be specially beneficial to neighboring property, may be lawfully assessed upon the property thus benefited.

For other cases on this subject, vide Livingston v. The Mayor, 8 Wend. 85; Town of Guilford v. Board of Supervisors, 13 N. Y. 143; Le Roy v. The Mayor, 20 Johns. 430; Betts v. City of Williamsburgh, 15 Barb. 255; Brewster v. City of Syracuse, 19 N. Y. 116; Litchfield v. McComber, 42 Barb. 288; People v. Lawrence, 36 id. 177, affd., 41 N. Y. 137; Litchfield v. Vernon, 41 id. 123; Booth v. Woodbury, 32 Conn. 118.

It is a principle of law, also, that the Legislature cannot, by any enactment, alter or change laws so as to affect vested interests, and thus give the

laws a retroactive effect.

Therefore, any enactment giving validity to titles or sales made under void or illegal assessments, or taxes imposed, and so conflicting with interests

otherwise created or vested, would be unconstitutional.

A mere legislative act is not considered due process of law, within constitutional provisions, and cannot operate to divest rights of property which had been previously unaffected by any proceeding legally impairing them. But proceedings imposing a valid tax or assessment and providing for a future sale of the property assessed for nonpayment of them, would be considered as due legal process within the Constitution. Hill, 9; People v. The Mayor of Brooklyn, 4 N. Y. 419. Striker v. Kelly, 7

New York City.— As to assessment of benefit. See Charter of New York City, L. 1897, Chap. 378, § 980; L. 1901, Chap. 466, § 980. See Matter of Townsend Ave., 35 Misc. 65.

The Land to be Taken .- In the exercise of the right of eminent domain only the land actually required for the public purpose can be taken; even if the law authorizing the exercise of the right require compensation to be made for all land taken. Any law making provision for the taking of land not so actually required would be held void.

In re Albany Street, 11 Wend. 150; Embury v. Connor, 3 N. Y. 511; Bennett v. Boyle, 40 Barb. 551; In re Commissioners of Central Park, 51 id. 277; Matter of N. Y., L. & W. R. Co., 33 Hun, 148, affd., 98 N. Y. 664; Matter of Deansville Cem. Assn., 66 id. 569; Matter of E. B. W. & M. Co., 96 id. 42. The acts must be strictly construed. Matter of Poughkeepsie Bridge, 108 N. Y. 483.

Land necessary to protect a water supply from pollution may be taken as well as the land for the supply itself. Matter of Gilroy, 32 App. Div. 216.

Land of private corporations may be taken. N. Y. C., etc., R. R. v. M. G. L. Co., 63 N. Y. 326; Re Board Street Openings, 133 id. 329.

Building owned by lessee. Matter of Buffalo, 17 State Rep. 371.

Where the Legislature has conferred upon a corporation or municipality the general power to acquire lands by the right of eminent domain, such power does not apply to lands already dedicated by authority of law to a public use, unless such right is expressly conferred by the statute in direct terms, or by necessary implication. Matter of City of Utica, 73 Hun, 256. Vide supra, as to cemetery lands, Tit. I.

Abandoned canal. Dewitt v. Elmira Transfer Ry. Co., 134 N. Y. 495. Resuming use of street by railroad. Re Moran, 21 N. Y. Supp. 489.

Exemption of State lands from condemnation by municipalities for street purposes. In re City of Utica, 73 Hun, 256.

Proceedings operate as a conveyance.— Proceedings taken under the statute with the consent of the owner of the land, and confirmed, followed by payment of damages under the statute, held to operate as a conveyance, and vest the title in the corporation. Sherman v. McKeon, 38 N. Y. 266.

What property may be taken for public use.—As a rule of law where property has been once acquired by condemnation and is held for a public use it cannot by implication be taken again under the right of eminent domain. Matter of Boston and Albany R. R. Co., 53 N. Y. 574; Matter of Petition of N. Y., L. & W. R. R. Co., 99 id. 12; Matter of City of Utica, 73 Hun, 256; cf. Matter of Canal Place, 64 App. Div. 604. It is, however, competent for the Legislature to devote property held for one public use to another without compensation where no private interests have intervened. Matter of City of Buffalo, 68 N. Y. 167; Heard v. City of Brooklyn, 60 id. 242; R. & H. V. R. R. Co. v. City of Rochester, 17 App. Div. 257. Or, when it may not be essential to the first public use, and it may be essential to a paramount public use. Matter of Rochester Water Com'rs, 66 N. Y. 413; Matter of Prospect, etc., R. R. Co., 67 id. 371; Sixth Ave. R. R. Co. v. Kerr, 72 id. 330. Prospect, etc., R. R. Co., 67 id. 371; Sixth Ave. R. R. Co. v. Kerr, 72 id. 330. That the Legislature may expressly authorize the taking of property already held to a public use cannot be doubted. In Matter of N. Y. C. & H. R. R. Co., 77 N. Y. 256; Re N. Y. C. & H. R. R. R. R. Co. v. Mut. Gas L. Co., 63 id. 326; R. & H. V. R. R. Co. v. City of Rochester, 17 App. Div. 257, and this power is à fortiori existent where the land is held on a quasi-public use such as for a private cemetery. Matter of Board of Street Openings, 133 N. Y. 329. The Legislature cannot authorize the taking of more land than is essential to the public use even if it makes provisions for compensation. In the Matter of Albany Street, 11 Wend. 149; City of Johnstown v. Wade, 30 App. Div. 5, 12; Matter of South Beach R. R. Co., 119 N. Y. 141. The buildings on the part of the land required for a public use may also be condemned and taken if they are permanently attached to the soil. Baker

be condemned and taken if they are permanently attached to the soil. Baker

v. Johnson, 2 Hill, 342.

Land under water may be taken under the right of eminent domain. In Matter of N. Y. C. & H. R. R. Co., 77 N. Y. 248, and docks or wharfs. Matter of Mayor, etc., 74 App. Div. 343.

Estate.— The fact that a public use seems to demand the condemnation of only an easement, or an estate less than a fee, does not in this State preclude the Legislature from authorizing the taking of an estate in fee, if the use is indeed a public use. Sweet v. Buffalo, N. Y., etc., R. R. Co., 79 N. Y. 293; Sixth Ave. R. R. Co. v. Kerr, 72 id. 333; Birdsall v. Cary, 66 How Pr. 358; Matter of City of Rochester, 24 App. Div. 383; In re Mayor, Id. 7. And when the authorized use is at end the corporation may alien the land in fee. People v. Mauran, 5 Den. 389; Heath v. Barmore, 50 N. Y. 302. Cf. Roby v. Yates, 70 Hun, 35.

But where the public use does not require the taking of a fee but only an easement, then when the public use ceases, the easement so taken for it, also ceases (Head v. City of Brooklyn, 60 N. Y. 242; Matter of John & Cherry Streets, 19 Wend. 659. Cf. Newton v. Mfr's Ry. Co., 115 Fed. Rep. 781). When an easement only is taken the public uses cannot be changed. Story v. N. Y. El. R. R. Co., 90 N. Y. 122.

It is no valid objection that the intended use of an improvement will benefit

one person or class more than others, if it is open to the whole public. Matter of Burns, 155 N. Y. 23.

Estate Taken.— Either a fee or an easement may be acquired under exercise of this right; and while acts will be strictly construed, so as not to permit the taking of any greater interest than is expressly authorized, yet no particular words are needed to the acquisition of a fee, and the intent of the legislature must govern; so when a fee is specifically granted by the act it is no valid objection that an easement would have been sufficient.

Rochester Water Comm'rs, 66 N. Y. 413; Wash. Cem. v. P. P. & C. I. R. R. Co., 68 id. 591; Sweet v. B., N. Y. & P. R. R. Co., 79 id. 293.

The State takes the canal lands in fee. Eldridge v. Binghamton, 42 Hun.

202.

The interest which a railroad company acquires in land condemned for the use of its road is a permanent easement; but while it exists, the company's use is exclusive of the owner of the fee. Roby v. N. Y. C. & H. R. R. R. Co., 142 N. Y. 176.

Effect of Condemning Lands.— Lands once taken by condemnation for a public use cannot, without special authority, be appropriated to another public use by right of eminent domain.

Land already taken for prior public use.— When may be condemned. ter of Mayor, etc., 51 Hun, 416; Pocantico Water Works Co. v. Bird, 4 N. Y. Supp. 317; N. Y., Lack., etc., R. R. Co. v. Union Steamboat Co., 99 N. Y. 12. But see Cemeteries, supra, Tit. I.

Matter of B. & A. R. R., 53 N. Y. 574; P. P. & C. I. R. R. Co. v. Williamson, 91 id. 552; Matter of N. Y., L. & W. R. R., 99 id. 12; Matter of N. Y. C. & H. R. R. Co., 77 id. 248; Matter of City of Buffalo, 68 id. 167.

Lands held by a railroad company by purchase and occupied by it for tracks may be condemned to the extent of laying a sewer under the tracks. Matter of City of Gloversville, 42 Misc. 559.

So a railroad may be laid out across a park. Newton v. Mfrs. Rv. Co.,

115 Fed. Rep. 781.

Or a further easement may be taken on land used for highway, as for putting up electric poles. Village of Canandaigua v. Benedict, 24 App. Div.

How taken by street railroad. Hornellsville El. Ry. Co. v. N. Y., L. E.

& W. R. R. Co., 83 Hun, 407.

A provision giving commissioners power to sell the land taken would be invalid. Matter of Comm'rs of Wash. Park, 52 N. Y. 131. But see In re

City of Rochester, 20 N. Y. Supp. 506.

But lands taken in good faith may afterward be sold by legislative authority. Brooklyn v. Copeland, 106 N. Y. 496; or otherwise disposed of. Eldridge v. City of Binghamton, 42 Hun, 202; People v. B. & O. R. R. Co., 117 N. Y. 150.

The city of New York held entitled to be compensated for lands held by it in fee, taken for its water supply and paid for by the city at large when such lands are subsequently taken for the purpose of a city avenue, through the board of street opening and improvement. In the Matter of the Mayor, etc., 186 N. Y. 237.

Where the former use has been abandoned, it forms no bar to taking by this right, under a general power. Matter of N. Y., L. & W. R. R. Co., 13 Week. Dig. 257.

A public body or officials may discontinue the proceedings at any time before the title has become divested. In re Wash. Park, 56 N. Y. 144, 2 N. Y. S. C. R. 637.

Easements taken, and their abandonment. Roby v. N. Y. C. & H. R. R.

R. Co., 142 N. Y. 176.

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Creation of a new use not an abandonment. Newton v. Mfrs. Ry. Co., 115

Fed. Rep. 781.

Nonuser in case of an express grant, however long continued does not create an abandonment. Welsh v. Taylor, 134 N. Y. 450; Haight v. Little-

field, 147 id. 338; Conabree v. N. Y. C. & H. R. R. Co., 156 id. 474.

The general power to acquire lands by the right of eminent domain does not extend to lands already dedicated by authority of law to a public use,

unless such right is expressly conferred by the statute in direct terms or by necessary implication. In re City of Utica, 73 Hun, 256.

Reversionary Interest.—Where the fee of lands has been taken under this right for a public purpose, there is no reversionary interest left in the original owner, even if the public use should cease or fail.

Hayward v. The Mayor, 3 Sel. (7 N. Y.) 214, affg. 8 Barb. 486; Rexford v. Knight, 1 Ker. (11 N. Y.) 308; De Varigne v. Fox, 2 Blatch. 95; Birdsall v. Carey, 66 How. Pr. 358.

It is otherwise, however, where an easement only has been taken, and in such cases the owner of the fee is entitled to resume possession, if the public use should cease or fail. Heard v. Brooklyn, 60 N. Y. 242; Miner v. N. Y. C. & H. R. R. Co., 123 id. 242.

So also if an easement only is taken, as for a park, a railroad route laid out across the park is a new easement for which the owner of the fee can claim compensation. Newton v. Mfrs. Ry. Co., 115 Fed. Rep. 781.

Disposition of Land on Closing a Street, Road, etc.—After the land has once been taken for the public purpose and it cannot be taken from the public and revested in the former owner without compensation to the public, e. g., as by reducing the width of a highway; or, doubtless, in closing a street and donating the land.

People v. Com'rs, etc., 53 Barb. 71; In re John and Cherry Streets, 19 Wend. 659.

Where a street is closed the damages awarded stand in place of the land and are applicable to mortgage deficiency even where there is no judgment. Utter v. Richmond, 112 N. Y. 610.

On closing any street or road, therefore, for which the public had paid, or which has been taken by law, under the exercise of the right of eminent domain, it cannot be taken from the public and donated to a former owner, without compensation, by any act merely closing the road; nor is it supposed would the legislature have the right, even for a public purpose, to close a street in the city, and so destroy the public easement, without compensation to the municipality at least, if not to land owners who had been assessed on the opening.

This principle would especially be just in its application where lot owners had been assessed for benefit on the opening of an adjacent square, and where the city or State closed it, to the detriment of such owners.

Matter of Munson, 29 Hun, 325; Coster v. Mayor, etc., 43 N. Y. 399; Fearing v. Irwin, 55 id. 486.

For a full discussion of the rights of abutting owners in streets, see infra, Title IV, "Railroads." Also Chap. XXXVI.

City of New York.—By L. 1867, Chap. 697, § 3, abutting owners on streets, roads and avenues as may be closed, under the provisions of the act, above 59th street, in the City of New York, are to become seized, in fee simple, of the road-bed closed.

The above law was held unconstitutional, as against owners of the roadbed. De Peyster v. Mali, 92 N. Y. 262, reversing 27 Hun, 439; Fearing v. Irwin, 4 Daly, 385. See Charter of The City of New York, L. 1897, Chap. 378, and L. 1901, Chap. 466.

An act closing a street is not unconstitutional because it does not provide compensation to the owners of adjoining lands who are deprived of a right of way therein, when another street is left giving access to such land. Fearing v. Irwin, 55 N. Y. 486. See Matter of Bd. of Education, 24 App. Div. 117.

Leases.— Re N. Y. & B. Co., 137 N. Y. 95. See Matter of Mayor, etc., of N. Y., 168 N. Y. 254.

Dower rights.— Where the fee of land is taken under this right it is taken free from contingent interests as of inchoate dower. Moore v. The Aldermen,

etc., 4 Sand. 456, affd., 8 N. Y. 110.

In choate dower is protected as between the wife and any other but the State. Matter of Trustees of N. Y. & Brooklyn Bridge, 75 Hun, 558; 89 id. 219; Simar v. Canaday, 53 N. Y. 298, also see Chap. VII. Dower.

Mortgages .- Effect on, and rights of mortgageee and others. In re City of Rochester, 136 N. Y. 83; Gates v. De La Mare, 142 id. 307.

Judgments.— So the land is taken freed from the lien of judgments; and judgment creditors are not "owners" to be notified. Watson v. N. -X. C. R. R., 47 N. Y. 157. See Code of Civ. Proc., § 3378.

What is comprehended as Land.—Where a statute authorizes land to be taken for a public use, everything included in the general term "land" may be taken, including the buildings of a permanent character thereon, but not that part of them beyond the land actually taken for the public use.

Mark v. State, 97 N. Y. 572; Baker v. Clogher, 2 Hill, 342; Bennet v. Boyle, 40 Barb. 551; Stamford W. Co. v. Stanley, 39 Hun, 424.

When the improvements, however, are allowed, and intended as part of the compensation to the party whose lands are taken, they belong to him, and he may sever them from the land. Schuchardt v. The Mayor, 53 N. Y. 202.

See, as to the taking streets, etc. In re N. Y. C. R. R., 77 N. Y. 229. Fixing a building line is held a taking of land. People v. Calder, 89 App.

An easement is property which cannot be taken without just compensation. Matter of the City of New York, 168 N. Y. 134.

Right to interfere with enjoyment of property by operating a turntable an easement. Long Island R. R. Co. v. Garvey, 159 id. 334.

Flooding of land is a taking. U. S. v. Lynch, 188 U. S. 445.

Franchises.—The taking away or destruction of franchises for a public use is held to fall under the principle requiring compensation to be given, equally with any other private property; and they cannot be vacated under claim of public advantage or use without just compensation.

West River Bridge Co. v. Dix, 6 How. (U. S.) 507; Alabama R. R. v. Kenney, 39 Ala. 307; In re Flatbush Avenue, 1 Barb. 286; White River T. Co. v. Vt. R. R., 21 Vt. 590; County of Richmond v. County of Laurence, 12 Ill. 1; Albany N. R. v. Brownell, 24 N. Y. 345; Lafayette Pl. R. v. New Albany R., 13 Ind. 90; Harding v. Goodlet, 3 Yerger, 41.

See, however, the subject "Franchise," and the cases cited as to the exclusive rights impliedly conferred by the State grant creating them. Suggesting

clusive rights impliedly conferred by the State grant creating them. Supra.

Chap. I; also this chapter, Tit. I.

It has been held, also, that if the damage be consequential or indirect, as by the creation of a new and rival franchise, in a case required by public necessity, compensation is due. Bonaparte v. C. & A. R. R., 1 Bald. (C. C. U. S.), 205; Glover v. Powell, 2 Stock. (N. J.) 211.

The fixing of unreasonable railroad rates is a taking of property for public

use for which just compensation must be made. Matthews v. Bd. of Corp.

Com'rs of North Carolina, 106 Fed. Rep. 7.

Land under Water.— The right of the Legislature to convey or use land under water in front of riparian owners, without compensating them for the loss of their riparian advantages, will be considered hereafter, "Land under Water." Chap. XLIII.

For discussion of this subject, see Sage v. The Mayor, etc., of New York, 154 N. Y. 61; Matter of the City of New York, 168 id. 134.

Where no Compensation is Provided for. Any acts of the Legislature that authorize the taking of private property for public use, without making a just compensation, are considered by the courts of this State not only unconstitutional, but in violation of principles of natural right and justice, and such acts are held null and void.

Bradshaw v. Rogers, 20 Johns. 103, revd., Id. 735, on other grounds; In re John and Cherry Streets, 19 Wend. 659; Taylor v. Porter, 4 Hill, 140; Sage v. Brooklyn, 89 N. Y. 189; Langdon v. Mayor, 93 id. 129; Dusenbury v. Mut. Tel. Co., 11 Abb. N. C. 440; Re Rogers Ave., 22 N. Y. Supp. 27; Re South Market St., 67 Hun, 594; Foster v. Scott, 136 N. Y. 577.

But this has been held not to apply to public lands. People v. L. I. R. R.

Co., 9 Abb. N. C. 181.

Land cannot be entered upon and trees cut until compensation has been awarded. Blodgett v. Utica, etc., R. R. Co., 64 Barb. 580. Except see Code Civ. Proc., § 3379 and *In re* De Camp, 21 N. Y. Supp. 131.

Until compensation is made in condemnation proceedings, the owner of land

has a right to mortgage or convey the same; and any such mortgage or conveyance effects an equitable assignment of the award, which gives to the grantee or mortgagee an equitable lien on the damages awarded. Engelhart v. City of Brooklyn, 3 Misc. 30. See also Forster v. Scott, 136 N. Y. 577; Sweet v. Rechel, 159 U. S. 380; Code Civ. Proc., § 3378.

Public Corporations are equally within the protection of the law. change in their property, franchises or interests, so as to interfere with their vested estate, would be void, notwithstanding the general reservation in their act of incorporation authorizing the Legislature to make changes therein. But the Legislature might subject them to new restrictions or increased burdens without such compensation. Miller v. N. Y. & E. R. R., 21 Barb. 513, modified by Albany N. R. R. Co. v. Brownell, 24 N. Y. 345; In re Kerr, 42 Barb. 119; Benson v. The Mayor, 10 id. 223; The Brooklyn Park Comm'rs v. Nichols, 45 N. Y. 729; supra, Chap. I; Franchise and Street Railroads, infra.

Private Corporations.- Land of these may be taken even when a cemetery. Re Board Street Opening, 133 N. Y. 329.

Streams.—A statute declaring a private stream on which riparian owners have vested interest a public highway, without compensation to the owners, would be null and void. The same rule, doubtless, would prevail as to private streets. Morgan v. King, 35 N. Y. 454, reversing 46 Barb. 340; The People v. The Commissioners, etc., 53 Barb. 71.

An act declaring a stream a public highway for floating logs is unconstitutional if no compensation is provided. Brewster v. Rogers Co., 169

N. Y. 73.

As to right to condemn use of stream. Stamford Water Co. v. Stanley, 39 Hun, 424; City of Syracuse v. Glenside Woolen Mills, 73 id. 421.

Property destroyed, to prevent the extension of a conflagration, is not taken under the right of eminent domain, and a party cannot recover therefor. Russell v. The Mayor, 2 Den. 461.

Compensation, however, is provided for by laws applicable to several of the cities of the State. See Charter of the City of New York, L. 1897,

Chap. 378, and L. 1901, Chap. 466, § 754.

Turnpikes, Highways and Streets .- Turnpike roads cannot be taken or closed for public use without compensation. Bradshaw v. Rogers, 20 Johns. 103, revd. on other grounds, Id. 735. Nor a part of a highway or street that has been dedicated for such use only. The Trustees, etc. v. The Auburn, etc., R. R., 3 Hill, 567; Kelsey v. King, 33 How. Pr. 39; Williams v. N. Y. C. R. R., 16 N. Y. 97; People v. Board of Supervisors, 4 Barb. 64; Knox v. The Mayor, 55 Barb. 404. But the public rights in a highway or street may be taken without compensation to an individual as one of the rule of the r be taken without compensation to an individual, as one of the public, for resulting damages. The People v. Kerr, 37 Barb. 357, affd., 27 N. Y. 188. Matter of Munson, 29 Hun, 325. And see infra, as to street railroads, etc., over highway.

But authorizing a highway road-bed to be used as a turnpike, has been held not a taking of land requiring compensation to the owners of the

road-bed.

As to what is an additional burden (e. g., gas-pipes) requiring compensation, see Crooke v. Flatbush W. W. Co., 29 Hun, 245; B. & R. G. L. Co. v. Calkins, 62 N. Y. 386.

See supra, Tit. I, as to special acts for the cities of New York and Brooklyn,

and also as to villages.

Mode of Ascertaining Compensation.— If a law authorize the compensation to be ascertained otherwise than through a jury, or commissioners to be appointed by a court of record, under the Constitution, the law and any assessment under it will be void; unless the compensation is made by the State.

Const. 1894, Art. I, § 7; House v. City of Rochester, 15 Barb. 517; Clark v. City of Utica, 18 id. 451; Clark v. Miller, 42 id. 255, affd., 54 N. Y. 528. The commissioners must be directly appointed by the court. Menges v. Albany,

Even any provision authorizing the Supreme Court to increase or reduce the amount of damages reported by the commissioners would be unconstitutional. The Rochester Water Works v. Wood, 60 Barb. 137.

Although, in case of error or fraud, the court could set aside the appraisal

and appoint new commissioners. Id.

As to proceedings for compensation, vide Code Civ. Proc., Chap. 23, Tit. 1. As before seen, the constitutional provisions which may control in respect to the mode of ascertaining the compensation to be made to the citizen upon taking his property, do not apply to the question whether it is needed for public use. The People v. Smith, 21 N. Y. 595; and cases cited supra.

It would be otherwise, however, where the damage has been sustained, and

the law is retroactive in its effect. In such a case the party cannot be deprived of his right to trial by jury. In re Townsend, 39 N. Y. 171.

The party instituting proceedings cannot abandon them after the report of commissioners of appraisal has been confirmed. Matter of R. & C. R. R. Co., 67 N. Y. 242. But see as to Parks, Streets, etc., Matter of Wash. Pk. 56 N. Y. 144.

Provision for an assessment upon adjacent owners is not a provision for compensation within the Constitution. Hartwell v. Armstrong, 19 Barb. 166.

Power to select or locate the land may be delegated, but the compensation must be provided to be adjusted by a court having competent jurisdiction, In re City of Buffalo, 139 N. Y. 422.

Limit as to time.— The State may limit the time for which compensation may be claimed. Rexford v. Knight, 1 Kern. (11 N. Y.) 308.

The liability to pay, however, is a liability created by the Constitution; hence a proceeding by a landowner to obtain compensation is not within the six years' limitation imposed by § 382, subd. 2 of the Code of Civil Procedure, Matter of Clark v. Water Com'rs of Amsterdam, 148 N. Y. 1.

Waiver. As to the waiver of compensation, see Arnold v. Hudson R. R., 55 N. Y. 661, revg. 49 Barb. 109.

Waiver of defective jurisdiction, and right to withdraw same. Re N. F. & W. R. Co., 121 N. Y. 319; Aitken v. Water Comm'rs, 82 Hun, 265.

Notice. Property cannot be taken without due notice to every owner as regards fixing the compensation; and it is competent for the Legislature to direct the mode of giving the notice. Where the matter to be inquired into, however, is not as to the amount of the compensation, but as to the propriety of taking the land in question, no notice need be given. The notice when requisite may be waived by acts of the parties. Owners, etc. v. The Mayor, 15 Wend. 374; Dyckman v. The Mayor, 1 Sel. 434; The People v. Smith, 21 N. Y. 595.

No notice need be given of the application to appoint commissioners. L. I. R. Co. v. Bennett, 10 Hun, 91. But all notices and hearings that may tend to give the party affected any semblance of benefit must be carefully observed. People v. Kniskern, 54 N. Y. 52. A law imposing an assessment without notice or hearing is unconstitutional. Stuart v. Palmer, 74 N. Y. 183; Norton v. W. V. R. R., 61 Barb. 476. Only land can be taken that is described in the notice. *In re* Central Park Commissioners, 51 Barb. 277.

A reasonable notice, sufficient to apprise is sufficient. Happy v. Mosher,

48 N. Y. 313.

Objections not then made are waived. Allen v. U. E. & I. R. R. Co., 15 Hun, 80. See Code Civ. Proc., §§ 3361, 3362.

Adjacent street owners entitled, when.—Matter of Metropolitan Transit Co., 7 St. Rep. 477; their measure of damages, Newman v. M. E. R. R. Co., 118 N. Y. 618.

For what Compensation may be Required.— The prohibition in the Constitution has reference to property actually taken for the public use. Therefore injuries or damages, or disturbances of rights or easements that may accrue to property not actually taken. but in the vicinity of land taken (e. g., the propinquity of a railroad), or contingent future damages or incidental or consequential injuries not capable of estimate, do not come within the rule.

A person or corporation, however, would of course be liable for

any injury to others by not using proper precautions in the exercise of the right of ownership of property, or for a nuisance created.

Snyder v. Penn. R. Co., 55 Pa. 340; Drake v. Hud. R. R. R., 7 Barb. 508; Brown v. Cayuga R. R., 2 Ker. (12 N. Y.) 486; Bellinger v. N. Y. C. R. R., 23 N. Y. 42; Matter of Union Village R. R., 35 How. Pr. 420; Benedict v. Goit, 3 Barb. 459; Swett v. City of Troy, 12 Abb. N. S. 100; Graves v. Otis, 2 Hill, 466; Radcliff v. Mayor, 4 Coms. (N. Y.) 195; Laurence v. The Great N. R. R., 16 Ad. & Ell. 643; Hudson, etc., Canal Co. v. N. Y. & E. R. R., 9 Paige, 323; Matter of Thompson, 43 Hun, 416. And see 110 N. Y. 669, mem. And see further, infra, as to consequential damages. It is not requisite to the validity of a legislative enactment of a police nature that provision for compensation for such disturbance be made, where the act does not appropriate private property, but simply regulates its use and

the act does not appropriate private property, but simply regulates its use and enjoyment by the owner. Health Dep't v. Rector, 145 N. Y. 32.

If a common council in bad faith and as a matter of favoritism, grants to

a railroad company a franchise for a less sum than could be obtained from

a railroad company a franchise for a less sum than could be obtained from a competing company, such act amounts to a waste of the public funds of the municipality, and a taxpayer's action will lie to declare it void. Adamson v. N. El. R. Co., 12 Misc. 600.

A railroad corporation cannot require compensation for a mere paper route acquired by filing a map and service on occupants. No lien or any right in the nature of a lien is acquired, or if it be assumed a lien is so acquired, it is a lien created by statute, which can be abolished by statute without compensation before any rights under it have become vested. The People v. Adirondack Ry. Co., 160 N. Y. 225.

See Adirondack Ry. Co. v. Indian River Co. 27 App. Div. 202.

See Adirondack Ry. Co. v. Indian River Co., 27 App. Div. 326, where an injunction was denied this railway company against owners transferring forest

lands to State unincumbered.

A modification of the above principle, however, is to be considered with reference to the question of compensation, viz., that in the exercise of this right reserved to the sovereign power, its administration will be regulated and interpreted by the courts upon the basis of a broad and liberal equity, as to the right or estate of which the citizen is deprived. The taking of property, therefore, for public advantage, as construed by that principle, will not be held to be confined merely to its conversion and transfer from the subject to or for the public, but also such an utter destruction of, or interference with, private property, for the public weal, as will materially impair its practical value to the citizen, inflict permanent or irreparable injury upon it, or prevent his full enjoyment of it.

The courts, therefore, in sustaining the above doctrines, as applicable to legislative interference with private property, hold that any serious interruption to the common and necessary use of property may be equivalent to the taking of it; and that, therefore, under the above constitutional provisions, it is not necessary that the land should be absolutely taken.

Gardner v. Newburgh V., 2 Johns. Ch. 162; Charles R. Bridge v. Warren Bridge, 11 Pet. 638; Angell on Water-courses, § 465a; Hooker v. New Haven, etc., R. Co., 14 Conn. 146; Rowe v. Granite Bridge Co., 21 Pick. 344;

Canal Appraisers v. The People, 17 Wend. 571, 604; Lackland v. N. Missouri R. R., 31 Mo. 180; Stevens v. Proprietors of Middlesex Canal, 12 Mass. 466; Pumpelly v. Greenbay & Miss. Land Co., 13 Wall. 166; McKean v. Del. Co., 49 Pa. 424; People v. Haines, 49 N. Y. 587; Norton v. W. V. R. R. Co., 63 Barb. 77. But a mere temporary annoyance in the course of constructing a public improvement gives no right to compensation. Trans. Co. v. Chicago, 9 Otto, 635.

The erection and use of a fortress by the United States, although it interferes with use of his land by a neighboring landowner or impairs its value, is not a taking of property requiring compensation. U. S. v. Certain Lands,

112 Fed. Rep. 622.

A statute, however, preventing owners from building within thirty feet of the street is unconstitutional, unless compensation is provided. The People

v. Calder, 89 App. Div. 503.

So the taking of land containing a trunk system of sewers, involves injury to adjoining land drained thereby, which injury must be compensated. Matter of City of Rochester, 24 App. Div. 383.

In accordance with the above views, and, as a modification of the general principle that for a mere consequential injury to the property of an individual arising from the prosecution of improvements of roads, streets, rivers and other highways for the public good, there may be no redress, it is now the doctrine that where there is an actual invasion of land by superinduced additions of water, earth, sand or other material, or through having any artificial structure placed on it, or passage cut over or through it, so as to effectually destroy or impair its usefulness, it is a taking within the equitable meaning of the Constitution, and compensation must be made.

The diversion of a water-course, whereby the value of property is impaired, would come within the same rule.

Who entitled to Compensation. For land taken by the State, Welch v. I. &

Who entitled to Compensation. For land taken by the State, Welch v. I. & T. Nat. Bk., 122 N. Y. 177.

Mortgagee when and when not. Burkhard v. City of B'klyn, 6 Misc. 431; Kuhlman v. City of Brooklyn, 6 id. 429; Magee v. City of Brooklyn, 144 N. Y. 265; Engelhardt v. City of Brooklyn, 2 N. Y. Supp. 777.

Lot owners on a street shown on a filed map, when. Matter of Adams, 141 N. Y. 297; Petition of James Bird, 68 Hun, 562.

In the absence of an agreement to the contrary, the damages caused by closing a road belonging to the owner of the fee of the land at the date when the road was closed. Conkling v. Zerega, 72 Hun, 134.

Lessees when entitled. In re Clark, 21 N. Y. Supp. 233.

Lessees are entitled to damage to rental value as against the lessor in tase of nuisances, even when the nuisance antedated the lease. Bly v. Edison Electric Illum. Co., 172 N. Y. 1; Miller v. Edison Electric Illum. Co., Ct. of A., Feb. 6, 1906. But it is otherwise in elevated railroad cases. Kernochan v. N. Y. El. R. R. Co., 128 N. Y. 559. Vide infra. N. Y. El. R. R. Co., 128 N. Y. 559. Vide infra.

Lessee under lease expressly subject to contingency of taking cannot recover

Lessee under lease expressly subject to contingency of taking cannot recover value of unexpired terms. The lease terminates on the taking and no part of award shall be deducted for such lessee. Matter of Pier 39, 168 N. Y. 284. The award stands for the land, and in its stead. Matter of City of Rechester, 136 N. Y. 83, 90; Gates v. De La Mare, 142 id. 313; Magee v. City of Brooklyn, 144 N. Y. 269.

Provision will be made to protect wife's dower. Matter of Trustees of N. Y. & Brooklyn Bridge, 89 Hun, 219.

But a devisee of real estate in will made by owner before condemnation is not entitled to the proceeds. Ametrano v. Downs, 170 N. Y. 388. See also Willenbrock v. Hanschildt, 36 Misc. 262.

Navigable Streams.—The government of a State, under its reserved, or the government of the United States, under its constitutional powers to regulate commerce, may make alterations in the course, width, etc., of a navigable stream; and for this purpose may take the river-bed which, under the principles of law hereafter stated, may be vested in the riparian proprietor; or may divert the stream in which, by law, he has a peculiar or special right by reason of his location. Such property or right can only be taken. however, on making provision for compensation to such proprietor for the land taken, or for the diversion of the stream.

And although courts cannot directly restrain the President or Congress of the United States, or a State Legislature, they can restrain and prevent the action of their agents, if the property is taken as above without consent or compensation duly provided.

Vide infra, Chap. XLIII, Land under Water, and cases cited. See Avery v. Fox, W. Dist. Mich. 1868; reported 1 Abb. U. S. 246. Matter of Gilroy, 85 Hun, 424; City of Syracuse v. Stacey, 86 id. 441. Rights of individuals acquired in navigable streams may be taken. Kerr v. West Shore R. R. Co., 127 N. Y. 269. A city has no power to take and appropriate the natural and permanent banks of a nonnavigable stream within the municipality without paying to the owner compensation therefor. City of Schenectady v. Furman, 145 N. Y.

Improvement of navigation of a river and sequestration of land for that purpose held proper. Kaukauna Water Power Co. v. Green Bay & M. Can. Co., 142 U. S. 254.

Riparian owners.— In those streams of the State, where the fee of the bed, or alveus, is in the adjacent proprietors such proprietors are entitled to the usufruct of the waters and for an interruption in their enjoyment by reason of a public improvement are entitled to compensation. Comm'rs of the Canal Fund v. Kempshall, 26 Wend. 404; Duesler v. The City of Johnstown, 24 App. Div. 608; Lakeside Paper Co. v. The State of New York, 45 id. 112; Gallagher v. Kingston Water Co., 25 id. 82; Coxe v. State, 144 N. Y. 396, 407; City of Syracuse v. Stacey, 169 id. 231. Cf. Shively v. Bowlby, 152 U. S. 141,

So our State government now recognizes sub modo a right to compensation if access of a riparian proprietor is cut off (Langdon v. The Mayor, 93 N. Y. 127; Matter of Riverside Park Extension, 27 App. Div. 373; Steers v. Brooklyn, 101 N. Y. 51; Williams v. Mayor, 105 id. 419. Cf. Scranton v. Wheeler, 179 U. S. 141, 175; Slingerland v. Internat. Contracting Co., 43 App. Div. 215); except where the tide-way is owned by a city. Sage v. Mayor, etc., 154 N. Y. 61; Jarvis v. Lynch, 157 id. 445; Matter of N. Y. Speedway, 168 id. 134.

The Rule of Compensation.— It is now settled that the rule of compensation in this State is the actual value of the property taken, in money, without any deduction for estimated profit or

general advantages accruing to the owner from the public use of the property. And this seems to be the principle generally maintained throughout the United States, although the decisions are not altogether harmonious on the subject.

Matter of City of New York, 190 N. Y. 350; Jacob v. City of Louisville, 9 Dana, 114; Rogers v. R. R. Co., 35 Me. 391; St. Louis R. R. v. Richardson, 45 Mo. 496; State v. Moller, 3 Zabr. 383; People v. Mayor, 6 Barb. 209; Hatch v. R. R., 25 Vt. 49; Moale v. Baltimore, 5 Md. 314; People v. Mayor, 4 Coms. (N. Y.) 419; Rexford v. Knight, 15 Barb. 627, affd., 11 N. Y. 308; R. R. v. Doughty, 2 Zabr. 495; McMicken v. Cincinnati, 4 Ohio, N. S. 394. See also 25 Miss. 258; 5 Ohio, 250; N. S. Id. 140; Boom v. Patterson, 8 Otto, 403; Reisert v. City of New York, 174 N. Y. 196.

Neither, except as above observed, can contingent future damages or incidental or consequential injuries be taken into account—as the proximity of a railroad, or a change of grade in a street from the level of surrounding land. But allowance will be made for special injury in the case of a railroad, etc., according to the manner in which the land is cut, the difficulty of access, noise, smoke, etc. The general measure of damages is the difference between the market value of the land, with and without the improvement; and the injury to the land not taken by the use made of the land taken may be considered.

Troy & B. R. R. v. Lee, 13 Barb. 169; Sidener v. Essex, 22 Ind. 201; Wilmington R. R. v. Stauffer, 60 Pa. 374; Goodin v. Cinn. Canal Co., 18 Ohio, 169; Jacot v. City of Louisville, 9 Dana, 114; Drake v. Hudson R. R. R., 7 Barb. 508; Radeliffe's Exrs. v. Mayor of Brooklyn, 4 Coms. (N. Y.) 195; Concord R. R. v. Greely, 23 N. H. 237; Carpenter v. Landaff, 42 id. 218; East Penn. R. R. v. Hottenstine, 47 Pa. 28; Hatch v. Vermont C. R. R., 25 Vt. 49; Matter of Utica R. R., 56 Barb. 456; Taylor v. M. E. R. W. Co., 50 Super. 311; 52 id. 299; Henderson v. N. Y. C. R. R. Co., 78 N. Y. 423, distinguished, 86 N. Y. 127; Conklin v. N. Y., O. & W. R. R. Co., 102 id. 107, 52 Super. 274; B. & R. G. L. Co. v. Calkins, 1 T. & C. 540, affd., 62 N. Y. 386.

Damages to residue of land must be allowed in compensation. Matter of Board of Public Improvements, 99 App. Div. 576. See also Matter of N. Y. & Brooklyn Bridge, 18 id. 8; Rome, Watertown & O. R. R. Co. v. Gleason, 42 id. 530; Sharp v. U. S., 191 U. S. 341.

Including those damages which will be sustained by reason of the use to which the portion taken is to be put. So. Buff. Ry. Co. v. Kirkover, 176 N. Y. 301.

The rule applies however only to cases where the land taken is part of a larger tract, not to contiguous lots. Sharpe v. U. S., 112 Fed. Rep. 893, affd., 191 U. S. 341.

Rental value may properly be considered. In the Matter of the City of New York, 118 App. Div. 272.

Proceedings to condemn land, being statutory proceedings, should closely follow the statute and where doubts exist a strict construction should be accorded.

The commissioners must "view" the premises (In re Dept. Public Parks, 6 N. Y. Supp. 750), take the evidence offered (In re N. Y. El. R. R. Co., 8 6 N. Y. Supp. 750), take the evidence offered (17 72 N. I. E. R. R. Co., S. N. Y. Supp. 707; Long Island R. R. Co. v. Garvey, 159 N. Y. 334; Matter of Manhattan Ry. Co. v. Comstock, 74 App. Div. 341), including expert opinion in a proper case (Matter of City of Rochester, 40 Hun, 588), and then commissioners must determine the just compensation due to "owners." Just compensation should never be less than the owner sustaines (Rome, W. & O. R. R. Co. v. Gleason, 42 App. Div. 530, 535), and no allowance or deduction shall be made to owners on account of his real, or supposed benefits from the public use. Lewiston & N. F. R. Co. v. Ayer, 27 App. Div. 571. The value is to be fixed on the basis of real not supposed, conditions (Five Tracts of Land v. United States, 101 Fed. Rep. 661; Cf. Matter of Daly, 72 App. Div. 394), on the date of the award. Matter of Manhattan R. Co. v. Comstock. 35 Misc. 326.

Profits from business are not to be considered. City of Syracuse v. Stacev. No. 1, 45 App. Div. 249; Sauer v. Mayor, 44 id. 305; Matter of Gilrov. 26 id. 314.

Unless commissioners adopt an erroneous principle of compensation their report will not be disturbed. Matter of Grade Crossing Comm'rs, 52 App. Div. 122; City of Syracuse v. Stacey, 45 id. 249; Matter of Collis, 76 id. 368. The report cannot be modified, it must be set, aside if erroneous. Matter of Town of Guilford, 85 App. Div. 207. When a railroad takes part of a tract, the owner is entitled to recover the value of the part taken without deduction for benefits resulting to the remainder. South Buffalo Railway Co. v. Kirkover, 86 App. Div. 55.

Where land is leased, the entire value may be appraised and then apportioned; or, the value of each interest may be separately appraised. Matter of Trustees, etc., 137 N. Y. 95; Matter of Pier 39, 62 App. Div. 271; Matter of Daly, 29 id. 286; Matter of Mayor of New York, 168 N. Y. 254. A large tract of land may have a "plottage" value in a city. Matter of Armon Board, 73 App. Div. 152. But ordinarily where a part of a plot of land is taken the damages are the difference between the value of the whole before the taking and the actual value of the remaining part after such taking (Matter of N. Y. & Brooklyn Bridge, 18 App. Div. 8; South Buffalo Ry. Co. v. Kirkover, 176 N. Y. 301); but this rule does not authorize the allowance to separate contiguous tracts or holdings of the same owner. Sharpe v. United States, 112 Fed. Rep. 893. Where government condemns land, held subject to a restrictive covenant, adjacent owners entitled to enforce the covenant are not thereby entitled to compensation because the covenant is pro tanto discharged. United States v. Certain Lands in Jamestown, R. I., 112 Fed. Rep. 62. See 2 Columbia Law Rev. 333. If land held subject to a condition subsequent is taken the award may be divided. Whittemore v. Woodlawn Cemetery, 71 App. Div. 257.

Where the title to land taken for a public street is in an individual, subject to the easements of passage of abutting owners, in taking an easement for a street for public use the valuation by commissioners of such individual's interest therein at a nominal sum is proper. In the Matter of Adams, Commissioner, etc., 73 Hun, 581, affd., 141 N. Y. 297.

But if the fee itself is taken, the rule is otherwise and real damages must be assessed, the value of the land as incumbered by the easements being allowed. Matter of Mayor (Trinity Ave), 81 App. Div. 215; Matter of Ninety-fourth St., 22 Misc. 32; Matter of Adams distinguished.

As to date of valuing. Matter of Dept. Pub. Parks, 53 Hun, 280; Hynes v.

Manhattan R. Co., 54 App. Div. 256.

The assessment of fee damages is co instanti as of the date of the award. Matter of N. Y. El. R. R., 76 Hun, 384; Matter of Manhattan El. Ry. Co. v. Comstock, 35 Misc. 326.

Opening street. In re Rogers Ave., 22 N. Y. Supp. 27; In re Reynolds, 21 N. Y. Supp. 592.

Damages cannot be recovered on change of grade of street unless so provided by statute; it is damum absque injuria.

Uline v. N. Y. C. & H. R. R. R. Co., 101 N. Y. 98; Atwater v. Trustees, etc., 124 N. Y. 602; Talbot v. N. Y. & H. R. R. R. Co., 151 *id.* 155; Smith v. Washington, 20 How. (U. S.) 135; Transportation Co. v. Chicago, 99 U. S. 635; Sadlier v. City of New York, 185 N. Y. 408.

So also where by statute damages are given to abutting owners on change of grade, owners whose lots do not abut on streets, the grade of which is changed are not entitled to compensation. Matter of Grade Crossing Comm'rs,

166 N. Y. 69.

For measure of damages on change of grade under New York charter. See Matter of Mayor (Trinity Ave.), 81 App. Div. 215. See also Sadlier v. City of New York, 185 N. Y. 408.
Poles on Highway, Blashfield v. Empire State Tel. & Tel. Co., 71 Hun, 532;

Village of Canandaigua v. Benedict, 24 App. Div. 348.

It is sufficient if the act makes provision for future compensation. The assessment and payment of damages need not precede the condemnation.

Kelly v. Mayor, 6 Misc. 516; Smith v. Helmer, 7 Barb. 416; Rexford v. Knight, 11 N. Y. 308; Bloodgood v. M. & H. R. R., 18 Wend. 9; Baker v. Johnson, 2 Hill, 342; People v. Hayden, 6 Hill, 359; Fletcher v. The Auburn R. R., 25 Wend. 462; Case v. Thompson, 6 Wend. 634; Nichols v. R. R. Co., 43 Me. 356; Walther v. Warner, 25 Miss. 277; Francisco v. Scott, 4 Cal. 114; Rexford v. Knight, 1 Ker. (11 N. Y.) 308; Patten v. N. Y. E. R. R. Co., 3 Abb. N. C. 308. Contra, Avery v. Fox, 1 Abb. N. S. 246; Dusenbury v. Mut. Tel. Co., 11 Abb. N. C. 440; Re De Camp, 21 N. Y. Supp. 131. If the law taking the land is repealed, the right to compensation ceases.

Hampton v. Commonwealth, 19 Pa. 329.

Value of buildings erected in good faith after the enactment of the statute but before the exercise of discretion to begin condemnation proceedings may

be recovered. Matter of the Mayor, 24 App. Div. 7.

No possible or prospective of contingent advantages are to be estimated against the owner of the land taken. Alabama R. R. v. Burkett, 42 Ala. 83. See Reisert v. City of New York, 174 N. Y. 196; Dinger v. City of New York, 101 App. Div. 202.

The value of the land for the public purpose itself cannot be considered. U. S. v. Tuffe, 78 Fed. Rep. 524; U. S. v. Seufert Bros. Co., 1d. 520; Matter of Daly, 72 App. Div. 394; Board of Levee Inspectors v. Crittenden,

94 Fed. Rep. 613.

This is the general rule, although it is otherwise in the elevated railway

cases. Lewiston, etc., Ry. Co. v. Ayer, 27 App. Div. 571.

Value of the land for any purpose may be considered, but not the profits realized from the business conducted on the land. Matter of Gilroy, 26 App.

Its special value by reason of historical associations may be considered.

Five Tracts of Land v. U. S., 101 Fed. Rep. 661.

So in case of a trespass and erection of improvements before condemnation proceedings, the enhanced value of the land itself may be considered. Village of St. Johnsville v. Smith, 184 N. Y. 341.

The State may vacate the award and make a new assessment in case of

fraud or irregularity. Garrison v. City of New York, 21 Wall. 196.

A commission appointed in proceedings to condemn private property and acquire the use thereof for the purposes of a public street has jurisdiction to try the question of easements existing in abutting property owners. Matter of Ethel Street, 3 Del. 403.

Measure of Damages .- In elevated railroad cases, see as to Adjoining Own-

ers and Easements, infra, Tit. IV.

As to streets subject to right of passage. Matter of Adams, 73 Hun, 581, affd., 141 N. Y. 297; Matter of 173d St., 78 Hun, 487.

Measure of damages for diversion of water-flow under exercise of eminent domain. Matter of Thompson, 85 Hun, 438.

As to bed of pond, substantial damages allowed. Matter of Brookfield,

176 N. Y. 138.

"Plottage" Value.—Owner of lots in plot may elect to prevent claim only for each lot or lots as one parcel. In latter case full value of buildings need not be awarded. Matter of Armory Board, 73 App. Div. 152.

Standing Trees.- Value on stump is basis; or if no value at place of appropriation, then value at nearest market. Turner v. State of New York, 67 App. Div. 393.

The award seems to be in its nature and effect a judgment. Cottle v. N. Y., W. S. & B. Ry. Co., 27 App. Div. 604.

As to lessee's trade fixtures and measure of damages, vide In the Matter of the City of New York, Ct. of A., 192 N. Y. 295.

The general rules for measure of compensation have become somany and so specialized that further inquiry cannot be here entered into. See Tit. IV., as to Railroads in Streets.

As to the Use of Dedicated Streets .- See Chap. XXXV.

Land Under Water, Generally .- As to the taking of land under water, see-Chap. XLIII.

Practice, Procedure and Appeals in Condemnation Proceedings.—We have stated that these proceedings are regulated by the Code of Civ. Pro. Vide p. 28, supra.

Proceedings are commenced by petition to the Supreme Court, and usually result in a judgment and appointment of commissioners, upon the coming in and confirmation of whose report, a final order is entered, awarding possession and providing compensation. The proceedings must be before a court and not a judge; appeals, and new appraisals are also provided for.

As to proceedings up to appointment of commissioners, see Matter of So. Boul. R. R. Co., 146 N. Y. 352.

Other Authorities .- Matter of the City of New York, 104 App. Div. 445; Matter of City of Rochester (Re Neun), 102 App. Div. 99.

Action of the Commissioners of Appraisement.—All the commissioners mustmeet and act in making the appraisement and estimate of damages. Board

of Water Comm'rs v. Lansing, 45 N. Y. 19.
But if all be notified, action by two is enough. Astor v. Mayor, 62 N.
Y. 580. In condemnation proceedings the appraisers may either appraise the entire value of the premises, and then apportion such value among the fee owners and tenants, or they may, in the first instance, appraise the value of each separate interest, and thus ascertain the entire value. Trustees N. Y. & B. Bridge v. Clark, 137 N. Y. 95.

Omission of words in oath of commission when fatal. Matter of Gilroy.

85 Hun, 424, also same as to residence of commissioners and waiver.

Failure to appoint commissioners. Man. R. R. Co. v. Strout, 68 Hun, 90. In reaching value of property, commissioners are guided by their own judgment and experience rather than the opinion of witnesses, are untrammeled by technical rules of evidence and unrestricted as to their sources of information. Matter of Town of Guilford, 85 App. Div. 207.

The commissioners may view the premises. Matter of Manhattan Ry. Co.

v. Comstock, 74 App. Div. 341.

Report.—Until filed the report of the commissioners does not become canclusive upon them. People v. Morrison, 54 App. Div. 262, affd., 165 N. Y. 644.

Confirmation of Report. - Matter of Dept. Pub. Parks, 53 Hun, 280; Matter of De Camp, 151 N. Y. 557; Matter of Board of Public Improvements, 99

App. Div. 576.

Findings of commissioners not to be disturbed unless some injustice has been done. Matter of Town of Guilford, 85 App. Div. 207; Matter of the Mayor of N. Y., 74 id. 343; Matter of Grade Crossing Comm'rs, 52 id. 122, affd., 164 N. Y. 575.

Appeals.—An order dismissing whole proceeding and leaving the applicant without any award whatever, is appealable to the Court of Appeals. Matter of George Clark v. Water Comm'rs of Amsterdam, 148 N. Y. 1.

An order at Special Term setting aside report of commissioners and for a rehearing before same commissioners is appealable to Appellate Division notwithstanding §§ 3371, 3375 of Code of Civil Procedure. Matter of Town of Guilford, 85 App. Div. 207.

What review shall be permitted rests in discretion of Legislature. Matter

of De Camp, 151 N. Y. 557.

Costs and Extra Allowance.— For practice in these proceedings, see § 3372, Code of Civil Procedure; Matter of the City of Brooklyn, 148 N. Y. 107; Matter of City of Rochester, 181 id. 322.

When Title Vests.— See Forster v. Scott, 136 N. Y. 577, where the court held that the part of the Consolidation Act providing that no compensation should be allowed for buildings which were erected on mapped streets subsequent to the filing of such maps was unconstitutional.

Taxes.—Akin to the question of the time when title vests is the question of payment of taxes imposed after action taken to condemn. It is held that taxes imposed subsequent to time of appropriation are not a lien on the land, and must be returned with award, if paid (Matter of Board of Education, 169 N. Y. 456), unless the property is income producing. The owner receives from it pendente lite a sum sufficient to pay the taxes and assessments. Matter of Department of Public Parks, 53 Hun, 280.

Law in Force When Title Vests.—This has been held to be the law applicable. Matter of E. 175th St., 49 App. Div. 114.

TITLE IV. RAILROADS AS PUBLIC IMPROVEMENTS.

Railroads as Public Improvements.— Railroads for the transportation of merchandise and passengers from one part of the State to another are considered to be public improvements, and for the public benefit, for the construction of which private property may be taken under the authority of the Legislature, upon payment of a just compensation to the owner.

Acts, therefore, authorizing railroad companies to take private property for the purposes of the road have been held constitutional; and the Legislature may lawfully delegate to such corporations or companies the right of power of eminent domain for the above object.

Provisions, also, authorizing the taking of such property and assessing damages through commissioners to be appointed by the Legislature or governor, are also held constitutional, and not repugnant to the clause of the Constitution declaring the right of trial by jury to be inviolate. Such provision is held to apply to the trial of civil and criminal cases in courts of justice, and has no relation to assessments for damages to owners of property taken for public Such acts would not be valid, however, unless provision is made in them for compensation. The money need not be actually paid before the property is taken, but provision must be made out of some adequate fund. This is a condition precedent to taking the property.

Backus v. Fort St. Union Depot Co., 169 U. S. 557; Williams v. Parker, 188 U. S. 491.

All statutory proceedings must be strictly followed. In re R. E. R. Co.,

123 N. Y. 351.

It seems the exercise of the power of eminent domain by a railroad in acquiring land for its road may exhaust its right and a successor cannot change the route, unless authorized by a subsequent statute. Erie R. R. Co. v. Steward, 170 N. Y. 172.

Foreign corporations allowed to acquire land in this State. N. Y., N. H. &

Foreign corporations allowed to acquire land in this State. N. Y., N. H. & H. R. R. Co. v. Welsh, 143 N. Y. 411.

Acts have from time to time been passed in this State establishing the mode by which land may be taken for frailroad purposes. Livingston v. Mayor, 8 Wend. 85; Beekman v. Saratoga, etc., R. Co., 3 Paige, 45; Bloodgood v. The Mohawk, etc., R. R. Co., 18 Wend. 9; Smith v. Helmer, 7 Barb. 416; In re Kerr, 42 id. 119; The People v. Law, 34 id. 494; The People v. Smith, 21 N. Y. 595; Clark v. City of Rochester, 24 Barb. 446; Secombe v. R. R. Co., 23 Wall. 108.

Only railroads which are highways can use the act. Matter of N. F. &

Only railroads which are highways can use the act. Matter of N. F. & W. R. R. Co., 108 N. Y. 375.

The Legislature may grant the above powers to railroad companies by a general act. Buffalo & N. Y. C. R. R. v. Brainard, 9 N. Y. (5 Seld.)

It has been held however, that the acquisition of lands for speculation or sale, or to prevent competition by other lines, or in aid of collateral enor sale, or to prevent competition by other lines, or in aid of collateral enterprises, however beneficial to the road, are not such purposes as authorize the condemnation of private property therefor. Rensselaer & Sar. R. R. v. Davis, 43 N. Y. 137.

But land may be acquired for protective purposes and for necessary structures, stations, cattle yards, etc. Matter of N. Y. & H. R. R. Co. v. Kip, 46 N. Y. 547; Matter of N. Y. C. R. R., 5 Hun 201, affd., 63 N. Y. 326. For prospective use and for increased facilities. Matter of N. Y. C. & H. R. R. R., 77 N. Y. 248; Matter of S. T. R. T. Co., 103 N. Y. 251.

But not for merely incidental uses, such as gravel, material, etc. N. Y. & C. R. R. v. Gunnison, 3 Supr. Ct. 632.

As to streets, etc., see Matter of N. Y. C. & H. R. R. R. Co., 77 N. Y. 248; Matter of B. B. Co., 20 Hun, 201.

The Legislature may also allow the use of a railroad track by other roads;

The Legislature may also allow the use of a railroad track by other roads; Sixth Ave. R. v. Kerr, 72 N. Y. 330; Constitutional Provisions and Acts, infra.

Land may be taken by a leased road. Matter of N. Y., L. & W. R. R.

Co., 35 Hun, 220.

As to the determination of the route, and the modus of taking the land, see Norton v. W. V. R. R., 61 Barb. 476; L. 1850, Chap. 140; L. 1851,

Chap. 19; L. 1853, Chap. 53; L. 1854, Chap. 282; L. 1864, Chap. 582; L. 1867, Chap. 515; L. 1869, Chap. 237; L. 1871, Chap. 560; L. 1876, Chap. 198; L. 1877, Chap. 103; L. 1886, Chap. 593; L. 1889, Chap. 78; G. L., Chap. XXXIX; L. 1890, Chap. 565. As to the taking of public streets, piers, etc. In re N. Y. C. R. R., 77 N. Y. 248, 258.

A railroad seeking to establish title under condemnation proceedings must show compensation awarded has been paid. Niagara Falls v. N. Y. C. & H. R. R. Co., 41 App. Div. 93, affd., 168 N. Y. 610.

As to tunnels and bridges and general provisions see the Railroad Law, G. L., Chap. XXXIX; L. 1890, Chap. 565.

As to railroads over the streets of a city, vide infra.

The general rule in this country is that railway companies, by virtue of the compulsory powers conferred on them in taking lands, acquire no absolute fee simple, but only the right to use the lands for their purposes; and where compensation is to be made for the value of the use appropriated, in estimating the value, what, if anything, would be left to the land owner of value, subject to the easement, should be considered. But under Laws 1833, Chap. 294, a fee was taken. Beale v. N. Y. C., etc., R. R. Co., 41 Hun, 172, affd., 119 N. Y. 635; Alabama R. R. v. Burkett, 42 Ala. 83; Roby v. N. Y. C. & H. R. R. R. Co., 142 N. Y. 176; G. L., Chap. XXXIX, § 4, subd. 2.

As to the fee still remaining in the land-owner, Hatch v. Cinn. R. R., 18 Ohio, 92; Morris v. Schallsville, 6 Bush (Ky.), 671.

General act of 1850 does not cover underground roads. Matter of N. Y.

Dist. R. R. Co., 107 N. Y. 42, distinguished, 115 id. 445.

It does not sanction the taking of more than required. In re S. B. R. Co.,

119 N. Y. 141.

As to abandonment, see L. 1891, Chap. 294.

The use of Streets for Railroads.—A variety of statutes from 1831 have been passed, conferring upon railroad companies the right to lay tracks over the public streets or highways of cities and towns.

In some of them the grantees were to obtain a prior consent of the city corporation; in others not. By Laws 1854, Chap. 140 (repealed by G. L., Chap. XXXIX), cities were not to allow railroad tracks which commenced and ended in the city to be constructed without the consent of a majority in interest of owners of property on the streets over which the road was to run, as per assessed valuation. On such consent being obtained, grants might be made, after due notice by the common council, on proper security being given, and under proper conditions. The act was not to affect roads already begun.

Many special acts were passed by the Legislature, however, subsequently granting railroads franchises without any such consent.

For the general law now relating to railroads, see the Railroad Law, G. L., Chap. XXXIX., L. 1890, Chap. 565, and amendments.

In relation to the intersections and crossings of the tracks and roadbeds of certain religiously in carroes on upon the highways streets avenues or

of certain railroads laid in, across or upon the highways, streets, avenues or roads of the cities, towns and villages of the State, see G. L., Chap. XXXIX, and amendments.

The grant of street rights by abutting owner to a railroad company pre-cludes a grantee of said owner from establishing a claim for damages against a railroad operated on a viaduct by the premises. Conabeer v. N. Y. C. & H. R. R. Co., 156 N. Y. 474. See Curvin v. Rochester R. R. Co., 78 Hun, 555.

It has been held in New York, apparently reversing Lewis v. N. Y. & H. R. R. Co., 162 N. Y., that the creation of a viaduct along a highway in which a railroad had the right to operate is no cause for damages to abutter which a railroad had the right to operate is no cause for damages to abutter by reason of consequential damages in the nature of interference with his light, air, etc., the law of the elevated railroad cases not being applicable. Fries v. N. Y. & H. R. R. Co., 169 N. Y. 270, where abutter had no title in highway. Muhlker v. N. Y. & H. R. R. Co., 173 N. Y. 549. It has however been held that though the above rule may be the general

rule, still in its application to a purchaser of real estate since the elevated railroad cases became the law of the State, it is violative of the constitutional provision against the impairment of the obligation of contracts. Muhlker v. N. Y. & H. R. R. Co., 197 U. S. 544.

New York City.-Act of January 30, 1860, Chap. 10 - By this act no railroad was to be built in or along any of the streets or avenues of the city of road was to be built in or along any of the streets or avenues of the city of New York, except under the authority and subject to the restrictions of the Legislature. The act was not to affect roads already begun, or for which grants had been made. Inconsistent acts were repealed. See Const. 1894, Art. III, § 18; also Charter of the City of New York, L. 1897, Chap. 378, § 45; L. 1901, Chap. 466, § 45.

See also as to streets and avenues prohibited from use for railroads, L. 1890, Chap. 565, § 123; L. 8192, Chap. 676, and L. 1895, Chap. 870.

Constitutional Provisions.—By § 18, of Art. III of the Constitution, which was adopted in 1875, and also in that of 1894, Art. III. § 18. amended in 1901, the passage of any private or local bill "granting to any corporation, association, or individual, the right to lay down railroad tracks" was forbidden; and the Legislature was directed to pass general laws providing for the various cases enumerated in the section, which contained many other prohibitions of private legislation. The section further provided, that no law should authorize the construction or operation of any street railroad, unless the owners of one-half in value of the property bounded on the streets through which the railroad was to run, and also the local authorities having control of such streets, should consent; except that the consent of the property owners might be supplied by the determination of three commissioners appointed by the Appellate Division of the Supreme Court, given after hearing, and confirmed by the court.

An underground road is a street road within this provision. N. Y. Dist. R. R., 107 N. Y. 42.

An act amending charter of road previously given is not void under this section. Astor v. N. Y. Arcade R. R. Co., 48 Hun, 562, affd., 113 N. Y. 93.

Rapid Transit Acts. - By Chap. 606, L. 1875, commonly called the "Rapid Rapid Transit Acts.—By Chap. 606, L. 1875, commonly called the "Rapid Transit Act," provision was made for the construction of steam railways, in accordance with the provisions of this section of the Constitution. Sections 17 to 25 inclusive regulated the procedure with great minuteness, and expressly forbid any allowance, in estimating compensation, for benefits resulting to property from the operation of the road.

This act has now been superseded, so far as the subject treated in this chapter is concerned, by "The Railroad Law," G. L., Chap. XXXIX; L. 1890, Chap. 565, and its amendments. See L. 1891, Chaps. 360, 362; L. 1892, Chaps. 306, 532, 676; L. 1893, Chaps. 239, 316, 433, 434, 546;

L. 1894, Chaps. 648, 723; L. 1895, Chaps. 545, 921, 933; L. 1896, Chaps. 356. 855; L. 1897, Chaps. 504, 754; L. 1898, Chaps. 263, 520, 521, 590, 597, 656; L. 1899, Chaps. 359, 541, 710; L. 1900, Chaps. 517, 549, 739, 740; L. 1901, Chaps. 419, 617, 638, 731; L. 1902, Chaps. 140, 198, 209, 225, 487, 504; L. 1903, Chaps. 462, 537, 597, 626, 627; L. 1904, Chap. 313; L. 1905, Chaps. 650, 695, 727.

This body of statutes, starting with G. L., Chap. XXXIX, now regulates all railroads, including those operated by steam or electricity, and whether elevated, surface or in tunnels or subways and the taking or acquisition of

land by same.

See for construction of these acts: Matter of N. Y. E. R. R. Co., 70 N. Y. 327; Matter of G. E. R. R. Co., 70 id. 361; N. Y. Cab. R. W. Co. v. 42d St., etc., Co., 13 Daly, 118; N. Y. Cab. Co. v. Mayor, 104 N. Y. I; Matter of Kings Co., etc., Co., 105 id. 97; Matter of N. Y. Cab. R. W. Co., 109 id. 32; Matter of N. E. R. R. Co., etc., Co., 112 id. 61; Matter of Date of Co., 120 id. 12 id. 61; Matter of Co., 12 id. 61; Matter of Co., 120 id. 12 id. 61; Matter of Co., 120 id. 12 id. 61; Matter of Co., 120 id. 12 id. 61; Matter of Co., 12 id. 61; Matter of Co., 120 id. 61; Matter of Co., Brooklyn El. R. R. v. Flynn, 147 id. 344.

Land needed for authorized connection may be taken by eminent domain.

Matter of U. E. R. R., etc., Co., 113 N. Y. 275.

The "Rapid Transit Act," applied only to steam railroads; and, to comply with the provisions of the Constitution as to ordinary street railroads, the Legislature passed the act, L. 1884, Chap. 252, providing for surface street railroads to be operated by any means except locomotive steam-power. This act provided (§ 16), that the act of 1875 should not cover any surface street railroad, and made no provision for taking land by right of eminent domain. It contained provisions as to the consent of owners of abutting domain. It contained provisions as to the consent of owners of abutting property similar to those of the Rapid Transit Act. This act was amended by L. 1886, Chaps. 65 and 642, and by L. 1887, Chap. 622. It did not apply to underground roads. Matter of N. Y. Dist. R. R. Co., 107 N. Y. 42. Organization of a corporation under this act does not of itself, give any present right to lay tracks. People v. O'Brien, 111 N. Y. 1; as to proceedings under this act, vide Matter of People's R. R. Co., 112 N. Y. 578.

Nature of title acquired thereunder, Sub. R. T. Co. v. Mayor, etc., 128 N. Y. 510 as distinguished from that under General Pailroad Act. Id.

N. Y. 510, as distinguished from that under General Railroad Act. Id.

By L. 1880, Chap. 415, street railroads, except in the counties of New York and Kings, were authorized to extend their lines over bridges crossing the Hudson river, subject to obtaining the consent of property owners and bridge companies, or, in lieu thereof, that of three commissioners, appointed by the General Term of the Supreme Court, whose report was to be confirmed by the court.

All these various acts were repealed when "The Railroad Law" went into effect on May 1, 1891, the provisions of that law taking the place of all previously enacted statutes. See G. L., Chap. XXXIX.

Underground Railroads.- By L. 1880, Chap. 582, general provision was made for the construction of underground roads, authorizing them to acquire lands under the provisions of the General Railroad Act of 1850 and requiring, where the road is built under a street, the consent of the local authorities and of the owners of one-half in value of the abutting property. In default of either consent three commissioners might be appointed by the General Term (as under the Rapid Transit Act) whose consent, when confirmed by the court, would be sufficient, though neither property owners nor local authorities consented. This provision has been held unconstitutional, as no substitute for the consent of the local authorities is lawful under § 18, Art. III, of the Constitution. Matter of N. Y. Dist. R. R. Co., 42 Hun, 621, affd., 107 N. Y. 42.

Now regulated by G. L., Chap. XXXIX, amd. L. 1893, chap. 316, etc., infra.

Railroads in Streets.— See L. 1884, Chap. 252; L. 1886, Chap. 65; L. 1887, Chap. 622; L. 1889, Chaps. 281, 531, 564. See G. L., Chap. XXXIX (as amended from time to time) which now governs.

Elevated Railroad Acts.— See L. 1888, Chap. 462, repealed L. 1890, Chaps. 565 (Gen. Laws, Chap. XXXIX), 566; L. 1891, Chap. 294; L. 1892, Chaps. 566, 687, etc., which now regulate the subject. See also infra.

Elevated railroad for rapid transit in a city — cannot be constructed under chapter 140 of 1850 — section 123 of chapter 676 of the Laws of 1892 applies only to rapid transit railroads — section 23 of title 19 of chapter 863 of 1873 applies only to street railroads. Beekman v. Brooklyn & B. B. R. R.

Laws 1890, Chap. 565, § 4, permitting a railroad company to construct its road "across, along, or upon" any highway, contemplates only a casual or incidental occupation and use of the highways, and does not authorize a company to build its entire railway along a highway between two villages. Burt v. Lima & H. F. R. Co., 21 N. Y. Supp. 482.

All the above are practically superseded by "The Railroad Law." L. 1890, Chap. 565, as amended, etc., L. 1891, Chap. 360, 362, 367; L. 1892, Chaps. 306, 460, 534, 676, 700, 702; L. 1893, Chaps. 433, 434; L. 1894, Chap. 693; L. 1895, Chaps. 545, 933; L. 1896, Chaps. 356, 855; L. 1897, Chaps. 504, 754; L. 1898, Chaps. 263, 520, 521. 590, 597, 656; L. 1899, Chaps. 359, 541, 710; L. 1900, Chaps. 517, 549, 739, 740; L. 1901, Chaps. 419, 617, 638, 731; L. 1902, Chaps. 140, 198, 209, 225, 487, 504; L. 1903, Chaps. 462, 537, 597, 626, 627; L. 1904, Chap. 313; L. 1905, Chaps. 650, 695, 727; etc.; vide supra.

Rapid Transit Railways in Cities of over a Million.- L. 1891, Chap. 4; amd. L. 1892, Chaps. 102, 556; L. 1894, Chaps. 528, 752 et al. See also infra.

Rapid Transit Acts Constitutional.—L. 1891, Chap. 3, as amended by L. 1894, Chap. 752, and L. 1895, Chap. 519, held constitutional. Sun P. & P. Assn. v. The Mayor, 152 N. Y. 259.

See, also, L. 1896, Chap. 729; L. 1900, Chap. 616; L. 1901, Chap. 587; L. 1902, Chaps. 533, 542, 544; L. 1904, Chaps. 562, 564; L. 1905, Chaps. 599, 631, amending the Rapid Transit Act, L. 1891, Chap. 4, for cities of over a

million inhabitants. Acquisition of real estate. L. 1891, Chap. 4, § 39, amended L. 1904, Chap.

564, § 5.

A detailed examination of this subject is beyond the limits of this work.

See, also, Charter of The City of New York, L. 1897, Chap. 378, § 45; Am'd L. 1900, Chap. 7; L. 1901, Chap. 466, § 45; L. 1905, Chap. 629, § 6, taking from the Board of Aldermen of the City of New York the right to grant railroad franchises in general.

Judicial Determination as to Railroads over Streets.-The decisions as to the rights acquired in and the authority of the State and city to bestow easements over the public streets and highways for railway purposes, have been numerous and somewhat variant.

The general views of the courts have been that a surface railroad in the street of a city, when constructed under proper legal authority, is not per se, a nuisance, nor an injury to contiguous land owners, nor an infringement of private rights, provided that such use does not interfere with the free use of the streets by the public as a highway.

The courts, also, at first, held that municipal corporations in the State, subject to all positive legal restrictions, had a right, without previous grant from the Legislature, and as an incident to their authority to title, to allow the privilege or license of such use over streets to individuals or companies, if the license were revocable at the will of the municipal corporation; otherwise, if not revocable, but a surrender of the whole power and duty of the corporation over the street, the license would be invalid. Plant v. L. I. R. R. Co., 10 Barb. 29; Adams v. Saratoga, etc., R. R. Co., 11 id. 414; Drake v. Hudson R. R. Co., 7 id. 508; Milhau v. Sharp, 15 Barb. 193; 17 id. 435, affd., in some particulars, 27 N. Y. 611; State v. City of N. Y., 3 Duer. 119.

It was also at first held that the Legislature could not confer on railway companies any right over the public streets without compensation to the

municipality for the land appropriated.

The principles laid down as above, and asserted in the cases quoted, have been generally sustained, except so far as the right to compensation and the powers of municipal corporations are concerned. The tendency of the courts has been to recognize more fully the authority of the Legislature over municipal property, and to diminish the authority and estate of municipal corporations.

Later cases held, as to streets in which municipal corporations have the fee, under acts appropriating it, that, having been taken by them as delegates of the Legislature, in the exercise of the right of eminent domain, the Legislature might apply them to a public use without compensation to the city or adjacent land owners, and that the Legislature had entire control of any public rights in the highways or streets.

They held, also, that the owners of property bounded on streets had no private or exclusive right to, or property in, the use or employment of such

streets.

The courts also held, and still hold, that notwithstanding the various city charters, the Legislature has the paramount right to make grants of railroad privileges and franchises over the streets and avenues of a city; and that when this power is exercised it is superior to and exclusive of any power which previously resided in the local authorities; and that the local government has no right to grant railway privileges, or establish or extend railroads in cities, independent of legislative action and approval; that in general amunicipal corporation, as such, has no franchise in connection with the use of the streets for the transportation of passengers; and that, if it ever had such a franchise, it is not one that is irrevocable, being a mere grant for governmental powers. People v. N. Y. & H. R. R. Co., 45 Barb. 74; People v. Third Ave. R. R. Co., 45 id. 63; Wetmore v. Story, 22 id. 414; Davis v. The Mayor, 14 N. Y. 506; People v. Kerr, 27 id. 188, affg. 37 Barb. 375; Wetmore v. Law, 34 id. 515.

In People's Passenger R. R. Co., etc. v. John Park, Mayor, etc., of Memphis, 10 Wall. 38, it is held that a municipal corporation has no right by virtue of its general powers, to give an association of persons the right to construct and maintain for a term of years, a railway in one of the streets of the municipality, and that any ordinance or resolution granting such a

right is void.

See in this connection the instructive reasoning in the Special Franchise Tax Cases, People v. Tax Com'rs, 174 N. Y. 417, 199 U. S. 1, 48, 53.

As to Compensation to the City or Adjacent Owners.— Under the above principles, and unless there was a restraining law, it was held that the Legislature might confer upon the company the privilege of building and using a horse railroad in the streets of the city, without the consent of the adjacent street owners or of the city authorities, and without compensation to them.

Lexington & Ohio R. R. v. Applegate, 8 Dana, 289; Phil. v. T. R. R., 6 Whart. 25; Drake v. Hudson R. R. R., 7 Barb. 508; Brooklyn City, etc., R. R. Co. v. Coney Island, etc., R. R. Co., 35 id. 364; Wetmore v. Story, 22 id. 414; N. Y. & H. R. R. v. The 42d St. R. R., 50 id. 309; English v. N. H. R. R., 32 Conn. 240, but compare Thayer v. Rochester City, etc., R. R., 15 Abb. N. C. 52.

But abutting owners may have damages as for a nuisance if steam motors

are used without legal right irrespective of whether they own the fee or not. Hussner v. B. C. R. R. Co., 114 N. Y. 433.

No damages for permanent injury, in an action at law. Pond v. Met. R. R. Co., 112 N. Y. 186.

The whole subject of the rights of adjacent street owners has been finally very thoroughly investigated in the numerous cases arising out of the building of elevated railroads in the cities of New York and Brooklyn. By the decisions in these cases it has been settled that the owners of property abutting on a street have an easement of light, air, and access in such street, independent of the general easement of the public therein; and this equally whether the fee of the street be in such owners or not. When their enjoyment of such easement is invaded they are entitled to compensation, and the erection or operation of an elevated railroad in such street before provision has been made for such compensation, will be enjoined at their suit.

Story v. N. Y. E. R. R. Co., 90 N. Y. 122; Peyser v. Met. E. R. R. Co., 12 Daly, 70, and 13 id. 122; Glover v. Man. E. R. R. Co., 51 Super. 1; People v. Loew, 39 Hun, 490; Patten v. N. Y. E. R. R. Co., 3 Abb. N. C. 306; Watson v. Man. E. R. Co., 17 Abb. N. C. 289; Lahr v. Met. E. R. Co., 104 N. Y. 268; Abendroth v. N. Y. E. & Man. R. R. Co., 54 Super. 417, affd., 122 N. Y. I.

Even under Brooklyn Streets Act of 1835, providing for use by law then "and in such other manner as the Legislature may hereafter deem proper to enact," damages are recoverable. Meth. Soc. v. Bkln. E. R. R. Co., 46 Hun, 530.

The right to damages does not extend to property of the abutter on the cross or intersecting street, which is architecturally not a part of the abutting property, Reilly v. Manhattan Ry. Co., 43 App. Div. 80, even though unity of construction exist. Keene v. Met. El. Ry. Co., 79 Hun, 451.

Measure of Damages .- Value of property at time of trial determines amount of abutting owner's recovery. Hynes v. Manhattan Ry. Co., 54 App. Div. 256.

Damages for past trespasses are measured by diminution of rental, not of the selling value of the property. Syracuse Salt Co. v. R., W. & O. R. R.

Co., 11 App. Div. 557.

Co., 11 App. Div. 557.

In the elevated cases the question is, has the property shown an increase or a decrease in rental values. Gray v. N. Y. El. R. Co., 43 App. Div. 104. Other cases; Cook v. N. Y. El. R. Co., 3 Misc. 248, revd., 144 N. Y. 115; Sutro v. Met. El. R. Co., 137 N. Y. 592; Hadden v. Met. El. R. R. Co., 75 Hun, 63; In re N. Y. El. R. Co., 76 id. 384; Sperb v. Met. El. R. Co., 137 N. Y. 155, 596; In re Seaside El. R. R. Co., 83 Hun, 143, and cases cited; Saxton v. N. Y. E. R. Co., 139 N. Y. 320; Buck v. Met. R. Co., 73 Hun, 251; Moore v. N. Y. E. R. Co. et al., 4 Misc. 132; Bischoff v. N. Y. E. R. Co. et al., 138 N. Y. 257; Bookman v. N. Y. E. R. Co. et al., 137 id. 302; Lazarus v. Met. El. R. Co., 69 Hun, 190; Metropolitan Svgs. Bk. v. N. Y. El. R. Co., 21 N. Y. Supp. 286, affd., 142 N. Y. 663; Roosevelt Hospital v. N. Y. El. R. Co., 21 N. Y. Supp. 205; Sadlier v. City of New York, Ct. of A., June 12, 1906.

Lessees.—In case of leases made after an elevated railroad is constructed, the lessee cannot recover damages for decreased rental value. Kernochan v. N. Y. E. R. Co., 128 N. Y. 559.

Otherwise, however, in case of a renewal of lease at same aggregate rental under provisions of the original lease made before the elevated was constructed. Witmark v. N. Y. Elevated R. R. Co., 149 N. Y. 393. See also for case of continuity of title as lessee and owner. Farrell v. Met. Ry. Co., 43 App. Div. 143.

See also Pegram v. Elevated R. R. Co., 147 N. Y. 135; Stokes v. Man-

hattan Ry. Co., 47 App. Div. 58.
Or in case of transfer of the fee after the construction of the elevated, provided there has been no release given. Farrell v. Manhattan Ry. Co., 43 App. Div. 143.

A lessee cannot recover damages under a new lease made after the lessor has granted the railroad company an easement of light, air and access. Child v. N. Y. El. Ry. Co., 89 App. Div. 598. Held also that the operation of the road is notice to the lessee though the release is not recorded. *Id.*

The rule is otherwise, however, in the case of nuisances; the lessee may recover damages to rental value even if lease were made after the establishment of the nuisance. Bly v. Edison Electric Ill. Co., 172 N. Y. 1; Miller v. Edison

Electric Illum. Co., Ct. of A., Feb. 6, 1906. Vide supra.

No damages recoverable after twenty years user by elevated railroad, a prescriptive right arising in its favor. Hindley v. Met. El. Ry. Co., Ct. of A., June 12, 1906. The presumption of grant and lost deed may of course be rebutted. Id.

Same rule applied where title to abutting premises was in an infant at sometime during the twenty years, no disability existing at time period began to run. Scallon v. Met. Ry. Co., Ct. of A., June 12, 1906.

Remedy for Those Specially Injured.—The case of Milhau v. Sharp, reported in 28 Barb. 228, affd. in 27 N. Y. 611, holds that individuals owning lots fronting on a public street may maintain an action to enjoin the construction in such street of a railway, or a use of such street by a rail-road company, which would be specially injurious to their property, or may bring an action against the company for damages.

Mahady v. B. R. R. Co., 91 N. Y. 148; Davis v. Mayor, 4 Kern. (14 N. Y.) 506; Anderson v. Rochester, etc., R. R., 9 How. Pr. 555; Clark v. Blackmar, 47 N. Y. 150; Fanning v. Osborne, 102 id. 441; Henderson v. N. Y. C. R. R. Co., 78 id. 423; Hussner v. B. C. R. R. Co., 30 Hun, 409, affd., 96 N. Y. 18,

114 id. 433, and see elevated railroad cases, above.

But the danger of special damage must be great and imminent to adjacent owners before the court would interfere, and mere inconvenience is not enough. Drake v. Hudson R. R. R., 7 Barb. 508; Kellinger v. 42d St., etc., R. R. Co., 50 N. Y. 206. An owner upon a part of the street where the railroad does

not run cannot maintain an action. Matter of N. Y. & H. R. R. Co., 39 Hun, 338. See also Reilly v. Manhattan Ry. Co., 43 App. Div. 80.

A suit may be maintained in equity, by the owner of the fee to restrain a railroad company from unlawfully using his land, and for the recovery of the damages sustained by such use. Syracuse S. S. Co. v. Rome, W. & O.

R. R. Co., 67 Hun, 153.

Injunction is the proper remedy where a railroad takes an assignment of a lease and without resorting to condemnation proceedings uses the land for its railroad purposes, same not being contemplated in lease. Bass v. Met. West Side El. R. Co., 82 Fed. Rep. 857.

Case of a spur track illegally granted. Hatfield v. Strauss, App. Div., April,

1907.

Semble, that where a railroad is unlawfully constructed in a street, the adjacent owner, whose title extends to the center, has three remedies: (1) He may bring successive suits to recover his damages. (2) He may bring an action in equity to restrain the operation of the road, or (3), when the highway has been exclusively appropriated, he may maintain ejectment. Syracuse S. S. Co. v. Rome, W. & O. R. R. Co., 67 Hun, 153. See also Chap. XXXVI, Tit. III.

Railways over Dedicated Streets.—As to this branch of the subject see Chap. XXXV.

Railways over Highways. In view of the ownership of the road-bed of highways, under the principles adverted to hereafter. it has been held by the courts that the Legislature has no power to authorize the construction of a steam railway over a highway. or take it for any other public use, without providing for compensation to the owner of the land over which it passes.

Mahon v. N. Y. C. R. R. Co., 24 N. Y. 658; The Trustees, etc. v. The Manon v. N. Y. C. R. R. Co., 24 N. Y. 658; The Trustees, etc. v. The Auburn, etc., R. R., 3 Hill, 567; Carpenter v. The Oswego, etc., R. R., 24 N. Y. 655; Williams v. N. Y. C. R. R. Co., 16 id. 97; Kelsey v. King (Ct. of Appeals), 33 How. Pr. 39; Wager v. The Troy Union R. R. Co., 25 N. Y. 526; People v. Board of Supervisors of Westchester Co., 4 Barb. 64.

By the Laws of 1864, Chap. 582, railroads might be constructed over any public highway. This has, however, been superseded by "The Railroad Law," G. L., Chap. XXXIX, and amendments, having been merely an amendment to "General Railroad Act," L. 1856, Chap. 140, which was repealed in toto by "The Railroad Law."

by "The Railroad Law."

If the construction of a railroad on a highway has been legally authorized. abutting owners, who own no fee in the road are not entitled to compensation. Uline v. N. Y. C. & H. R. R. R. Co., 101 N. Y. 98; Falker v. N. Y., West Shore & Buffalo R. R. Co., 17 Abb. N. C. 279. An owner of property not abutting on the street in which the railroad runs cannot complain. Hier v. N. Y., West Shore, etc., Co., 40 Hun, 310; Sadlier v. City of New York, 185 N. Y. 408, same rule applied to an interborough bridge.

An abutting owner may recover, however, when a viaduct is erected opposite his land as in the case of an elevated railway. Sauer v. The Mayor, 44 App.

Also in case the railroad has not been legally authorized. Hussner v. B. C. R. R. Co., 114 N. Y. 433. For a case of injunction, see Hatfield v. Strauss,

118 App. Div. 909.

The above cases seem only to apply to railroads authorized to run with steam-power over the highway. The People v. Kerr, 27 N. Y. 188, draws a distinction between such cases and where an ordinary street railroad with horse-cars was authorized. In the latter case, the railroad over the highway, as in the case of a dedicated street, would probably be held merely a new mode of using the easement.

The consent of highway commissioners, is not requisite, neither is a steam railway crossing a nuisance. Baxter v. The S. R. R., 11 Abb. N. S. 72, 61

Land taken in a street for a railway operated by steam, must be compensated for. Wash. Cem. v. P. P. & C. I. R. R. Co., 68 N. Y. 591; Jersey C. R. R. v. Jersey City, etc., 20 N. J. Eq. 61; aliter as regards a horse railway. Id.

Bridge.— The rule applied to elevated structures does not apply to bridges which are highways, and damages are not recoverable for consequential injuries resulting to neighboring land. Sadlier v. City of New York, 185 N. Y.

Taking of land occupied by a railroad station for a highway. Matter of Village of Walden, 14 St. Rep. 590. See also Chap. XXXVI, Tit. III.

CHAPTER III.

THOSE CAPABLE BY LAW OF HOLDING AND CONVEYING LANDS.

TITLE I.— CITIZENS OF THE UNITED STATES AND THE NATURALIZATION LAWS.

II.— INDIANS.
III.— MARRIED WOMEN.

IV .- ALIENS, AND THE ALIEN LAWS OF THE STATE.

V .- Corporations, Infants, Lunatics, Etc.

VI .- THOSE SENTENCED TO IMPRISONMENT.

TITLE I. CITIZENS OF THE UNITED STATES.

By law of this State it is provided, that every citizen of the United States is capable of holding real property within this State, and of taking the same by descent, devise, or purchase. Every person, except idiots, persons of unsound mind, and infants, seized of or entitled to any estate or interest in real property, may alien such estate or interest, at his pleasure, with the effect, and subject to restrictions and regulations provided by law.

1 Greenleaf, 358; Law of 1787; 1 R. L. 70, § 1; and 74, § 5; 1 R. S. 719, § 8; The Real Property Law, G. L., Chap. XLVI, L. 1896, Chap. 547, §§ 2, 3; Fowler's R. P. Law (2d ed.), 98-127.

Change of Sovereignty and Ante nati. Vide supra, Chap. I.

Expatriation.— Under the English common law it was held that natural born subjects owe an allegiance, which is intrinsic and perpetual, and which could not be divested by any act of their own, without the assent of the State.

Van Dyne, Citizenship of the United States, 271. See Ludlam v. Ludlam, 26 N. Y. 356. As to what constitutes expatriation, vide Act of March 2, 1907, 34 Stat. at L. 1228.

In this country expatriation, under the more recent decisions and legislation, is considered a fundamental right, and a citizen may transfer his allegiance elsewhere, and become an alien.

Act of July 17, 1862, infra; Act of July 27, 1868, Chap. 249; 15 Stat. at L. 223. As to the former rule in this country, following the English common law, vide The Trinidad, 7 Wheat. 283; Juando v. Taylor, 2 Paine C. C. 652; In re Isaac Williams, 2 Cranch, 64; Id. 82; Talbot v. Jansen, 3 Dall. 383; United States v. Gillies, 1 Pet. C. C. 159; Inglis v. Trustees of Sailors' Snug Harbor, 3 Pet. 99; Chas. Green's Sons v. Salas, 31 Fed. Rep. 106; Jennes v. Laudes, 84 id. 73; Ruckgaber v. Moore, 104 id. 947; and see infra, this title.

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In many cases this right is made the subject of treaty, and a return to and residence for a certain term in the native country is made evidence of expatriation from the adopted one. (1868) Opinions of Atty-Gen., 380.

Treaties: With England, 16 St. at L. 775, in 1870; with North German Union, 15 St. at L. 615, in 1868; with Austria, 17 St. at L. 833, in 1870; with Denmark, 17 St. at L. 941, in 1872; with Sweden and Norway, 17 St. at L. 809, in 1869; with Belgium, 16 St. at L. 747, in 1868; with Spain; 30 St. at L. 1754, in 1898.

An act of July, 1862, 12 Stat. 597, also declares the right of expatriation to be a natural and inherent right of all people, and abrogates all past judicial legislative action inconsistent therewith.

The act of July 27, 1868, 15 Stat. 223, reasserts the right, and provides for the protection of naturalized citizens in foreign States, The act further declares that all prior orders, opinions, and decisions of government officers contrary to such view is inconsistent with the fundamental principles of the government.

R. S. U. S., §§ 1999, 2000. Vide Foreign Relations of the U. S. for 1873, Vol. 2, 1185.

Vide also infra, this Title.

Penalties for Perjury and Fraud. By Act of July 14, 1870, Chap. 254, various penalties are prescribed for perjuries and fraud in connection with naturalization. R. S. U. S., § 5395.

This act held to repeal the provisions of the Act of 1813 on the subject. U. S. v. Tynen, 11 Wall. 88.

Setting Aside Naturalization.- U. S. v. Norsch, 42 Fed. Rep. 417; U. S. v. Kornmehl, 89 id. 10.

Cannot be Impeached Collaterally .- State v. Macdonald, 24 Minn. 48. But see Re Yamashita, 59 L. R. A. 671.

Citizens.—As a general rule, according to the common law principle, all persons born within the jurisdiction and allegiance of the United States are native citizens. The special regulation of the status of citizenship, as changing the common law rules, is one appertaining to the Nation as such, and not to the States severally; and the right of citizenship, as distinguished from alienage, is a national right or condition. The principle of the English law, that birth within the jurisdiction of and under allegiance to a country creates citizenship thereof, was the law of the Colonies; and continued the law of each State, respectively, on the Declaration of Independence, until the Federal Constitution was established, when exclusive jurisdiction of the subject passed to the general government. Where, however, the constitutional or statute law is silent as to the political status of an individual, the principles of the common law are still the recognized law of the land as it existed, irrespective of English statutes, at the adoption of the Federal Constitution.

Const. of U. S., Art. IV, § 2; Art. I, § 8, subd. 4. Lynch v. Clarke, 1 Sandf. Ch. 583; Ludlam v. Ludlam, 31 Barb. 486, affd., 26 N. Y. 356.

Exceptions; Children of Ambassadors.—An exception to the above common law rule is found in the case of the children of ambassadors or other emissaries born out of a country, who are born in theory within the allegiance of the foreign power represented by the ambassador or other emissary. Calvin's Case, 7 Co. 1; Lynch v. Clarke, 1 Sandf. Ch. 583.

Those Born within Hostile Occupation .-- Also an exception exists where a person is born in a foreign country during war with it, within a portion held by conquest by the forces of his own country; or if he be born within the armies of his State while abroad, unless the parents adhere to the enemy as subjects de facto. Calvin's Case, 7 Co. 18; Craw v. Ramsey, Vaugh. R. 281; Dyer's Rep. 224.

As a general principle, also, of the common law, a subject traveling or sojourning abroad, either on the public business, or on lawful occasion of his own, with the express or implied license or sanction of the sovereign, and with the intention of returning, continues under the protection of the sovereign power, and retains the privileges and continues under the obligations of his allegiance. His children, therefore, although born in a foreign country, are not deemed to be born under foreign allegiance, and are an exception to the rule which makes the place of birth a test of citizenship. On the same principle a child born on an American ship, in a foreign port, is a citizen.

1 St. at L. 104, Chap. 3; Id. 415, Chap. 20, § 3; 2 id. 155, Chap. 28, § 4; U. S. R. S., § 1993 (Act of Feb. 10, 1855); Lynch v. Clarke, 1 Sandf. Ch. 583; U. S. v. Gordon, 5 Blatch. 18; Ludlam v. Ludlam, 31 Barb. 486, affd., 26 N. Y. 356.

Vide Act of Feb. 10, 1855, infra, this Title; also Act of March 2, 1907, 34

St. at L. 1228.

Illegitimate Children.—Their nationality follows that of the mothers by the law of nations; but the rule has been arbitrarily established that such are not United States citizens even though born of an American mother, if they are born outside the jurisdiction. See Guyer v. Smith, 22 Md. 239; Re Acosta y Foster, Moore, Int. Arbitrations, 2462.

Treaties Regulating Expatriation and Alienage.—Before the acts of July 17, 1862, and July 27, 1868, infra, the decisions throughout the State and Federal courts, supra, had been to the effect that every citizen owed allegiance to the government; and that, where there was no legislative act or treaty, the English common law doctrine prevailed, and the citizen had no right, intrinsically, to renounce his citizenship and allegiance to the government, without the consent of the government, nor until he arrived at full age.

In the case of Ludlam v. Ludlam, supra, a doubt was expressed as to whether a citizen were capable of renouncing his allegiance without the

consent of the government, or whether he might not do so when his government has not prohibited such an act. It was held by the court, however, that he could not divest himself of his citizenship until he became the citizen of another country, and that he could not do that until he was of full age.

That case further intimated, that a child born abroad of a citizen sojourning in a foreign country, for an indefinite time, might be subject to a double allegiance; and upon arriving at majority, might elect to retain the one and repudiate the other; but that, until such election, he retained the rights of citizenship in both countries, although discharging its duties in

but one.

This rule has been frequently acted upon in the matter of granting pass-ports, on the theory that the American citizenship acquired by birth even though coupled to a foreign allegiance cannot be divested during minority, and that only an overt act of election on reaching majority is determinative.

It may be remarked, that a person's commercial domicil might also give him rights appurtenant to the country where he was domiciled in a commercial point of view; and thus he might acquire a double political status. The law on this head, however, is not applicable to this treatise.

Various conventions and treaties have been made with foreign States with reference to the alien status and right of expatriation of the citizens of the United States, and of the foreign States, respectively. These treaties are important, as bearing upon the right to, and transmission of, real and personal property by the alien in the alien country, and as being, in many cases, inconsistent with the State laws regulating the title to land and its transfer.

The terms of these treaties are various. In some, the citizens and inhabitants of either of the two countries, who become heirs of lands or other property in the other, are to succeed to their estates without obtaining letters of naturalization, and without succession duty. In others, the rule applies only to the heirs of an alien dying within the jurisdiction of the foreign country. In other treaties, where land descends, alien parties are to have a reasonable or specified time to sell and remove the proceeds, without molestation.

Treaty with Switzerland of 1850, 11 St. at L. 590. Treaties with the Two Sicilies, 1865; with Hanover, 1846; with Portugal, 1840; Russia, 1832; and treaties of the same character exist with many of the smaller German and South American States. Vide supra, Treaties.

Some of the treaties (e. g., that with France, of February 23, 1853) are

made subject to the provisions of the State alien laws.

Aliens may take and hold, when.- By Chap. 593, N. Y. Laws of 1897, any citizen of a State or nation which confers similar privileges on citizens of the United States, may take, hold and convey lands within this State as if a citizen of the United States. Fay v. Taylor, 31 Misc. 32; Haley v. Sheridan, 46 id. 506, mod., 107 App. Div. 17; Hayden v. Sugden, 48 Misc. 123.

Hawaii.— Prior to its annexation to the United States, Hawaiians were refused admission to citizenship, as not being of the Caucasian or white race or of the African race. Re Kanaka Nian, 6 Utah, 259. See, however, as to the status of Hawaiians, 31 St. at L. 141, Act of April 30, 1900. This act provides "that all persons who were citizens of the Republic of Hawaii on

August 12, 1898, are hereby declared to be citizens of the United States and citizens of the Territory of Hawaii," § 4. See 23 Ops. Atty.-Gen. 345, 352, 509.

Philippines and Porto Rico. The status of the inhabitants of these islands is fixed by the Treaty of Paris, of December 10, 1898. This treaty provides that Spanish subjects, natives of the Peninsula, residing in the Territory ceded, shall have one year from the date of exchanging ratifications to declare their decision to preserve their allegiance, in default of which declaration, they shall be held to have renounced same and to have adopted the nationality of the Territory in which they resided. (Art. 9.)

It was further provided that the civil rights and political status of the native inhabitants of the ceded Territories should be determined by Congress.

It will be seen that in the absence of legislation by Congress, the status of the Phillipinos and Porto Ricans is rather unique. They are neither citizens nor aliens, but are under the protection of the United States.

They are not aliens. Gonzales v. Williams, 192 U. S. 1.

See Insular Cases, 182 U.S. 1.

They may apply as aliens for naturalization. Act June 29, 1906.

Passports.—R. S. U. S., § 4076, provides that "no passports shall be granted or issued to, or verified for, any other persons than citizens of the United States." This was amended however by Act of June 14, 1902, 32 St. at L. 386, so as to permit the issuance of passports to residents of the insular possessions of the United States; also by Act of March 2, 1907, 34 St. at L. 1228, authorizing their issuance to persons who have declared intention to become citizens under certain circumstances.

The effect which the political privileges created by these treaties may have upon the title to property within the States respectively. is a subject of judicial construction. The question arising is, whether the treaty-making power can, by its political action, vary or regulate what is supposed to be peculiarly a matter of State jurisdiction; and so, virtually abrogate the State sovereignty in matters connected with the disposition of and title to property within each State.

See, also, Chap. I.

The case of Hauenstein v. Lynham, 10 Otto, 483, seems to adjudicate this matter in favor of the general efficacy of the treaty-making power. Also Kull v. Kull, 37 Hun, 476. See Bollerman v. Blake, 94 N. Y. 624, where a release by the State given in accordance with a special legislative enactment

to the alien heirs was held effective without regard to treaty.

The case of The People v. Gerke, 5 Cal. 381, which sustained the view that the government of the United States has the constitutional power to enter into treaty stipulations with foreign governments, for the purpose of restricting or abolishing the property disabilities of aliens or their heirs in the several States, was virtually overruled by the subsequent case of Siamessan v. Bofer, 6 Cal. 250, in which the court held that the treatymaking power can never be extended, by implication, to the reserved powers on matters which belong to State sovereignty, or to the right each State has to regulate its domestic concerns.

Judge Story, in the case of Prevost v. Grenveaux, with reference to a treaty with France, which placed citizens of France on a par with citizens of Louisiana, and all States of the Union whose laws permit it, held that, inasmuch as the treaty did not conflict with the laws of the State, or claim for the United States the right of controlling the succession of real or personal property in a State, its provisions would be carried out; but otherwise the courts might not do so. 19 Wheat. 1.

In a case decided in this State, as to the effect of the United States in-

ternal revenue law, which required a stamp to be affixed to conveyances, in order to give them validity in the State, the broad principal was asserted that the Federal government had no power to prescribe any rule for a State, affecting the transfer of property within it, so as to render void any mode of transfer otherwise valid in the State. Moore v. Moore, 47 N. Y.

The same principle, if extended conversely to the operation of the treaties in question, would render their provisions ineffective to confer upon aliens the privileges of citizens with relation to property, if such pro-

visions were not harmonious with the State legislation.

In U. S. v. Fox, 4 Otto, 320, on appeal from New York Court of Appeals. it is held that the control of the descent of real estate can be regulated only by State law; and it is not within the jurisdiction of the United States or Congress. In this case there was no question as to a treaty.

The United States Supreme Court also passed upon another phase of the question in the above case of Hauenstein v. Lynham, in holding that where the State law, fixed no time within which aliens might sell and remove the proceeds of realty descending to them, their rights would be regulated by the treaty, and would not be defeated by the absence of a State law as to time for sale and removal.

A treaty is a law of the land when defining rights of citizen or subject. In re Cooper, 143 U. S. 472.

All citizens of the United States are enabled by statute to hold real estate in this State and to take same by descent, devise or purchase. Real Property Law, § 2.

Colonial Acts Relative to Citizenship .- The Colonial Act of July 5, 1715.—An act of the Colonial government of this Province was passed on this date, declaring that all persons of foreign birth, theretofore inhabiting within the Colony, and dying seized of any lands, etc., should be deemed to have been naturalized.

1 Van Schaick, 9; 1 Smith & L. 112. See also supra, as to other colonial laws, and particularly act of January 27, 1770, correcting defects in purchases made theretofore, before naturalization.

Original Powers of the States .- Before the adoption of the present Constitution of the United States, the power of naturalization resided in the several States; and naturalization was provided for by the respective State constitutions or laws. In default of which the common law rules prevailed.

Vide supra, Chap. I, as to citizenship in this State after the Revolution, and supra, this Title. See also Const. of New York of 1777, last clause.

United States Laws as to Admission of Aliens as Citizens .-Various acts have been passed by the general government enabling aliens to bécome citizens of the United States, a digest whereof is here given.

Where the provisions of such acts have been incorporated into the Revised Statutes of the United States, the section in which the provision is found is given in each case.

Since the adoption of the Constitution of the United States, it was considered that no State can by any subsequent law make foreigners or any other description of person citizens of the United States, nor entitle them to the rights and privileges secured to them by that instrument.

It would be lawful, however, for a State, by its laws, passed since the adoption of the Constitution, to put foreigners or any other description of person upon a footing with its own citizens, as to all the rights and privileges enjoyed by them within its dominion. and by its laws. But that would not make them citizens of the United States, nor entitle them to any of the privileges and immunities of citizens within the other States.

The right of naturalization, therefore, since the establishment of the Federal government, is exclusively in Congress.

The exercise of this right, however, as to its modus, may be delegated. Chirac v. Chirac, 2 Wheat. 259; Scott v. Sanford, 19 How. 393; Lynch v. Clarke, 1 Sandf. Ch. 583; Boyd v. Nebraska, 143 U. S. 160.

The question of what are the "privileges and immunities" referred to in the Constitution, has opened a wide field of inquiry, as has the determination of those who are the citizens entitled to them. Decisions on the subject have been made, to a large extent, in the United States courts. Each State determines for itself the meaning of the word "citizen" in respect to its own denizens, and so long as such determination does not conflict with the Federal Constitution, it is final.

Naturalization under Act of April 4, 1802, 2 St. at L. 153, R. S. U. S., § 2165.—By this act an alien, being free and white, may be admitted to become a citizen on certain prescribed conditions, for the details of which reference must be made to the statute.

This section of the Revised Statutes of the United States was repealed by § 26 of the Act of June 29, 1906, 34 St. at L. 596, to which reference should be had for the new provisions as to naturalization in general.

Aliens Residing in the United States before January 29, 1795.—Such aliens, by said act, might be admitted citizens, on proof of two years' residence in the United States, and one year in the State. Also, aliens having a two years' residence between January 29, 1795, and June 18, 1798, might be admitted within two years after the passage of the act. R. S. U. S., § 2165. Repealed, see above.

The Courts.— Every State court of record having common law jurisdiction, and a seal, clerk, or prothonotary, is to be a district court within the act. Id; Re Christern, 11 Jones & S. 523.

Vide amendment of 1824, infra, allowing the declaration to be made

before clerks of courts.

Children of Naturalized Citizens, and of Citizens.- Law of 1802, R. S. U. S., § 2172.—By the 4th section of this Act of 1802,

children of naturalized citizens, or of those who, previous to the Federal laws on the subject, had been admitted citizens of any State, being under twenty-one at the time of the parent's naturalization, or admission, shall, if dwelling in the United States, be considered citizens thereof.

People v. Newell, 1 How. Pr. N. S. 8, citing many cases (affirming, 38 Hun, 78).

Children Born Abroad.—Act of 1802, R. S. U. S. § 2172.— By the same Act of 1802 children of persons who now are or have been citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered citizens: provided the right of citizenship shall not descend to persons whose fathers have never resided within the United States. (R. S. U. S., See also Act of March 2, 1907, 34 St. at L. 1228. § 1993.)

In Ludlam v. Ludlam, 31 Barb. 486, affd., 26 N. Y. 356, the doctrine was maintained that the status of all children born abroad of American parents temporarily absent after 1802, and who were not within the terms of the Act of 1855, infra (i. e., all children of citizens born abroad between 1802 and 1855), is to be determined according to the principles of the common law, which make the children of a subject traveling abroad, although

such children are born abroad, citizens.

These cases hold also that the child of an American citizen temporarily absent, though the child be born abroad of an alien mother, is by the com-

mon law an American citizen.

See also Lynch v. Clarke, 1 Sandf. Ch. 659, holding that the children of American citizens, born abroad, though not within the provisions of the Act of 1802, are citizens under the rules of the common law. West v.

West, 8 Paige, 433.

If the father alone is naturalized, it is supposed sufficient for the law. See Peek v. Young, 26 Wend. 613, as to an infant child born abroad of a citizen and remaining an infant till after 1783 (peace with Great Britain), and not coming to this country until 1830, held a citizen, affirming 21 Wend. 389.

Under this act, infant children of aliens, though born abroad, if dwelling within the United States at the time of the naturalization of their parents, become citizens by such naturalization. West v. West, 8 Paige, 433. See above, People v. Newell.

See infra, Act of 1855.

Earlier Acts before 1802, now Repealed .- Prior to the above Act of 1802, viz., March 26, 1790, January 29, 1795, and June 18, 1798—laws similar to that of 1802 had been passed, making the probationary term of residence two, five and fourteen years respectively. All prior acts, however, were repealed by the Act of 1802, § 4.

Indians.— The statutes of naturalization have been construed not to apply to Indians. 7 Op. Atty. Gen. 746; vide infra, Constitutional Amendments, 14 and 15, also Title II.

Jurisdiction of State Courts.—The process of naturalization is a judicial act, power to exercise which Congress cannot authoritatively confer on a State court; but it may be exercised by the State courts, if not prohibited by Congress; and Congress may give to the State courts jurisdiction in the matter, as delegated agents, to exercise the power.

State v. Penney, 5 Eng. 621; Morgan v. Dudley, 18 B. Monroe, 693; Ramsden's Case, 13 How. Pr. 429; Rump v. Commonwealth, 6 Casey, 475; Re Christern, 11 Jones & S. 523; Green v. Salas, 31 Fed. Rep. 106.

Action of State Courts.—It has been held in this State that the powers conferred upon the courts in admitting aliens to the rights of citizenship are judicial, and not ministerial or clerical; and, consequently, cannot be delegated to the clerk, but must be exercised by the court itself. An examination must be made in each case sufficient to satisfy the court of the requisite facts. In re Clark, 18 Barb, 444.

State Interference.—It has been held that a State law restricting its courts and their clerks from entertaining jurisdiction for the naturalization of aliens, under the acts of Congress, is not contrary to the Constitution of the United States. Stephen's Case, 4 Gray, 559.

Residents between 1798 and 1802—Act of March 26, 1804, 2 Stat. 292.—By this act, any free white person residing in the United States between June 18, 1798 and April 14, 1802; and who has continued his residence, may be admitted without making the first declaration. *Vide infra*, Act of March 22, 1816.

Widows and Children of Aliens.—Widows and children of an alien who has made the declaration and application, as per Act of 1802, and who shall die before naturalization, are to be deemed citizens on taking the prescribed oaths.

Same act. R. S. U. S., § 2168; see also Act June 29, 1906, 34 St. at L. 596. Boyd v. Nebraska, 143 U. S. 178; Trabing v. U. S., 32 Ct. Cl. 440.

Five Years' Residence Required.— Act of March 3, 1813, 2 Stat. 811, R. S. U. S., § 2170.— No one who arrives in the United States after the act took effect, shall be naturalized who shall not have resided within the United States five years continuously [without being at any time during the period out of the territory of the United States]. The clause within brackets was repealed by law of June 26, 1848, 9 Stat. 240. Even now there has to be a continuous legal residence. See Act of June 29, 1906, 34 St. at L. 596.

In re Hawley, 1 Daly, 531.

The repealed clause while in force was strictly construed; and a few minutes stoppage in Canada was held to disqualify. In re Paul, 7 Hill, 56. Declaration of intention, however, does not confer citizenship upon the declarant. Lanz v. Randall, 4 Dill. 425; Maloy v. Duden, 25 Fed. Rep. 673; Baird v. Byrne, 3 Wall. Jr. 1; Adlam v. U. S., Moore, Int. Arbitrations, 2552, 2553; Wilson v. Chile, Id.

Penal Provisions.—This act also contained penal provisions against persons forging or counterfeiting evidence or certificates of citizenship. Held repealed by Act of 1870, infra; U. S. v. Tynen, 11 Wall. 88.

Aliens before 1812.—An Act of July 30, 1813, relates to aliens who were enemies during the war of 1812, providing that persons resident in the United States on June 18, 1812, who before that had made the declaration, or who on that day were entitled to become citizens, without making such declaration, may be admitted citizens notwithstanding they were alien enemies; provided that any alien enemy may be apprehended and removed previous to such naturalization. R. S. U. S., § 2171.

Residents between 1798 and 1802.—Act of March 22, 1816, 3 Stat. 259.— Free white persons residing within the United States. between June 18, 1708, and April 14, 1802, who have continued such residence, without having made the declaration, may be made citizens under the Act of March 26, 1804, on proof of the above residence. A previous residence of five years is to be proved by the oath, etc., of citizens. This act and that of May 24, 1828, are combined in § 2165 R. S. U. S.

Minors.— Act of May 26, 1824, 4 Stat. 69, R. S. U. S., § 2167.— Minors (free whites) who shall have resided in the United States three years next before they are twenty-one years of age, and shall reside there until their application, after a residence of five years, including the three years of minority, may, without having made the previous declaration, be admitted by taking the oath of allegiance, etc., as in other cases,

They shall prove also, that three years preceding the application it was their bona fide intention to become citizens.

See Re Bodek, 63 Fed. Rep. 814; U. S. v. Walsh, 22 id. 644; Schutz's Petition, 64 N. H. 241; Re Fronascone, 99 Fed. Rep. 48.
Under the Act of June 29, 1906, 34 St. at L. 596, previous declaration is now required and two years thereafter petition may be made. Vide infra.

Amendment of Law of 1802.— This Act of 1824 also provided that the declaration might be made before the clerks of courts; and that the declaration under Act of 1802, might be made two years, instead of three, before admission.

Residents between 1802 and 1812.— Laws of May 24, 1828, 4 Stat. 310.— By this law, free white aliens residing within the United States, between April 14, 1802, and June 18, 1812, who have continued such residence, may be admitted without previous declaration. A residence of at least five years before the application must be proved.

This act and that of March 22, 1816, are combined in § 2165 R. S. U. S.

Children of Citizens Born Abroad.—Act of Feb. 10, 1855, 10 St. at L. 604, R. S. U. S., § 1993.—By this act, persons heretofore born, or hereafter to be born, out of the limits and jurisdiction of the United States whose fathers were or shall be at the time of their birth, citizens of the United States, shall be deemed citizens; but the rights of citizenship shall not be deemed to descend to persons whose fathers never resided in the United States.

Warr v. Wisner, 50 Fed. Rep. 310; Ludlam v. Ludlam, 26 N. Y. 356. As to certain formalities now required in such cases, see Act of March 2, 1907, 34 St. at L. 1228.

Generally.— By the Act of June 29, 1906, 34 U. S. St. at L. 596, the whole subject of naturalization is now regulated. This act declares that "an alien may be admitted to become a citizen of the United States in the following manner and not otherwise," and prescribes the necessary declaration as under the former law, and that "not less than two years nor more than seven after he [the applicant] has made such declaration of intention he shall make and file, in duplicate, a petition in writing and duly verified "by the applicant and two witnesses citizens of the United States who have known the applicant to be a resident of the United States at least five years continuously.

See Act of June 29, 1906, supra, § 4.

This act, however, provided that an alien should not be required to renew a declaration previously made. Id.

It also repeals U. S. R. S., §§ 2165, 2167, 2168, 2173, and § 39 of Chap. 1012 of the Acts of 1903.

In case of decease of an alien after declaration and before he is actually naturalized, the widow and minor children may by complying with the provisions of the act be naturalized without making any declaration of intention. Id. § 4, subd. 6.

See Matter of Schmidt, So. Dist. of N. Y., February, 1908.

As this Act of June 29, 1906, modifies the law as to naturalization in many ways with the intention of placing it under more careful scrutiny, reference should be had to the act for the details of the procedure. It is now in every sense a court procedure. Act of June 29, 1906, supra, § 4, subd. 3.

See also Act of March 2, 1907, 34 St. at L. 1228.

Wife of Citizen.— A woman who might be naturalized under existing laws who is married or shall be married to a citizen, shall be deemed a citizen.

Same act. R. S. U. S., § 1994. Act of March 2, 1907, 34 St. at L. 1228. So also, 1 R. S. 719, § 8.

Wainwright v. Low, 132 N. Y. 313; Kelly v. Owen, 7 Wall. 496; Halsey v. Beer, 52 Hun, 366; People v. Newell, 38 id. 78; Luhrs v. Eimer, 80 N. Y. 171; Tsoi Sim v. U. S., 116 Fed. Rep. 920.

The naturalization laws include females as well as males. Brown v.

Shilling, 9 Md. 82; Minor v. Happerzett, 21 Wall. 162.

An alien wife may be naturalized without the concurrence of her husband. Priest v. Cummings, 16 Wend. 617; Comitis v. Parkerson, 22 L. R. A. 148; Ex parte Pic, 1 Cranch, C. C. 372. A foreign born woman, however, married to a foreigner is not entitled to become a citizen. Matter of Rionda, So. Dist. of New York, June, 1968.

An Indian woman by marrying a citizen becomes a citizen thereby, under

the Act of August 9, 1888, 25 St. at L. 392.
Under this Act, it has been held that an alien widow of a naturalized citizen, although she never resided within the United States during the life-time of her husband, is entitled to dower in his real estate. Burton v. Bur-

ton, 1 Keyes, 359, revg. 26 How. Pr. 474.

This act has been held to confer the privilege of citizenship on free white women only, married to citizens of the United States. The terms "married," or "to be married," in the act, do not refer to the time when the ceremony of marriage is celebrated, but to a state of marriage; and the citizenship of the husband when it occurs, confers citizenship upon her, without the necessity of any application on her part. Kelly v. Owen, 7 Wall. 496. See also Luhrs v. Eimer, 80 N. Y. 171; U. S. v. Kellar, 13 Fed. Rep. 82.

Her minor son also shares in her citizenship. U. S. v. Rodgers, 144 Fed.

As to the present status of married women, see Act of March 2, 1907, supra.

Discharged Alien Soldier.— Act of July 17, 1862, 12 Stat. 597, R. S. U. S., § 2166.—By this act, any alien of the age of twentyone, who has enlisted or shall enlist in the regular or volunteer forces of the United States, and has been or shall be honorably discharged, may be admitted a citizen upon his petition, and shall not be required to prove more than one year's residence in the United States previous to his application.

Mere residence in the country as a soldier does not make one a citizen. People v. Riley, 15 Cal. 48.

Declaration of Citizenship as to Negroes.—Act of April 9, 1866, 14 Stat. 27.—By this act, all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are declared to be citizens of the United States. R. S. U. S. § 1992. See, also, § 2169.

This law of April 9, 1866, also provides that such citizens of every race and color, without regard to any previous condition of slavery, or involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall have the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, leave, sell, hold and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens; and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation or custom to the contrary notwithstanding. R. S. U. S., §§ 1977, 1978.

The other sections of the act impose penalties for depriving any citizen of his civil rights, by reason of his color or race; and give jurisdiction to U. S. District Courts over the same. Provision is also made for carrying out the purposes of the act, through the courts and Federal officers, and the President may employ the land and naval regular or militia forces to

carry out the act. Final appeal in questions arising under the act is given to the Supreme Court of the United States.

This act has been held constitutional, and as naturalizing all persons of color within the United States. U. S. v. Rhodes, 16 Am. L. R. 233; Ex parte Turner, 6 Int. R. Rec. 147; People v. Washington, 3 Am. L. R. 574.

So far as the act prescribes rules of evidence for the State courts, however, it has been held unconstitutional. State v. Rash, 15 Pitts. L. J. 61; Carpenter v. Snelling, 97 Mass. 458; Craig v. Dimock, 9 Int. R. Rec. 129; Oving v. Lloyd, 2 Ralt. I. T. 780 Quinn v. Lloyd, 2 Balt. L. T. 760.

Declaration of Citizenship — Fourteenth Constitutional Amendment.—" § 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State where they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Other sections of the amendment provide for the apportionment of Representatives, and impose certain civic disabilities upon persons who have been engaged in the rebellion, giving Congress the power, however, by a two-third vote of each House, to remove disability. Power is given to Congress to legislate to carry out the purposes of the act. Declared ratified, July 28, 1868, 15 U.S. S. 711.

To carry out the provisions of the above amendment, an act was passed May 31, 1870, 16 U. S. S. 140. This act also re-enacts the Civil Rights Bill of April 9, 1866.

Negroes and Africans.—By Law of July 14, 1870, Chap. 254, R. S. U. S., § 2169, the naturalization laws are extended to aliens of African nativity,

and to persons of African descent.

Free negroes born within the allegiance of the United States have always been regarded as citizens (U. S. v. Rhodes, 1 Abb. U. S. 28), and so are emancipated slaves (Id.; Matter of Turner, 1 Abb. 84). In the Dred Scott case (19 How. (U. S.) 393) it was held that a negro whose ancestors were brought here as slaves is not a citizen.

Seamen.—By Act of June 7, 1872, R. S. U. S., § 2174, every seaman being a foreigner, who has declared his intention and has served for three years afterward on a merchant vessel of the United States, may on production of his certificate of discharge and good conduct, together with the certificate of his declaration, be admitted a citizen of the United States; and every such seaman after such declaration and service shall be deemed a citizen for the purpose of serving on any merchant vessel of the United States. But he shall be a citizen for purposes of protection after the filing of his declaration.

Retroactive effect of Naturalization.—Naturalization before "office found," it has been held, has a retroactive effect so as to confirm a former title. No title in cases of alienism vests in the people until after "office found."

Osterman v. Baldwin, 6 Wal. 116; Jackson v. Beach, 1 Johns. Ca. 399; Fowler's Real Prop. Law (2d ed.), 112, 118.

Naturalization has no retroactive effect, however, so as to vest title to lands, which by reason of alienage a person could not inherit; as, the capacity to take by descent must exist at the time the descent is cast.

People v. Conklin, 2 Hill, 67. Jackson v. Green, 7 Wend. 333; Heeney v. The Trustees, etc., 33 Barb.

360, affd., 39 N. Y. 333.

The naturalization of a married woman would not have a retroactive effect so as to entitle her to dower in lands of which her husband was seized during coverture, and which he had aliened previous to her naturalization. Priest v. Cummings, 20 Wend. 338.

Record of Naturalization, Effect of .- The record of a competent court, reciting the necessary facts, is deemed conclusive, without any evidence thereof being set up, and it cannot be impeached by proof contradicting those recitals. In collateral proceedings it is conclusive. McCarthy v. Marsh, 5 N. Y. 263; Ritchie v. Putnam, 13 Wend. 524.

State v. Macdonald, 24 Minn. 48. But see, however, Re Yamashita, 59 L. R. A. 671, where the judgment admitting a Japanese to citizenship was allowed to be collaterally attacked, as it appeared on its face that the person

admitted was not entitled to citizenship.

See further as to its effect, Spratt v. Spratt, 4 Pet. 393; Campbell v. Gordon, 6 Cranch, 176; Stark v. Chesapeake Ins. Co., 7 Cranch, 420; Ex parte Cregg, 2 Curt. C. C. 98; Fowler, Real Property Law, 102.

Declaration of intention.—As to power of aliens to hold and transfer land upon filing a certificate of intention to become a citizen. See infra this Chapter, Tit. IV.

Cancellation of Naturalization for Fraud. - United States can sue to cancel decree, U. S. v. Norsch, 42 Fed. Rep. 417; 2 Wharton, Int. Law. Dig., § 174a; U. S. v. Kornmehl, 89 Fed. Rep. 10.

Private individual cannot, however, institute such a proceeding, Re Mc-Curran, 23 L. R. A. 835.

Traitors and Deserters, and Political Disabilities .- Mere traitors, so called,

do not, ipso facto, lose their citizenship.
11 Op. Atty-Gen. 317. Of. §§ 1996, 1997, 1998, U. S. R. S.; N. Y. Laws of 1872, Chap. 172.

Forfeiture of Citizenship by Deserters, etc.— The Act of March 3, 1865, provided for the forfeiture of citizenship by all persons who should thereafter desert from the military or naval service of the United States; or who, having formerly deserted, should not return within sixty days after proclamation by the President; or who, being enrolled, leave the district in which they are enrolled, or who leave the United States to avoid a draft. U.S. R. S., §§ 1996, 1998. As to evidence of conviction, vide Goecheus v. Matthewson, 40 How. Pr. 97. Compare further decision, 61 N. Y. 420.

Removal of Disabilities as to Deserters in 1865.—The Act of July 19, 1867, removed all disabilities incurred under the Act of March 3, 1865, by persons who, having faithfully served under their enlistment, until April 19, 1865, deserted or refused to serve after that date. U. S. R. S., § 1997.

Political Disabilities.—By Act of May 22, 1872, all political disabilities imposed by the 3d section, 14th article of amendments to the Constitution, are removed from all persons except Senators and Representatives of the 36th and 37th Congress, officers of the judicial, military and naval service of the United States, heads of departments and foreign ministers of the United States.

TITLE II. INDIANS.

The aborigines of this country, commonly called "Indians," are considered to have a right to enjoy the land which they occupy, until that right becomes extinguished by a voluntary cession to the Government; but they are excluded from the right of treating with any other power. The United States Government, as against foreign countries, claims the exclusive right to extinguish the Indian title, by purchase or conquest from the aborigines, asserting a right of pre-emption with respect to them, and the sovereignty with respect to all other nations.

Cherokee Nation v. State of Georgia, 5 Pet. 1; Worcester v. State of Georgia, 6 id. 515; Kent, Vol. III, 384; 8 Ops. Atty.-Gen. 255; Goodell v. Jackson, 20 Johns. 693; Mitchell v. United States, 9 Pet. 711.

The Indians have not been considered as citizens, however, but as dependent tribes or political societies under domestic subjection, entitled to be governed by their own usages and rulers, but placed under the tutelary protection of the United States, and subject to government coercion as far as the public safety requires. They are also recognized to have a quasi national status; and their existence. rights and competence as distinct political bodies are recognized through various treaties made with them, both by the Colonial, Federal and State governments.

Elk v. Wilkins, 112 U. S. 93; Goodell v. Jackson, 20 Johns. 693, overruling 15 id. 264; Cherokee Nation v. State of Georgia, 5 Pet. 1; Worcester v. State of Georgia, 6 id. 515; Blackfeather v. U. S., 190 U. S. 368; U. S. v. Winans, 198 id. 371.

This guardianship may be abandoned however. Matter of Heff, 197 U.S.

By Act of Congress of March 3, 1871, 16 St. at L. 566, R. S. U. S., § 2079, it was provided "Hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by freaty."

The general statutes of naturalization have been held not to apply to them. Nor do they become citizens of the United States, through being declared electors by any one State.

Naturalization has, however, been granted to various Indian tribes by special acts of Congress:

To the Stockbridge tribe, Act of March 3, 1843, 5 St. at L. 647.

To the Winnebago Indians, Act of March 3, 1843, 5 St. at L. 647.

To the Winnebago Indians, Act of July 15, 1870, 16 St. at L. 361.

To any member of the Miami tribe, Act of March 3, 1873, 17 St. at L. 632.

See also for general enactments: Act of February 8, 1887, 24 St. at L. 390;

Act of May 2, 1890, 26 St. at L. 99; the former granting citizenship to Indian living apart from tribe, the latter granting the right to Indians in the Indian Territory to apply and become citizens.

On becoming citizens they are held entitled to all the immunities of citizens. Re Celestine, 114 Fed. Rep. 551.

Indian half-bred is not a "white person" within the naturalization laws and is not entitled to be admitted to citizenship. Re Camille, 6 Sawy. 541.

Citizens of Indian Nation.— See Roff v. Burney, 168 U. S. 218, holding that such citizenship when conferred may be withdrawn by subsequent act of the Legislature of the said nation.

Under the United States statute of April 9, 1866, supra, Civil Rights Bill, p. 72, and the above constitutional amendments (Amend. XIV, supra), Indians would now seem to be classed as citizens of the United States, and of the State where they reside, provided they are taxed as are other citizens.

See U. S. R. S., § 1992; Elk v. Wilkins, 112 U. S. 94; United States v. Holliday, 3 Wall. 407, cited Fowler Hist. Real Prop., 199.

For an instance of a law authorizing a treaty with the Indians in this State,

vide Laws of 1813, 36th Sess., Chap. 130.

In this State the Indians were considered to hold their lands as quasi owners or occupants, except that they could not sell without the assent of the State. Charters or patents therefor, issued, bearing on the title to lands occupied by Indians, before their right is extinguished, only give the pre-emptive or ultimate fee. Such pre-emptive proprietors previous to their acquiring the Indian title to the lands, had merely an exclusive right to purchase from the Indians their lands, but not a right to interfere with or control the use and enjoyment of them while the title remained with the Indians.

Ogden v. Lee, 6 Hill, 546, affd., 5 Denio, 628; Wadsworth v. Buffalo Hydraulic Ass'n, 15 Barb. 83; The People v. Snyder, 51 id. 589, affd., 41 N. Y. 397; Blacksmith v. Fellows, 7 N. Y. 401, 19 How. (U. S.) 366; Seneca Nation v. Christy, 49 Hun, 524, affd., 126 N. Y. 122.

Subject to this right of possession or usufruct, the ultimate fee of land in the State, became, on discovery and conquest, as stated in the first chapter of this treatise, vested in the Crown or its successors; and the Crown or the subsequent State government could confer it, subject to the Indian possession. A purchaser from Indians, therefore, could acquire only the Indian title. They could not convey a complete title nor one paramount to the Crown or State.

Mitchell v. United States, 9 Pet. 711; Johnson v. McIntosh, 8 Wheat. 543; Howard v. Moot, 64 N. Y. 262. The State, it is held, can appropriate to public use the lands of Indians only upon making compensation therefor. Wadsworth v. Buffalo, etc., 15 Barb. 83.

It is not within the legislative power of the State of New York to em-

power Indian nations to make, or others to take from them, grants or leases of lands within Indian reservations. B. R. & P. R. R. Co. v. Lavery, 75 Hun, 396.

This whole subject is now regulated by "The Indian Law," G. L., Chap. V, L. 1892, Chap. 679, as amended (L. 1893, Chap. 229, etc.), repealing most of the former laws on this subject.

By L. 1893, Chap. 229, § 2, it is provided "a native Indian may take, hold and convey real property the same as a citizen."

See, however, Const. 1894, Art. I, § 15, to the effect that no purchase of lands of Indians is valid unless made under and by legislative authority and consent. But as this was a re-enactment of the constitutional provision of 1846 (Const. 1846, Art. I, § 16), semble L. 1893, Chap. 229, § 2, is still operative, as an enactment saved by Const. 1894 Art. I, § 16.

In this connection see U. S. Const., Art. I, § 9, giving Congress the right "to regulate commerce * * * with the Indian tribes;" also Act of June 30, 1834, passed in execution of this authority, and prohibiting purchase, grant, case or other conveyance of lands from any Indian nation or tribe of Indians, unless the same be made by treaty or convention entered into pursuant to the Constitution. 4 St. at L. 730, U. S. R. S., § 2116.

Worcester v. Georgia, 6 Pet. 580; Seneca Nation v. Chrystie, 126 N. Y. 122; Jones v. Meacham, 175 U. S. 1; also 2 St. at L. 143. Vide infra.

Purchases and Sales by Indians in this State.—As early as 1763, the Crown, by proclamation, prohibited purchases of Indian lands, unless at a public assembly of the Indians, and in the name of the Crown, and under the superintendence of the Colonial authorities. See, also, Duke of York's Laws, 1664.

By the Constitutions, and by various early enactments in this State, no purchase of, or contract with Indians, for the sale of land therein, made since October 14, 1775, or which might be made thereafter, was held valid, unless by consent of the Legislature; and a conveyance without such consent is treated as void. Parties were to be punished for infringement of the provisions enacted; and intruders to be removed.

The following laws, from time to time, modified the general rules. See also above, "The Indian Law," and Constitution of 1894:

Constitutions of 1777 and 1822; Act of March 17, 1788, 2 Green, 194, 195; Laws of 1793; 3 Green, 72; 1 R. L. of 1801, 464; 1 R. L. of 1802; 2 R. L. of 1813, 153;—which last contains a summary of all laws then in force with reference to Indians in the State, and the rights and titles of the various tribes;— Laws of 1821, Chap. 204, 183; 1 R. S of 1830, 719. Exception

was made as to sales in favor of Indian patentees of land granted for military service. They might take by descent, and after March 7, 1809, convey to citizens, with the approval of the State Surveyor. 2 R. L. 175; 1 R. S. 720. See also Laws 1825, Chap. 257.

By the above Law of 1813, Indians residing in the State were prohibited from making contracts with respect to lands in the State, and forbidden in any way to give, sell, devise, or otherwise dispose of any such lands, or any interest therein, without the authority and consent of the Legislature, except as provided in the act. Re-enacted, 1 R. S. of 1830, 719. Vide Goodell v. Jackson, 20 Johns. 693; St. Regis Ind. v. Drum, 19 Johns. 127; Seneca Nation v. Hammond, 3 Supm. 347.

Purchases from tribes must be by treaty ratified by United States Senate. Seneca Tribe v. Christy, 49 Hun, 524, affd., 126 N. Y. 122; U. S. R. S., § 2116. It is only pursuant to the Federal authority that lands belonging to an Indian reservation can be granted or demised or acquired by conveyance

or lease from an Indian nation. B. R. & P. Co. v. Lavery, 75 Hun, 396.

Law of 1843, and the "Indian Law" of 1892, Chap. 679, G. L., Chap. V,

Amd. L. 1893, Chap. 229. By this law any native Indian was authorized to

purchase, take, hold, and convey lands in this State, in the same manner as if a citizen; and whenever he became a freeholder to the value of one hundred dollars, he is to be liable on contracts, and subject to taxation and to the civil jurisdiction of courts of law and equity in the State, as if a citizen.

This seems in conflict with the constitutional provision, supra, and also the Constitution of 1846; unless a distinction is drawn between an individual Indian and a tribe, and a general law may be considered as the consent of the Legislature. Goodell v. Jackson, 20 Johns. 693, and vide supra.

Marriage and Divorce.— The general law of the State is made applicable by section 3 of the "Indian Law," supra; formerly regulated by Laws 1849, Chap. 420.

But marriage according to Indian rites and customs is not abolished. Id.

Constitutions of 1846, 1894.—These provide also that no purchase or contract for the sale of lands in this State, made since the 14th day of October, 1775, or which thereafter be made, of or with the Indians, shall be valid unless made under the authority and with the consent of the Legislature.

Partition of Indian Lands. Law of 1849, Chap. 420, and The Indian Law, supra.— By these laws nations or bands of Indians owning and occupying Indian reservations in the State, and holding lands as common property, may, by acts of their respective governments, partition the same.

Provision is then made as to the mode of executing the deeds.

The lands thus distributed and partitioned shall be inalienable by the grantees thereof, or their heirs, for twenty years after the day of the recording of the deed thereof, but they may be partitioned among the heirs of the grantee thereof who may die. They shall not be subject to any lien or incumbrance by way of mortgage, judgment, or otherwise. See "The Indian

Construction of above Laws .- The above restrictions against sales by "Indians" have been held to apply to one Indian. Goodell v. Jackson, 20

Leases by Indians.—"The Indian Law," supra, § 9, amd. L. 1893, Chap. 229. Baker v. Johns, 38 Hun, 625; Shehan v. Maher, 41 id. 609, construing the Act of Congress of 1875. Also Seneca Nation v. Folts, 15 Wkly. Dig. 390.

Sales and conveyances against the above provisions are held void, no matter how the Indian acquired title. Jackson v. Wood, 7 Johns. 290; Lee v. Glover, 8 Cow. 189.

Removal from the State after void Sale. It is supposed that if Indians lease or sell lands without authority, and then remove from the State, their removal will be held an abandonment, and their title will vest in the United States, or the State, as the case may be; or their grantees by operation of law. 3 Opin. Atty. Gen. 230.

Proceedings to Remove Intruders from Indian Lands,—See the Indian Law of 1892, Chap. 679, supra; amd. L. 1893, Chap. 229; L. 1893, Chap. 692, § 640a.

Ejectment by Indians. - Independent of statute Indians cannot bring ejectment. They are not without legal redress however, as an enabling act may be sought. Johnson v. L. I. R. R. Co., 162 N. Y. 462, revg. 42 App. Div. 626.

Patent to an Indian and his Heirs.— Under a patent to an Indian and his heirs, they would take whether aliens or not. Goodell v. Jackson, 20 Johns.

Highways in Indian Reservations.— See O'Mara v. Comm'rs, etc., 3 Supm. Ct. 235, revd., 59 N. Y. 316, and the "Indian Law," supra, § 12.

Sales of Timber by Indians. See Seneca Nation v. Hammond, 6 Supm. Ct. 595.

Entry without Legal Title.—See the "Indian Law," supra, § 8, amd. L. 1893, Chap. 229, also L. 1821, Chap. 204; People v. Dibble, 16 N. Y. 203, affd., 21 How. (U. S.) 366.

Taxation .- By the "Indian Law," supra, no taxes shall be assessed upon Indian reservations while occupied by them; § 6.

Moneys and Trust Funds.—As to powers of the Commissioners of the Land Office as to these, see the "Indian Law," supra, §§ 13, 14.

Contracts with Indians.— When a misdemeanor. L. 1893, Chap. 692, § 384a. An Act of March 9, 1821, relative to certain powers of district attorneys in the premises, was repealed by the general repealing act of 1828.

Tonawanda Band of Senecas. - Vide acts collected, 2 R. S. 360, 371; also Act of April 7, 1863, Chap. 90, repealing Act of April 17, 1861. Also, Laws of 1867, Chap. 839; 1860, Chap. 491. Also the "Indian Law," Art V, supra.

Allegany, Cattaraugus and Seneca Indian Reservations.—Act 1847, Chap. 365, and of April 15, 1859, giving the peacemakers jurisdiction to grant divorces, and to determine differences between Seneca Indians involving the title to real estate on said reservations. As to marriages among them, vide 2 R. S. 141; Id. 147.

As to taxes and sales of lands for. Laws of 1864, Chap. 81, repealed by the "Indian Law." See also the "Indian Law," Art. IV, supra.

The Seneca Indians.— See Act of May 8, 1845, Chap. 150, as to the protection and improvement of the Seneca Indians residing on the Cattaraugus

and Allegany reservations. As to the title of the Seneca Indians to the Cattaraugus and Allegany reservation, vide Ogden v. Lee, 6 Hill, 546, affd., 5 Denio, 628.

As to their constitution, Laws of 1865, Chap. 124; 1848, Chap. 208; 1849, Chap. 378. The "Indian Law," supra, Art. III. Taxes:—Laws of 1857, Chap. 45, repealed by the "Indian Law." See Tax Law, L. 1896, Chap. 908, § 4, amended. As to conveyance, by; Seneca, etc., Indians v. Christie, 126 N. Y.

Chapter 316 of the Laws of 1836 of the State of New York, authorizing railroad companies to contract with Indian nations for the right to construct railroads over Indian lands, is not within the legislative power of the State so as to give a railroad company, by virtue of a lease in accordance with its provisions from the Seneca Nation without the intervention of Federal authority, prior to the Act of Congress of February 19, 1875, of lands in the village of Salamanca in the Allegany Indian reservation, a right superior to that of an individual in possession under a prior lease, which, although originally invalid and giving no right as against the Seneca Nation, had been ratified and validated under the said Act of Congress by a renewal thereof by the Seneca Nation. B. R. & P. R. Co. v. Lavery, 75 Hun, 396.

Oneida Indians.—As to these Indians, in Madison and Monroe counties, vide Laws of 1843, Chap. 185; 1847, Chap. 486; and statutes collected in 1 R. S. 719, based on 2 R. L. of 1813, 153. See also Laws of 1839, Chap. 58; "Indian Law," supra.

Onondaga Indians.— Contracts with, as to timber, bark, etc., on their lands, highways, etc. Laws of 1855, Chap. 26; 1857, Chap. 659; 1845, Chap. 309; 1857, Chap. 659; and the "Indian Law," supra, Art. II.

Tonawanda Reservation.— Law of April 16, 1860, Chap. 439; April 7, 1863, Chap. 90. Provisions were also passed with reference to lands, taxes, disputes, etc., among the Indians generally, by the Law of April 10, 1813, Chap. 29, above referred to, particularly with reference to the Brothertown, Stockbridge, Oneidas, Onondagas and Cayugas. Section 11 being repealed by Laws of 1821, Chap. 204, §§ 27, 29, amended by Laws 1841, Chap. 234; and 1847, Chap. 486; § 44 repealed by Laws of 1841, Chap. 234 and § 47 by Laws of 1839, Chap. 40; also the General Indian Law, Art V, supra. Vide, also, Shinecocks, Law of 1816, Chap. 133; Stockbridges, Law of 1817, Chap. 152; 1823, Chap. 40; 1824, Chap. 177; Onondagas, Law of 1822, Chap. 205; St. Regis, Laws of 1841, Chap. 143; 1859, Chap. 364; Oneidas, St. Regis and Caughnawagas, Laws of 1841, Chap. 234; Brothertowns, Id.; Cayugas, Laws of 1851, Chap. 198; Tuscaroras, Laws of 1854, Chap. 175. See also the general "Indian Law" supra, as to all these tribes.

Heirs of Patriotic Indians.— Special provision has been made as follows: "The heirs of an Indian to whom real property was granted for military services rendered during the war of the revolution may take and hold such real property by descent as if they were citizens of the State at the time of the death of their ancestors. A conveyance of such real property to a citizen of this State, executed by such Indian or his heirs after March seventh, eighteen hundred and nine, is valid if executed with the approval of the Surveyor-General or State Engineer and Surveyor, indorsed thereupon." R. P. Law, L. 1896, Chap. 547. § 9.

Law, L. 1896, Chap. 547, § 9.

Cf. Murray v. Wooden, 17 Wend. 531; Jackson v. Brown, 15 Johns. 264;

Jackson v. Hill, 5 Wend. 532, as to original lack of capacity of Indian to

convey.

Railroads over Indian Lands.— L. 1836, Chap. 316; L. 1890, Chap. 565; L. 1892, Chap. 687; see Act of March 3, 1901, Chap. 832, 31 St. at L. 1084.

Poles and Wires.—L. 1902, Chap. 296.

Jurisdiction over Indians in this State.—By L. 1822, 202; incorporated in the Revised Statutes of 1830, the courts of this State are to possess the sole and exclusive jurisdiction of punishing Indians, as well as others, for offenses committed within the State boundaries, except those which are exclusively cognizable by United States tribunals. See Talton v. Mayes, 163 U. S. 376; Lucas v. U. S., Id. 612.

TITLE III. MARRIED WOMEN.

By the common law, a married woman could not make a valid contract relative to real property, nor could she convey her lands by deed, either with or without the concurrence of her husband.

By the common law, the only mode in which a married women could alienate her lands was by "fine and recovery."

Shepherd's Touchstone, Article Fine; 4 Cruise's Digest, Tit. 32, Deed, Chap. XI, § 29; 1 Black. Com. 444; 2 Kent's Com. 150; Jackson v. Gilchrist, 15 Johns. 89; Fire Ins. Co. v. Bay, 4 N. Y. 9; Constantine v. Van Winkle, 6 Hill, 177; Jackson v. Holloway, 7 Johns. 81; Witbeck v. Cook, 15 *id.* 545; 2 J. & V., N. Y. Laws, 841; Bradley v. Walker, 138 N. Y. 291, 297.

It will be seen, infra, that this rule was modified in the Province of New York.

A married woman and her husband also constituted but one person in law; and where land was conveyed or devised to them together they did not take by moieties. Both were seized of the entirety, and not as joint tenants, or tenants in common; and the survivor took the whole; and the deed of one without the other (if living) was inoperative. (See also infra. Chap. XI, Tit. I.)

Jackson v. Stevens, 16 Johns. 110; Jackson v. Suffern, 19 Wend. 175; Barber v. Harris, 15 id. 615; Torrey v. Torrey, 14 N. Y. 430; Doe v. Howland, 8 Cow. 277; O'Connor v. McMahon, 54 Hun. 66.

As to effect of divorce creating a tenancy in common. Steltz v. Schreck.

128 N. Y. 263.

This is the law as to joint ownership of husband and wife even since the acts of 1848, 1849, 1860 and 1862, infra, Chap. XI, Tit. I.

Bertles v. Nunan, 92 N. Y. 152; Stetz v. Shreck, 128 id. 263; Goelet v. Gori, 31 Barb. 314; Torrey v. Torrey, 14 N. Y. 430; Farmers', etc., Bk. v. Gregory, 49 Barb. 155; Freeman v. Barber, 3 T. & C. 574; Beach v. Hollister, 3 Hun, 519. A dictum in Meeker v. Wright, 76 N. Y. 262, unsettled the law for some time, as it was supposed to indicate an opinion of the Court of Appeals that, in such cases, husband and wife took as tenants in common; but the question was finally set at rest by the decision in Bertles v. Nunan, 92 N. Y. 152, which held the law to be as stated in the text, overruling Feely v. Buckley, 28 Hun, 451. Bertles v. Nunan has since been cited with approval; Steltz v. Shreck, 128 N. Y. 263; Hiles v. Fisher, 144 id. 306. See also Chap. XI, infra.

The acts relating to the rights of married women, however, while not abrogating tenancy by the entirety, did sweep away the rights of the husband to the rents and profits of the wife's lands, whether held in entirety or otherwise. As to the use of lands held by them in entirety, they are tenants in common or joints tenants. Hiles v. Fisher, 144 N. Y. 306, modifying 67 Hun, 229; Grosser v. City of Rochester, 148 N. Y. 235; Graney v. Berrie,

31 App. Div. 285.

And in recognition thereof a wife may maintain an action to restrain interference with her possession, though an award has been made to the husband. Grosser v. City of Rochester, 148 N. Y. 235.

But they may be made joint tenants by express wording to that effect. Jooss v. Fey, 129 N. Y. 17.

Or tenants in common. Miner v. Brown, 133 N. Y. 308; Brown v. Brown,

79 Hun, 44.

At common law, however, a conveyance to husband and wife operated as a conveyance in entirety, even though the habendum was express that they should hold as joint tenants. Dias v. Glover, 1 Hoffm. Ch. 71.

Alien Husband.—An alien husband would take by survivorship lands conveyed jointly to him and wife subject to being dispossessed by the People. Wright v. Saddler, 20 N. Y. 320.

Conversion into Money.— When an estate so held as above by husband and wife is converted into money, held, the same belongs to the husband exclusively, in virtue of his marital rights. The Farmers', etc. v. Gregory, 49 Barb. 155.

Husband's Right in the Joint Tenancy.— Where husband and wife hold the entirety, with right of survivorship, neither he nor she could alien the entire estate; but the husband could execute a mortgage of his interest, or he might makeea lease in his own name, for the purpose of bringing ejectment. Jackson v. McConnell, 19 Wend. 175; Hiles v. Fisher, 67 Hun, 229; modified,

144 N. Y. 306, supra. Under the common law he might alien or incumber the estate, subject to the right of entry of his wife and her heirs after his death, discharged from his debts and engagements, he having the control of the estate during his life; and if it were a term for years, the husband might alien the entire term or estate. 2 Kent's Com. 132; Grote v. Locroft, Cro. Eliz. 187; Jackson v. McConnell, 19 Wend. 175; Barber v. Harris, 15 id. 615; Dias v. Glover, 1 Hoff. Ch. 71; Goelet v. Gori, 31 Barb. 314. The husband's life interest and right of survivorship may be sold on execution. Beach v. Hollister, 3 Hun, 510

If a grant were made to a husband and wife and a third person, the husband and wife would have only one moiety, and the third person, the other.

Barber v. Harris, 15 Wend. 615.

Husband's Life Estate in Wife's Land .- By the principles of the common law, also if the wife, at the time of or during marriage, were seized of an estate of inheritance in land, the husband, upon the marriage, became seized of the freehold jure uxoris, and he took the rents and profits during their joint lives. After her decease, if entitled to it, he had his estate by the curtesy therein. If she survived him, she took the estate in her own right. If the wife dies before the husband, without having had issue, her heirs immediately succeed to the estate.

2 Kent, 130, 133; 2 Blacks. 126; Vartie v. Underwood, 18 Barb. 561.

This right of the husband applied also to an estate held by the wife for her life, or for that of another person. Also to her chattels real, such as leases for years, unless the wife held them by way of settlement. If he made no disposition of the same in his lifetime he could not devise the chattels real by will; and the wife, after his death, took the same in her own right, without being executrix or administratrix to her husband.

If he survived the wife, the law gave him her chattels real by survivorship.

Marriage Settlements .- In order to give control to married women over their lands, it was usual to give them powers of appointment to make dispositions in the nature of a will, and to provide for them by marriage settlements, through trusts. These settlements, if made bona fide, and in consideration of the marriage, would be sustained even as against creditors and purchasers; and even a post-nuptial voluntary settlement, upon the wife or children, if made without fraudulent intent, would generally be valid as against subsequent, but not existing creditors.

Reade v. Livingston, 3 John. Ch. 481; Sexton v. Wheaton, 8 Wheat. 229. She might affirm any settlement of her lands made by her during infancy. Temple v. Hawley, 1 Sandf. Ch. 153; Smith v. Hodges, 2 Otto, 183.

And if the wife parts, bona fide, with a full consideration, or if the settler is in prosperous circumstances, and the settlement is a reasonable provision, according to his state in life, post-nuptial settlements have been held good as to existing creditors; and even a deed between husband and wife has been sustained in equity under such circumstances.

Simmons v. McElwain, 26 Barb. 420; Babcock v. Eckler, 24 N. Y. 623; Dygert v. Remerschnider, 32 id. 629; Seward v. Jackson, 8 Cow. 406, 422; Parish v. Murphy, 13 How. (U. S.) 92. But see Case v. Phelps, 39 N. Y. 164; Savage v. Murphy, 34 id. 508; Dunlap v. Hawkins, 2 N. Y. S. C. 292, affd., 50 N. Y. 342. As to transfer to protect against future creditors. Carr v. Breese, 18 Hun, 136, revd., 81 N. Y. 584.

Vide subjects "Dower," "Wills," "Trusts," "Fraudulent Conveyances,"

etc., in subsequent chapters.

Secret settlements made before marriage in derogation of the husband's marital rights, e. g. curtesy, would be under certain circumstances held void as to him.

Settlements between the husband and a third person, as trustee, though originating out of and relating to a separation of husband and wife, are upheld, although such agreements have been held invalid between husband and wife directly. It may be questioned how far the laws of 1880, 1887 and 1892, infra, affected such agreements.

See Domestic Relations Law, G. L., Chap. XLVIII, L. 1896, Chap. 272, § 21, which provides that "a husband and wife cannot contract to alter or dissolve the marriage or to relieve the husband from his liability to support his

Champlain v. Champlain, 1 Hoff. Ch. 55; Shelthar v. Gregory, 2 Wend. 422; Wilson v. Wilson, 31 Eng. L. & Eq. 29; Rogers v. Rogers, 4 Paige, 516; Mercein v. The People, 25 Wend. 77; Hamilton v. Heetor, 18 Eq. Ca. E. L. R.

Deeds between Husband and Wife.—A deed between husband and wife was void by the common law and passed no title. and transfers between them had to be made through a third person. A deed or contract between them under certain circumstances, however, might be sustained in equity.

Townshend v. Townshend, 1 Abb. N. C. 81; Jackson v. Stevens, 16 Johns. 10 Handler V. Lowinshend, I Add. N. C. 81; Jackson V. Stevens, 16 Johns. 110; Livingston v. Livingston, 2 Johns. Ch. 537; Graham v. Van Wyck, 14 Barb. 531; Voorhees v. Presbyterian Church, 17 Barb. 103; Simmons v. McElwain, 26 id. 419; Lynch v. Livingstone, 6 N. Y. 422; Barnum v. Farthing, 40 How. Pr. 25; White v. Wager, 32 Barb. 250, affd., 25 N. Y. 328; Hunt v. Johnson, 44 id. 27; Dean v. M. E. R. R. Co., 119 id. 540; Berkowitz v. Brown, 3 Misc. 1.

In Equity.—A direct conveyance by husband to wife before the Act of 1887 sustained in equity though void at law. Fitzpatrick v. Burchill, 7 Misc.

This still continued to be the law (see Johnson v. Rogers, 35 Hun, 267) notwithstanding the subsequent statutes of 1848-9, 1860 and 1862, below referred to; and the rule which forbade a husband to take lands directly by conveyance from his wife or vice versa was considered still extant until changed by L. 1887, Chap. 537, § 1; vide infra.

See White v. Wager, 32 Barb. 250, affd., 25 N. Y. 328; The Farmers', etc.

y. Gregory, 49 Barb. 155; Winans v. Peebles, 32 N. Y. 423, overruling 31 Barb. 371; Dean v. M. E. R. R. Co., 119 N. Y. 540.

A deed from a married woman to her husband dated prior to the passage of Chapter 537 of the Laws of 1887, and delivered thereafter is not a void conveyance. Reynolds v. City Bank, 71 Hun, 386.

Recent Acts.—By Laws 1880, Chap. 472, § 1, it is provided that partition of lands held by husband and wife as tenants in common, joint tenants, or tenants by the entirety, may be made by deed from either to the other; and by Laws 1887, Chap. 537, § 1, deeds from husband directly to wife, or wife directly to husband, are not to be invalid because made directly from one to the other without the intervention of a third person. See also Dean v. M. E. R. R. Co., 119 N. Y. 540.

These acts now constitute § 26 of the Domestic Relations Law. G. L., Chap, XLVIII, L. 1806, Chap. 272. And this section further provides that if so expressed in the instrument of partition or division, such instrument bars the wife's right to dower in such property, and also, if so expressed, the husband's tenancy by curtesy.

Release of dower.— The old rule was held to apply to a woman's dower right in her husband's real estate, which could not be released directly to him, even under the acts of 1848-9, 1860, 1862. Graham v. Van Wyck, 14 Barb. 531; Guidet v. Brown, 3 Abb. N. C. 295.

Under § 26 of Domestic Relations Law, wife may in partition instrument made with husband release dower, as he may release curtesy; and see also § 21 of same act, giving wife the right to contract with her husband. G. L.,

Chap. XLVIII.

As to dower, however, it is probably against public policy, notwithstanding the broad wording of the present statutes, to admit a change from the older decisions, except in partition instruments, without a specific statutory provision enabling a wife to release her dower "right" or "claim" to her

A woman may, however, appoint her husband attorney to release dower. In re Wolff, 19 N. Y. Supp. 51, affd., Wronkow v. Oakley, 133 N. Y. 505. See The Real Property Law, L. 1896, Chap. 547, § 187; also Fowler's Real Property Law 604, and infra "Dower."

Purchases and Gifts between them upheld in Equity. - See Wickes v. Clarke, Purchases and Gifts between them upheld in Equity.— See Wickes v. Clarke, 3 Edw. Ch. 59, and Crosby v. Berger, 11 Paige, 377, as to a purchase upheld in equity, so as to support a post-nuptial settlement, or other agreement. Also Simmons v. McElwain, 26 Barb. 419; Jacques v. Trustees of Methodist Church, 17 Johns. 548, for instances of conveyances of such a nature being sustained and enforced in equity. Townshend v. Townshend, 1 Abb. N. C. 81; Brown v. Brown, 79 Hun, 44; Scott v. Caladine, 79 Hun, 79.

The cases held that the relation of husband and wife, and his duty to provide for her an assured and comfortable support, are a meritorious consideration which will uphold a gift by conveyance of real estate from him

sideration, which will uphold a gift by conveyance of real estate from him to her for such purposes, except as against creditors. Vide above cases, and Hunt v. Johnson, 44 N. Y. 27, reviewing the leading cases in England

and thint v. Johnson, Tr. 11. 12., to the subject.

Where a husband conveyed, through a third party, to his wife, lands which she was intended to hold for his benefit, it was held that as against the subject.

The subject is fever of the husband. So her heirs at law, there was a resulting trust in favor of the husband. So a conveyance by husband to wife of lands conveyed to him, without her

knowledge, being a gift to her, was sustained. Lowry v. Smith, 9 Hun, 514. Even against himself. In re Curtis Will, 73 Hun, 185, affd., 142 N. Y. 219.

Conveyances by Married Woman.— The sole deed of a feme covert was not only inoperative, at common law, but it was of no force in this State, and her deed could not pass title even if executed jointly with her husband, until it was duly "acknowledged," by her, except as to the property held in trust for her benefit. See infra. p. 92.

There seems to have been a modification of the "common law" in There seems to have been a modification of the "common law" in this colony and State, resulting from the laws and usages of the colony of New York; so that it was not necessary for the husband to join in a conveyance by a married woman residing within this State, of lands therein. Her "acknowledgment," separate and apart from her husband, was alone necessary to pass title. Albany Firemen's Ins. Co. v. Bay, 4 Barb. 407; affd., 4 N. Y. 9; Kelly v. McCarthy, 3 Brad. 7; Curtiss v. Follett, 15 Wend. 337.

If the deed was not acknowledged by the married woman, as required by the statute it was void at law, and no title passed. Jackson v. Stevens, 16 Johns. 110; Martin v. Dwelly, 6 Wend. 9; Gillet v. Stanley, 1 Hill, 121; Ryers v. Wheeler, 25 Wend. 434.

Ryers v. Wheeler, 25 Wend. 434.

And parol evidence of her acknowledgment could not be given. Without a proper certificate of acknowledgment, the deed could not take effect for any purpose. Elwood v. Klock, 13 Barb. 50.

Prior to the Act of 1771, however, below cited, the acknowledgment by the married woman was not necessary to pass the title. Except that in 1683 a colonial act was passed, which was re-enacted on May 6, 1691 (1 Brad. 2), which provided that no estate of a feme covert could be sold or conveyed but by deed acknowledged by her in some court of record, the woman being secretly examined as to her doing it freely, without threats or compulsion. or compulsion.

This Act of 1691 was disallowed by the king in 1697. Van Winkle v.

Constantine, 6 Hill, 177; 10 N. Y. 477.

Subsequent Acknowledgment.—A subsequent acknowledgment by the wife would not revert back so as to make valid a deed not acknowledged by her, as against intervening titles. Jackson v. Stevens, 16 Johns. 110; Doe v. Howland, 8 Cow. 277. Her acknowledgment of the deed, however, would make it valid from the time of such acknowledgment. Id.

Act of 1771.— The following are the acts of 1771 and others, by which the acknowledgment of married women was rendered necessary to pass title:

By Law of February 16, 1771 (2 Van S. 611), it is recited that it was the ancient practice of the colony to record deeds upon the acknowledgment by the grantors, or proof by subscribing witness before a member of the council, a judge of the supreme or county court, or a master in chancery, and sometimes before a justice of the peace; and also that certain deeds had been executed by married women not so acknowledged, etc. The act makes valid all deeds theretofore made by married women where they had not been privately examined before such officers; but provides that, to make title thereafter, there must be a private acknowledgment by her, apart from her husband, before one of the council, a judge of the Supreme Court, a master in chancery, or a judge of the inferior court of common pleas (other than mayor's courts) for that county where the lands lie. A certificate thereof, purporting that she had been privately examined, and confessed that she executed the conveyance freely without any fear or compulsion of her husband, was required to be indorsed on the deed, and signed by the officer.

Act of 1773.—By Law of March 8, 1773 (2 Van S. 765), all deeds executed by married women, out of the colony, since February 16, 1771; or thereafter to be so executed in conjunction with her husband, will be valid if acknowledged before any officer mentioned by said Act of 1771, or the Act of 1773, and the acknowledgment be written on the conveyance and signed by the officer. It shall specify that she was examined by him separate from her husband, and that she confessed that she executed such conveyance as her act and deed, freely, without any fear or compulsion of her husband. The act provided that the execution of the deed by the husband be proved, or acknowledged and certified, as required by said Act of 1771 or 1773.

By Power of Attorney.—By said Law of 1773, conveyances by married women out of the State since 1771, or thereafter, by a power of attorney, shall be valid if the power is acknowledged by her and her husband, as before directed, and be certified as above. Such deeds and powers may be read in evidence. See further as to acknowledgments by married women, infra, Chap. XXVI; also Chap. VII, "Dower."

Constitutionality of the above Act of 1771.—With respect to the constitutionality of the above Act of 1771, and similar acts it has been determined that a Legislature has a constitutional power to declare deeds valid which are defective, e. g., through failure of an officer to affix his seal to the acknowledgment, or other formal defects, but has no right to pass a law making valid conveyances which were not sufficient to pass title when made, under then existing laws.

Maxey v. Wise, 25 Ind. 1; Alabama Ins. Co. v. Blykin, 38 Ala. 510; Journeay v. Gibson, 56 Pa. St. 57; Orton v. Noonan, 23 Wis. 102. It could, however, make valid previously executed powers of attorney by married women to convey their estates, and the conveyances which had been made by virtue of said powers. Deutzel v. Waddie, 30 Cal. 138; Randall v. Kreiger,

23 Wall. 137.

The above Act of 1771 has been held not to be one either vesting or divesting titles, but an act confirming and quieting the title of bona fide purchasers. Before that act, there was no statute or charter in force here declaring the acknowledgment of the married woman to be necessary to pass title; but a loose and unsettled practice, as regards taking such acknowledgment, prevailed, as set forth in the recital to the above Act of February 1771. Consequently, it has been held by the courts of this State, that deeds executed before its enactment, by husband and wife, were valid and operative as against those claiming under the wife, although not acknowledged by her in any form.

Jackson v. Gilchrist, 15 Johns. 89; Constantine v. Van Winkle, 6 Hill,

177; 10 N. Y. 422; Hardenburgh v. Lakin, 47 N. Y. 109.

It has been held, however, that this act does not recognize or affirm the right of a feme covert to appoint or act by agent or attorney; therefore deeds executed by her through attorney before the subsequent Act of 1773, supra, were void, a married woman having no power by the common law to appoint an attorney. Hardenburgh v. Lakin, 47 N. Y. 109.

What possession necessary under Act of 1771.—A constructive possession was enough, under this Law of 1771, to cure the title to lands held before 1771. Jackson v. Gilchrist, 15 Johns. 89.

Act of 1792 as to Dower.—By Law of April 6, 1792 (2 Greenl. 452), it was provided that when married women, nonresidents of the State, should join with their husbands in the conveyance or sale of lands, tenements, or hereditaments, they should be barred of dower therein. See *infra*, Chap. VII, "Dower."

Provisions in Subsequent Statutes as to the Necessity of "Acknowledgments" by Married Women to Pass Real Estate.—By the provisions of the Laws of February 26, 1788; April 6, 1801; and Revised Laws of 1813 (Vol. I, 369); and by the Revised Statutes of 1830, Vol. I, 761, it is also provided that no estate of any married woman residing in this State, shall pass by any conveyance not acknowledged by her on a private examination apart from her husband, as provided by those laws. Acknowledgments by married women not residing in the State, of lands therein, may be taken as if she were sole to deeds executed with her husband.

See particularly as to the provisions of these laws, the form of acknowledgment; and as to conveyances by married women not residing in the State, infra, Chap. XXVI. And see "Powers of Attorney," infra, Chap. XIII, as to the powers of attorney executed by married women out of the State; and see as to "Powers" executed by married women, infra, Chap. XII.

For the abolition of separate acknowledgments, see L. 1849, Chap. 375 and "Acknowledgments," infra, p. 92.

Transfer of her Separate Estate.— Although at common law a husband was required to join with his wife in executing a conveyance of her real estate, as to her separate estate, secured to her through trustees, she was treated in equity as a *feme sole*, and could dispose of it unless specially restrained by the instrument; and a mortgage executed by a woman upon her separate estate, even prior to the subsequent acts of 1848–9 and 1860, would be upheld in equity. Such disposition is in the nature of an appointment.

Albany Fire Ins. Co. v. Bay, 4 Barb. 407, affd., 4 N. Y. 9; Jaques v. The

Trustees, etc., 17 Johns. 549.

And it has been held by the courts that the wife may dispose of such estate without the acknowledgment or private examination, such disposition being held in the nature of an appointment. Albany Fire Ins. Co. v. Bay, 4 N. Y. 9.

Effect of the above recited Common Law Rules.—It is to be remarked that the rules of the common law, as above set forth, are in force, except so far as modified by subsequent statutes.

For the general consideration of this development of the law, from a historical and legal standpoint, see Fowler's Real Property Law (2d ed.)

488, 595, and infra.

Modification of the Laws relative to Married Women, Acts of 1848, 1849, 1860, 1862.—Acts of April 7, 1848, Chap. 200.—By law of this date it was enacted:

"§ 1. The real and personal property of any female who may hereafter marry, and which she shall own at the time of marriage, and the rents, issues, and profits thereof, shall not be subject to the disposal of her husband, nor be liable for his debts; and shall

continue her sole and separate property, as if she were a single female.

- "§ 2. The real and personal property, and the rents, issues, and profits thereof, of any female now married, shall not be subject to the disposal of her husband, but shall be her sole and separate property, as if she were a single female, except so far as the same may be liable for the debts of her husband heretofore contracted.
- § 3. It shall be lawful for any married female to receive by gift, grant, devise, or bequest, from any person other than her husband, and to hold to her sole and separate use, as if she were a single female, real and personal property, and the rents, issues, and profits thereof; and the same shall not be subject to the disposal of her husband, nor be liable for his debts.
- "§ 4. All contracts made between persons in contemplation of marriage shall remain in full force after such marriage takes place."

Law of April 11, 1849, Chap. 375.— By law of this date, the third section of the above law of 1848 was amended so as to read:

"Any married female may take by inheritance, or by gift, grant, device, or bequest, from any person other than her husband, and hold to her sole and separate use, and convey and devise real and personal property, and any interest or estate therein, and the rents, issues and profits thereof, in the same manner and with like effect as if she were unmarried; and the same shall not be subject to the disposal of her husband, nor be liable for his debts."

This law of 1849 further provides, in its second section, as follows, as to her trust estate:

"Any person who may hold, or who may hereafter hold as trustee for any married woman, any real or personal estate, or other property, under any deed of conveyance or otherwise, on the written request of such married woman, accompanied by a certificate of a justice of the Supreme Court that he has examined the condition and situation of the property, and made due inquiry into the capacity of such married woman to manage and control the same, may convey to such married woman, by deed or otherwise, all or any portion of such property, or the rents, issues, or profits thereof, for her sole and separate use and benefit."

"§ 3. All contracts made between persons in contemplation of marriage shall remain in full force after such marriage takes place."

This act applies to conveyances made to trustees by a woman for her own benefit, in contemplation of marriage, and subsequent to the act. Thebaud v. Schermerhorn, 30 Hun, 332. See also, Douglas v. Cruger, 80 N. Y. 15.

The trustee has absolute discretion whether to convey or not and the court will not direct nor advise him. Matter of Brewer, 43 Hun, 597.

This is applicable only to nominal trusts, the sole object of which was to secure a married woman in the enjoyment of her separate estate. Genet v. Hunt, 113 N. Y. 158. See also U. S. Trust Co. v. Roche, 116 N. Y. 120. Also, Domestic Relations Law, § 29.

Act of July 18, 1853, Chap. 576. As to Wife's Debts contracted before Marriage.—This act provides that an action may be maintained against the husband and wife jointly for any debt of the wife contracted before marriage, but the execution of any judgment in such action shall issue against, and such judgment shall bind the separate estate and property of the wife only, and not that of the husband.

The act further provides that any husband who may hereafter acquire the separate property of his wife, or any portion thereof, by any ante-nuptial contract or otherwise, shall be liable for the debts of his wife contracted before marriage, to the extent only of the property so acquired, as if the act had not been passed. See Domestic Relations Law, § 24.

Act of March 20, 1860, Chap. 90.— By act of this date, it is provided: I, The property, both real and personal, which any married women now owns as her sole and separate property, that which comes to her by descent, devise, bequest, gift, or grant, that which she acquires by her trade, business, labor, or services carried on or performed on her sole or separate account; that which a woman married in this State owns at the time of her marriage and the rents, issues, and proceeds of all such property shall, notwithstanding her marriage, be and remain her sole and separate property, and may be used, collected, and invested by her, in her own name, and shall not be subject to the interference or control of her husband, or liable for his debts, except such debts as may have been contracted for the support of herself or her children, by her as his agent."

The second section of this Act of 1860 refers to her personal property and earnings in business.

The third section of this act, as amended by the Act of April 10, 1862, Chap. 172, is as follows:

"Any married woman possessed of real estate as her separate property may bargain, sell and convey such property, and enter into any contract in reference to the same, [with the like effect in all respects as if she were unmarried, and she may in like manner, enter into such covenant or covenants for title as are usual in conveyances of real estate, which covenants shall be obligatory to bind her separate property, in case the same or any of them be broken]."

The words in brackets were added by the Law of 1862, and a provision in the Law of 1860 struck out that "no such conveyance or contract shall be valid without the assent in writing of her husband, except as hereinafter provided."

The fourth, fifth and sixth, ninth, tenth and eleventh sections of the Act of 1860 were repealed by said Act of 1862. These sections made provision as to obtaining the consent of the husband or conveying without him, under an order of the Supreme Court.

Under this provision of the Act of 1860, consent need not be given at the time of the conveyance; but if given at any time afterward would validate the deed. Wing v. Schramm, 79 N. Y. 619.

Even if the consent were not obtained the deed was good as to all but

the husband. s. c., 13 Hun, 377.

The seventh section of the Act of 1860, as amended by the Law of 1862, provides that married women may sue with respect to their separate property, as if sole, and for damages to person and character, and may execute bonds, etc., in such actions as if sole; the bonds to be enforced against their separate estate. The provision as to bonds was not in the Law of 1860. Vide infra, p. 93, Law of 1884, Chap. 381, as to contracts by married women.

This seventh section was repealed, Law of 1880, Chap. 245.

See Code of Civ. Proc., § 450 (L. 1890, Chap. 248), as to when a wife may be sued and sue alone.

The eighth section of the Law of 1860 was amended by that of 1862 so as to read, that no bargains or contracts made by any married woman in respect to her sole and separate property, or that which she might acquire by descent, devise, bequest, purchase, or the gift or grant of any person except her husband, and no bargain or contract with reference to her trade or business, under any State law, should render her husband liable.

The words "purchase" and "grant" were added by the Law of 1862.

The ninth, tenth, and eleventh sections of the Act of 1860 were repealed by the Act of 1862. They provided that the wife should be joint guardian with her husband of their children, and that at the decease of the husband or wife without minor child or children, the survivor should have a life estate in one-third of the other's real estate: and that on the decease of either intestate, leaving a minor child or children, the survivor should take all the real estate of the other, the rent, etc., during the minority of the youngest child, and one-third thereof for life.

See fully, as to "Guardians," infra, Chap. XXV.

The sixth section of the Act of 1862 provides that no man shall bind his child to serve, etc., or part with the control of the child, or create any testamentary guardian therefor, without the consent in writing of the mother, if living.

Vide infra, Chap. XXV as to Guardians.

The seventh section provides that a married woman may be sued in any court of the State, and a judgment may be enforced against her separate estate, as if she were sole.

Sections three, five and seven of said Law of 1862 were abolished by Laws 1880, Chap. 245, and the subject is now regulated by the Code of Civ. Proc., § 450.

Judicial Interpretation of the above Laws of 1848-9, 1860-62.— With respect to the effect of these acts upon rights already existing, the courts of this State have held that vested rights in the property of the wife already acquired under the law regulating the marriage contract, cannot be disturbed by legislative authority; but that it is competent for the Legislature to modify the incidents of the marriage relation in respect to property to be acquired after the change of the law.

With respect to property acquired after the acts took effect, the principle maintained is that the marriage contract does not imply that the husband shall have the same interest in the future acquisitions of the wife that the law gives him in the property she possessed at the time of marriage; but that he shall have whatever interest, if any, the Legislature, before he is invested with them, may think proper to prescribe.

These laws have been held unconstitutional, therefore, and not to have a retroactive effect, as to property acquired before the acts took effect; but not as to that acquired after, although the marriage occurred before.

Holmes v. Holmes, 4 Barb. 295; Blood v. Colvin, 17 id. 147; Blood v. Humphrey, 17 id. 600; Watson v. Bonney, 2 Sandf. 405; Ryder v. Hulse, 24 N. Y. 372; Kelly v. McCarthy, 3 Bradf. 7; Snyder v. Snyder, 3 Barb. 621; White v. White, 5 id. 474, 485; Sleight v. Read, 18 id. 159; Lawrence v. Miller, 2 N. Y. 245; Vartie v. Underwood, 18 Barb. 561; Hatfield v. Sneden, 54 N. Y. 280; Tiemeyer v. Turnquist, 85 id. 516.

Contract.—A married woman held able to make a legal contract to purchase lands if she has a separate estate. Ballin v. Dillaye, 37 N. Y. 35; Hinckley v. Smith, 51 *id.* 21. As to lands so purchased, ejectment will lie by her against her husband. Wood v. Wood, 83 N. Y. 575.

Mortgage.— Effect of duress on mortgage of married women. See Wallach v. Hoexter, 17 Abb. N. C. 267.

Curtesy.—The husband's curtesy is not destroyed, unless the wife have conveyed or devised the land, even as to lands acquired after the above acts.

Vide "Curtesy," infra, Chap. VII; Hatfield v. Sneden, 54 N. Y. 280; Spaulding v. Cleghorn, 8 N. Y. Supp. 269.

Right to Administer .- Nor is his right taken away to administer upon her estate, and take her personal estate left undisposed of, absolutely.

2 R. S. 74, 75; Shumway v. Cooper, 16 Barb. 556; Ransom v. Nichols,

22 N. Y. 110; Ryder v. Hulse, 24 id. 372.

By Laws of 1867, Chap. 782, if she leaves descendants, he has no other right of distribution except such as a widow has in the personal estate of her husband. Barnes v. Underwood, 47 N. Y. 351.

The Acts of 1880 and 1887.—Reference is made to laws of those years, supra, p. 84, as to transfers from husband to wife.

Covenants by Married Women. - By the common law a wife was not answerable in damages on her covenant of warranty entered into during coverture.

By Law of March 20, 1860, Chap. 90, a married woman, as is above seen, owning real estate, may contract for and convey the same as if sole, and make the usual covenants in the deed, which shall bind her separate property. (As amended by Laws of 1862, Chap. 172.) Previous to the amendment, the consent of the husband or a county court was necessary.

Before this act a feme covert's covenants did not even work an estoppel, so as to indirectly transfer title.

Carpenter v. Schermerhorn, 2 Barb. Ch. 314; Jackson v. Vanderheyden, 17 Johns. 167; Martin v. Dwelly, 6 Wend. 9; Dominick v. Michael, 4 Sandf. 374. See, for construction of mortgage clause binding her separate estate, Rourke v. Murphy, 12 Abb. N. C. 402.

She is now also personally liable for breach of covenant, cut of her separate estate. Kolls v. Deleyer, 41 Barb. 208; Sigel v. Johns, 58 Barb. 620.

As to covenants to convey under a settlement made before 1848, see

Van Allen v. Humphrey, 15 Barb. 555.

Acknowledgments.- It was held that, under the above laws, a "married woman's separate acknowledgment" was unnecessary to pass title to lands acquired since the statute of 1849.

Blood v. Humphrey, 17 Barb, 660; Yale v. Dederer, 18 N. Y. 265; Wiles v. Pick, 26 id. 42.

And she may acknowledge the deed as if she were a feme sole. Id.

By L. 1879, Chap. 249. acknowledgments by married women to any instruments may be made as if they were sole.

L. 1880. Chap. 300, enlarged this statute to take in proof of execution by married women.

See now L. 1896, Chap. 547, § 251 (Real Property Law) to same effect.

Vide infra, Chap. XXVI, more fully, as to acknowledgments.

Liability for Loans, Rents, etc .- She is liable for money lent to her and paid to her husband, when she represents that she desires it for the benefit of her separate estate. It is immaterial whether the money was so applied or not. McVey v. Cantrell, 70 N. Y. 295, distinguished, 71 id. 199; Cohen v. O'Connor, 5 Daly, 28, affd., 56 N. Y. 613; Yale v. Dederer, 18 N. Y. 265.

The representations may have been made by her subsequently, and still

bind her. Id.

Rent .- She is liable for whole rent of house, leased entire by her for benefit of her separate estate, even when part is used for residence of herself and husband. Monheimer v. Muller, 1 Week. Dig. 562. This principle distinguished in Eustaphieve v. Ketchum, 6 Hun, 621. As to this latter case, see also Bush v. Babbitt, 25 Hun, 213.

Brokers commissions on mortgage loans or sales. See Turner v. Stymers,

9 Week. Dig. 216.

Money loaned to a married woman enlarges her separate estate, and she is liable therefor. Merritt v. Kinney, 18 Week. Dig. 316.

Vide infra, Law of 1884, as to the necessity of specifically charging her

separate estate.

Leasing Land, Ejectment, and Trespass.— Under the above laws a married woman may hire premises in her own name; and maintain an action in her own name for ejectment, or trespass thereon, without joining her husband.

Fox. v. Duff, 1 Daly, 196; Darby v. Callaghan, 16 N. Y. 71; Graham v. Luddington, 19 Hun, 246, 248, n. She may also lease lands leased to her and contract as to them. Prevost v. Lawrence, 51 N. Y. 219.

Contracts, Laws of 1884, Chap. 381, as amended by Laws of 1892, Chap. 594.—By this act married women were authorized to contract in all respects as if sole, and their separate estates were made liable upon contracts, whether made for the benefit of such separate estate or not, and without necessity for special charge upon such separate estate.

By section 2 of L. 1884, Chap. 381, contracts between husband and wife were exempted from the operations of this law. See also p. 83.

This disability is now removed, L. 1887, Chap. 537, allowing deeds between them, direct, and Law of 1892, Chap. 594 allowing contracts between them. Hendricks v. Pearsall, 117 N. Y. 411; Sommer v. Sommer, 87 App. Div. 434.

See Noel v. Kinney, 106 N. Y. 74, holding that a married woman can authorize husband to make a note in her name.

A judgment is not a contract within the meaning of L. 1884, Chap. 381.

White v. Wood, 49 Hun, 381.

These laws enabling married women to contract freely even with their husbands, and allowing deeds between them have been incorporated into the Domestic Relations Law, L. 1896, Chap. 272, §§ 21, 26.

An agreement made directly between husband and wite to continue to live

separate on the payment of a fixed annual sum has been upheld. Dower v.

Dower, 36 Misc. 559. See however, contra, Poillon v. Poillon, 49 App. Div.

341, where a separation was contracted for.

See also France v. France, 38 Misc. 459; also Carling v. Carling, 42 Misc. 492, refusing validity to a contract between husband and wife, in view of existing separation, where a fixed sum for support was provided for.

As to Lands Held Conjointly by Husband and Wife. As before observed, the above statutes of 1848-9 and 1860-62 do not affect the principles of the common law above referred to, with respect to lands that may be held conjointly by the husband and wife.

Those statutes, it is held, were not intended to enable married women to take and hold property jointly with their husbands, as if they were sole, but to take, hold, and dispose of property as if they had no husbands.

See Goelet v. Gori, 31 Barb. 314; F. & M., etc., Bank v. Gregory, 49 id. 155. See supra, p. 80 and also infra, Chap. XI.

Mechanics' Liens. - Liens under the mechanics' lien, laws attach on the separate property of married women, as well as on that of men. Hauptmen v. Catlin. 20 N. Y. 247.

Actions Affecting her Separate Estate. In such an action her husband has no right to enter an appearance for her; and she is not bound by the acts of an attorney who appears for her without her authority or knowledge. Lathrop v. Heacock, 4 Lans. 1.

The remedy against a married woman in equity to charge her separate

The remedy against a married woman in equity to charge her separate estate for her contracts is superseded by the statutory provisions for judgment against her personally. Law of 1862, Chap. 172, § 7.

In the case of the Corn Ex. Ins. Co. v. Babcock (42 N. Y. 613), it is held that where a married woman, having separate real estate, expressly charges her individual property as surety for her husband's debt, she is rendered liable to an ordinary judgment for the amount; and the property to be charged need not be specified. See also § 1206 of the Code of Civil Procedure (formerly § 274) and the Law of 1862, supra.

A charge by bond and mortgage would be valid. Kidd v. Conway, 65

Barb. 158.

But she was not liable for deficiency unless she expressly covenanted to pay. Merely charging her separate estate was not enough. Mack v. Austin, 29 Hun, 534, affd., 95 N. Y. 513; McKean v. Hagan, 18 Hun, 65. But she would be, if the money was applied to the benefit of her separate estate. Jones v. Merritt, 23 Hun, 184. Or where she charged her separate estate in express terms. Yale v. Dederer, 68 N. Y. 329. See L. 1884, Chap. 381, supra; Saratoga Co. Bk. v. Pruyn, 90 N. Y. 250.

Nonnecesity of joinder of husband in any action relating to her separate estate. Code Civ. Proc., 8 450, and L. 1890. Chap. 248

Code Civ. Proc., § 450, amd., L. 1890, Chap. 248.

Improvements to Wife's Estate.—A married woman is not chargeable at law for improvements made to her separate estate under the husband's contract therefor. Nor is she or her estate chargeable in equity for such improvements made under the husband's contract, where no fraud in her induced the contract. Ainsley v. Mead, 3 Lans. 11c, overruling 22 Barb. 371.

Former Provisions of the Code of Procedure as to actions.— Formerly by the Code of Procedure, § 114, when a married woman was a party, her husband must be joined with her, except that when the action concerned her separate property she might sue alone; when the action was between herself and her husband, she might sue or be sued alone; and in no case did she

need to prosecute or defend by a guardian or next friend. Superseded by Code Civ. Proc., § 450.

Provisions of the Code of Civil Procedure.— By section 450 of the Code of Civil Procedure, a married woman, as a party to an action or special proceeding, is in all respects as if *sole*.

Lumley v. Torsiello, 69 App. Div. 76.

Powers of Attorney.— It has been questioned whether, since the above Acts of 1848–9, a power of attorney to convey her land, executed by a wife to her husband, was valid.

Hunt v. Johnson, 19 N. Y. 279.

This question was removed by L. 1887, Chap. 537, and L. 1892, Chap. 594.

Wills by Married Women.— Vide infra, Chap. XV. A married female infant could not devise. Zimmerman v. Schoenfeldt, 3 Hun, 692.

Married Women as Executrices, Administratrices, and Guardians.—Vide infra, Chaps. XVII and XXV.

Partition of Land between Husband and Wife.—By L. 1880, Chap. 472, deeds to partition land held jointly by husband and wife may be made directly by either to the other.

See also Miller v. Miller, 9 Abb. N. S. 444; Zorntlein v. Bram, 100 N. Y. 12. For the re-enactment of the above laws in codified form, see Domestic Relations Law, G. L., Chap. XLVIII, L. 1896, Chap. 276, especially §§ 21 and 26. Except, however, as especially abrogated or modified by the above statutory provisions, which, however, would to-day be construed most broadly, the common law principles in this title above referred to are supposed to be still in force.

TITLE IV. ALIENS.

By the common law, an alien cannot take real property by descent or other mere operation of law, but can by act of a party transferring it. By said law, also, an alien could not have curtesy or dower; nor could a natural-born subject take through an alien, because an alien had no inheritable blood through which a title could be deduced.

An alien could, by the common law, take by devise or conveyance; but if he took by devise or conveyance, he could only hold until an inquest of office, "office found," by the *State*; and his title, during life, was only defeasible by such proceedings. His title to land thus held would be good against every person except the State; and his deed be good against himself only, and not against the State; but as he was incompetent to transmit by descent, on his death, or on the death of a citizen, without other than alien heirs, the land would instantly escheat to and vest in the State, without legal proceedings.

Craig v. Radford, 3 Wheat. 363; Doe v. Governor, 11 id. 352; The People v. Conklin, 2 Hill, 67; Jackson v. Green, 7 Wend. 333; Jackson v.

Fitzsimmons, 10 id. 1, 10; Fairfax v. Hunter, 7 Cranch, 603; Wadsworth v. Wadsworth, 12 N. Y. 376; Craig v. Leslie, 3 Wheat. 563; Munro v. Merchant, 28 N. Y. 9; Heeney v. Trustees, etc., 33 Barb. 360, affd., 39 N. Y. 333; Goodrich v. Russell, 42 id. 177; Wright v. Saddler, 20 id. 320; Osterman v. Baldwin, 6 Wall. 116.

Vide also infra, Chap. XXXIII, title "Escheat;" also "Devises to Aliens."

Chap. XV.

Under the principles above laid down, a son could not inherit from his grandfather, if his father was an alien, although son and grandfather were Brothers, or their descendants respectively, however, might inherit from each other, though the father was an alien, the descent between them being immediate. Collingwood v. Pace, 1 Sid. R. 193, 1 Vent. R. 413; Jackson v. Green, 7 Wend. 333; Parish v. Ward, 28 Barb. 328; McGregor v. Comstock, 3 N. Y. 408; Smith v. Mulligan, 11 Abb. N. S. 438; Luhrs v. Eimer, 80 N. Y. 171.

And cousins, children of brothers who were citizens, might inherit from each other, though the grandfather was an alien. McGregor v. Comstock, 3 N. Y. 408; Banks v. Walker, 3 Barb. Ch. 438.

But not if the descent had to be traced through an alien. And a nephew could not inherit from his uncle, if the former's father were an alien. Levy v. Levy, 6 Pet. 102; Jackson v. Green, 7 Wend. 333; Jackson v. Fitzsimmons, 10 id. 1; Redpath v. Rich, 3 Sandf. 79.

If the next heir of the person last seized, who had heritable blood, was an alien, the land did not therefore escheat, but went to a next remote heir, capable of taking. Thus, a younger son being a citizen, would inherit from the father in preference to the elder son, an alien. Jackson v. Jackson, 7 Johns. 214; Orser v. Hoag, 3 Hill, 79; Orr v. Hodgson, 4 Wheat. 453.

The estate would not go to the remote heir, however, if he could only deduce descent through such alien. Levy v. McCartee, 6 Pet. 102.

The capacity to take by descent had to exist at the time the descent happened; and subsequent naturalization will not enable, if alienage existed at the death of the one last seized. People v. Conkling, 2 Hill, 67; Heney v. Brooklyn Benev. Soc., 33 Barb. 360, affd., 39 N. Y. 333.

Naturalization, however, before "office found," would enable the alien to

hold an estate by purchase against the State. 2 Hill, 67, supra.

Aliens would not be held included in the general descriptive words "heirs

at law." Orr v. Hodgson, 4 Wheat. 453.

Although under a patent from the State to an alien and "his heirs," alien heirs are entitled to take, and the words are extended to all persons who might inherit. Act of April 2, 1798, Chap. 72; of April 18, 1808, Chap. 175; Jackson v. Etz, 5 Cow. 314, 397; Goodell v. Jackson, 20 Johns. 693; Duke of Cumberland v. Graves, 9 Barb. 595, 7 N. Y. 305.

A trust to a citizen to sell lands and give the proceeds to an alien is held

good. Anstice v. Brown, 6 Paige, 448.

Adverse Possession.—An alien may hold by adverse possession as against a third person claiming title. Overing v. Russell, 32 Barb. 263.

Sale by an Alien .- If an alien sold to a citizen, the right of forfeiture was not lost by the alienation, by the strict rules of the common law. Vide infra, changes by statutes of this State.

Dower.—An alien woman was not, by the common law, entitled to dower. Mick v. Mick, 10 Wend. 379; Connolly v. Smith, 21 id. 59. Vide infra, "Changes by Statute."

Joint Estate of Husband and Wife .- The alienage of a husband does not prevent the vesting in him, upon the death of his wife, of the entire estate in land conveyed in fee to himself and wife, subject to escheat, on "office found." Wright v. Saddler, 20 N. Y. 320.

Remainders .- A remainder in fee dependent on a valid life estate, may escheat before the death of the life tenant. The People v. Conklin, 2 Hill, 68. And by the common law, devisees in remainder, though aliens, can take and hold as against the heir, and all others except the State. Id.

Private Statutes.— A special statute, enabling an alien to acquire, hold and alienate real estate, invests him with inheritable blood, and dying intestate, his estate would descend the same as that of a citizen by birth, and would not escheat, provided an heir capable of taking by descent could be found. Such a statute would not remove the barrier against alien heirs. Parish v. Ward, 28 Barb. 328.

An authority to alienate as above would be authority to devise. Id.

Alien Laws in the Various States.—In connection with the subject of alienage in this country, it is to be observed that the statutory provisions of the various States modifying the common law disabilities of aliens are not uniform.

In some states the disabilities are removed altogether, and aliens are put upon the same footing as citizens. These various laws, in giving or withholding the privilege of citizenship, have no extraterritorial effect, and the privilege is entirely local in its character. The laws of one State are not permitted to prescribe qualifications of citizenship to be exercised in another State, in opposition to the laws and local policy of that State.

It has been held, therefore, that the article in the Constitution of the United States (Art. IV, § 2), declaring "that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States," applies only to natural born or duly naturalized citizens; and if they remove from one State to another they are entitled to the privileges that persons of the same description are entitled to in the State to which the removal is made, and to none other.

Corfield v. Corgell, 4 Wash. C. C. 371.

Effect of Treaties.— As to the effect of national treaties on the political qualifications of ali ns in a State, vide supra, this Chapter, Tit. I.

Also Bollerman v. Blake, 24 Hun, 187.

The treaty power of the United States extends to the manner in which property of citizens of a foreign country may be transferred, devised or inherited. Geoffroy v. Riggs, 133 U. S. 258.

Changes by Statute.— The statutes of this State have, on this subject, extensively modified the common law. The following is a summary of the laws, given chronologically:

Law of February 28, 1789, Chap. 42 (2 Green, 279).—By this law, the title of then citizens of the State, under sales to resident aliens, since January 27, 1770, is not to be prejudiced by alienism in the grantee or of any person holding as by descent or otherwise since such grant or purchase.

No title accruing between September 3, 1783, and the passage of the act, to citizens of the State, in lands granted by the colony prior to October 14, 1775,

shall be prejudiced on account of alienism of persons through whom the title

For the colonial laws respecting citizenship, vide supra, p. 5.

By Law of April 2, 1798, Chap. 72 (Amd. Chap. 95), all conveyances thereafter to any alien not subject to a power at war with the United States, shall vest the estate conveyed in him, his heirs and assigns, provided no rent service is reserved by such alien, such conveyances to be recorded within twelve months after date in Secretary of State's office - otherwise the land to escheat.

This law was to be in force only three years. An act declaratory of the construction of this act was passed March 3, 1819, Chap. 25, p. 29, curing any defects in titles then existing, and making any mortgages on said land effectual. Duke of Cumberland v. Graves, 7 N. Y. 305; The People v. Snyder, 41 id. 397; 51 Barb. 589. Under the above Law of 1798, alien heirs could take by descent from an alien entitled to hold. Vide above cases. Also their alien devisees and assigns. Id.; and Watson v. Dunnell, 28 Barb. 653; Howard v. Moot, 64 N. Y. 262, 270.

See L. 1896, Chap. 547, repealing L. 1798, Chap. 72, and L. 1819, Chap. 25. By Law of March 26, 1802, Chap. 49 (2 R. L. 540), purchasers of

land made or to be made by aliens who have become inhabitants of the State, to an extent not over 1,000 acres, are made valid, and they may make mortgages on the sales thereof. This act also provided that the title of any citizen to land theretofore conveyed and then in his possession, should not be impeached through the alienism of any one through whom title was derived (excepting bounty lands in counties of Onondaga and Cayuga).

The provisions of said act were, by Law of April 10, 1804, extended to the date of said last-mentioned act. (2 R. L. 542.) By Law of March 2, 1805, extended to all aliens who may have become inhabitants of the State at the close of the then legislative session. (2 R. L. 543.) Extended by Act of April 4, 1807, and April 8, 1808, to all becoming inhabitants at the close of the then session, and that such aliens might also take by devise or descent as well as by purchase. (2 R. L. 543.) These acts of 1802 and 1808 enabled aliens acquiring lands under those acts to transmit them by descent to their alien heirs. 5 Cow. 314; 7 N. Y. 305.

By the above Law of 1807, the title of no citizen to lands theretofore conveyed was to be impeached for alienism of any through whom title was

derived.

Under these acts of 1802, 1808, if an alien died intestate, his lands descended to his heirs, although they were aliens. If he died without heirs the lands escheated; but until office found, the State had no right to enter and take possession, and a grant by it before office found, conveyed no title. Jackson v. Adams, 7 Wend. 367.

The above laws were re-enacted in the revision of 1813, and a section was passed in 1813 (2 R. L. 542, § 2), which enabled alien mortgages, who were authorized to sell and dispose of real estate, to repurchase on foreclosure sales thereof, and to hold the same, as they were held by the mortgagor.

Alienism of Ancestor.- Possession before 1825.- By Law of 1826, Chap. 297, no title of a citizen of the State who was in the actual possession of lands on April 21, 1825, or at any time before, shall be defeated or prejudiced, etc., on account of the alienism of any person through or from whom the title may have been derived.

Re-enacted in the R. S. of 1830, Vol. I, 719, § 9.

Revised Statutes of 1830 - Alienism of Ancestor .- By the Revised Statutes of 1830, it was provided that no person capable of inheriting shall be precluded by the alienism of any ancestor of such person.

1 R. S. 754. Laws of 1802, 49, § 22.

This provision first altered the common law rule. It was taken from the English statute of 11, 12 William III, Chap. VI, which, however, had no operation in this State. Levy v. McCartee, 6 Pet. 102.

This provision has been held prospective. Redpath v. Rich, 3 Sandf. 79;

Jackson v. Green, 7 Wend. 333.

This provision is held to protect the inheritance, whether title was derived through lineal or collateral ancestors, or both. McCarty v. Marsh, 5 N. Y.

263.

This would cure the trouble arising from the alienism of an intermediable link in the chain of pedigree, but would not enable an alien to transmit by descent. McCormack v. Coddington, 184 N. Y. 467.

It does not, however, enable a person to take by inheritance by descent through a living alien relative of the deceased, who would himself inherit were he a citizen. McLean v. Swanton, 3 N. Y. 535 (citing The People v. Irvin, 21 Wend. 128); St. John v. Northrup, 23 Barb. 26. See modifications of this statute, Laws of 1868 and 1872, infra.

This statute is now § 294 of The Real Property Law, Laws 1896, Chap. 547.

Devises to Aliens.—Contrary to the common law devises to aliens not authorized by statute to hold real estate were declared void by statute, and the interest devised descended to the testator's heirs, if competent to take, and in default thereof to residuary devisees, if any, competent to take. (2 R. S. 57.) Statute of Wills.

Downing v. Marshall, 23 N. Y. 366. This, held not to apply to an alien devisee born after the death of the testator as not being within the strict words of the statute. Wadsworth v. Wadsworth, 12 N. Y. 376.

Vide infra this title as to devises to aliens under more recent laws; Smith

v. Smith, 70 App. Div. 286.

Naturalization Laws and Citizenship.— As to citizenship and its renunciation, and the naturalization laws, and treaties bearing on citizenship, vide supra, this Chapter, Tit. I.

Holding Lands on a Declaration of Intention.—By Law of 1825,* p. 427 (as amended by Law of 1834, Chap. 272), I R. S. 720, § 15, any alien who has or may come into the United States, on filing with the Secretary of State a deposition to be taken before and certified by an officer authorized to take proofs of deeds, of residence in and of intention to reside in the United States, and to be a citizen thereof as soon as he can be naturalized, and that he has taken the incipient steps for naturalization, may take and hold land to himself and heirs and assigns forever; and for six years thereafter may dispose thereof and devise and mortgage the same in any manner as if a citizen (except by lease until he is naturalized).

This Law of 1825 is held to apply to former alien residents as well-Kennedy v. Wood, 20 Wend. 230.

^{*} The original provision applied only to aliens becoming residents of this state.

The deposition is to be filed with and recorded by the Secretary of State. in a book kept by him for that purpose; and the certificate, or a certified

copy, is made evidence.

By the Revised Statutes taken from the said Law of 1825, such alien was not to be capable of taking or holding any lands or real estate, which may have descended or become devised or conveyed to him previously to his having

become such resident and made the deposition aforesaid. § 17.

It is held that the provisions of the Law of 1825, that the alien is not to be capable of taking land acquired by him previous to his making the deposition, is merely a limitation of the preceding sections, and prevents his title thus acquired being good as against the People, but does not impair the common law rule. The provision, therefore, leaves the common law in force as to lands previously acquired, and as to aliens who have not complied with the statute. Wright v. Saddler, 20 N. Y. 320; Heney v. Brooklyn Ben. Soc., 39 id. 333; Goodrich v. Russell, 42 id. 177; Jackson v. Beach, 1 Johns. Cas.

By Law of 1826, 348, if the alien died within the six years intestate after filing the deposition, any heirs, inhabitants of the United States, would take

as if he had been a citizen.

This section was repealed by the general repealing Act of 1828, but incorporated in the Revised Statutes of 1830. The above Act of 1825 was also incorporated in the Revised Statutes of 1830, the original act being repealed in the general repealing act. 1 R. S. 720, § 18.

The Act of November 2, 1827, conferred upon alien heirs of an alien denizen

the right to inherit equally with those who were citizens—but not if the alien ancestor afterward became naturalized. McCarty v. Terry, 7 Lans. 236.

Mortgage Sales and Purchases Thereon.—The Revised Statutes of 1830, 1 R. S. 721, § 19, also provided that if an alien sell real estate, which he was authorized to dispose of, he, his heirs and assigns, may take mortgages for the purchase-money, repurchase on any mortgage sale, and hold the same in the like manner and with the same authority as the same were originally held by the mortgagor. (2 R. L. 1813, 542.) Compare Laws of 1845, Chap. 115, § 13, and 1857, Chap. 576.

Purchases of Lands without Filing the Certificate.- By Law of April 15, 1830, Chap. 171, if a resident alien has purchased land without making the deposition, he may hold it by filing the deposition within a year after the passage of the act. The act confirms all grants, mortgages, etc., theretofore made by such alien to a citizen of the United States.

Even if he had not filed the deposition, an alien could still take by purchase, and hold against all but the State.

2 Hill, 67, 4 Edw. 395.

This act was extended until April 15, 1835, by Law of April 18, 1831, Chap. 172; April 17, 1832, Chap. 171; April 18, 1833, Chap. 167.

A law was passed May 13, 1836, enabling resident aliens to hold and convey land by filing the deposition within a year from the passage of the act, or taking the conveyance. This act was to be in force only for five years from date.

The time was extended to April 13, 1839, within which the deposition might be filed by Act of February 7, 1838. See McCarty v. Deming, 4 Lans. 440, as to such limitations as to time. Vide infra, Laws of 1843, 1845.

Naturalized Citizens before 1843.—By Law of 1843, Chap. 87, any naturalized citizen of the United States, being grantee or TIT. IV. ALIENS.

devisee of real estate (legal or equitable), within the State, or to whom it would have descended if a citizen at the time of decease of the person last seized, may hold it as if a citizen at the time of purchase, devise, or descent cast; and all deeds and mortgages theretofore made by such citizen are confirmed. Reservation is made of escheats, if instituted, and of any vested interests.

The above Law of 1843 is held not to apply to an alien who has not been in possession; and removes no disabilities as to alienage of ancestors, and none except growing out of the alienage of the party claiming its benefit. Redpath v. Rich, 3 Sandf. 79.

This act also held purely retrospective, and not to remove the disability of an alien to take by descent. The naturalization must have occurred before descent cast. Heney v. Trustees, etc., 33 Barb. 360, affd., 39 N. Y. 333.

Rights of Grantees, etc., Accruing before the Filing.— By Law of April 30, 1845, Chap. 115, any resident alien of the State who had purchased or might thereafter purchase and take a conveyance of land in the State, or to whom it had been or might be devised before filing the deposition, might, on filing, hold the land as if a citizen of the United States at the time of acquisition.

This act of 1845 does not operate to confirm a title previously conveyed

by an alien heir. Brown v. Sprague, 5 Den. 545.
Citizens are not included under this act. Luhrs v. Eimer, 80 N. Y. 171.
See for consideration of the effect of this act, Goodrich v. Russell, 42 N. Y.
130; Hall v. Hall, 81 id. 130; Maynard v. Maynard, 36 Hun, 227.

Alien Resident's Heirs.—By the same Law of 1845, § 4, the alien or other heirs of any alien resident of the State, who has taken or may take by conveyance, may hold the lands as if citizens, provided the male heirs file the deposition, if of age and not citizens, otherwise they shall not hold as against the State.

Distinction as to lands acquired by the alien by purchase or descent. Callahan v. O'Brien, 72 Hun, 216.

Purchase includes all land taken by devise. Stamm v. Bostwick, 122
N. Y. 48; Branagh v. Smith, 46 Fed. Rep. 517; Stewart v. Russell, 91 App. Div. 310.

By this law, alien heirs of resident aliens could take, but not if the intestate were a citizen. Larreau v. Davignon, 5 Abb. N. S. 367; Branagh v. Smith, 46 Fed. Rep. 517. The heirs may be nonresident aliens. Goodrich v. Russell, 42 N. Y. 177.

Held that a nonresident alien who takes under this enabling statute has

the same power of disposition as if he were a citizen, with the exception that if he die intestate, nonresident aliens cannot take as his heirs. Harrison v. Harrison, 3 N. Y. Law Bul. 65.

Amendment of 1874.—By L. 1874, Chap. 261, the above § 4 of the Law of 1845, was amended so as to extend the provisions of that law to citizens or alien heirs of citizens or resident aliens. Prior titles were not affected. Id. § 2.

Under Laws of 1874, Chap. 261 (which provides that if any alien resident or any citizen who has taken or may take by conveyance, has died seized of

land, leaving persons who would under the statutes of the State be his heirs, such persons, whether they are citizens or aliens, may inherit and hold such land), land which had, before the act was passed, escheated to the State because the heirs were aliens, passes by virtue of the act to such heirs, where the State had not before the passage of the act assumed in any manner to dispose of it. Wainwright v. Low, 132 N. Y. 313.

Amendment of 1875.— By L. 1875, Chap. 38, this section (4) was further amended so as to apply to alien or citizen devisees of the blood of the testator, as well as heirs of citizens or resident aliens, but adults must file deposition prescribed.

Stamm v. Bostwick, 122 N. Y. 48; Callahan v. O'Brien, 72 Hun, 216; Marx v. Glynn, 88 N. Y. 375; Parker v. Linden, 113 N. Y. 28.
Under Laws New York, 1875, Chap. 38, providing that aliens may inherit from a citizen who has "purchased and taken a conveyance" to real estate, an alien may inherit land that the owner acquired by devise, for title by devise is title by "purchase," within the meaning of the statute. Stamm v. Bostwick, 122 N. Y. 48, affg. 40 Hun, 35.

Aliens take land by descent absolutely under L. 1845, Chap. 115; Amd. L. 1874, Chap. 261, and L. 1875, Chap. 38; Daly v. Beer, 10 N. Y. Supp.

Under these statutes, however, a nonresident alien is not entitled to take as heir of a nonresident alien. Branagh v. Smith, 46 Fed. Rep. 517; Stewart

v. Russell, 91 App. Div. 310; McCormack v. Coddington, 109 App. Div. 741.

Under these statutes failure to file a declaration of citizenship by an alien renders his title liable to forfeiture during his life, and at his death works an immediate escheat, and no proceedings are necessary to effect it. Consequently, in the absence of legislation the title of such heir cannot be transmitted as against the State. McCormack v. Coddington, 184 N. Y. 467, reversing McCormack v. Coddington, 109 App. Div. 741.

Title through Aliens.— L. 1877, Chap. 111. By this act it is provided that "the right, title, or interest of any citizen or citizens of this State, in or to any lands within this State, now held or hereafter acquired, shall not be questioned or impeached by the reason of the alienage of any person or persons from or through whom such title may have been derived," saving rights of the State in proceedings then begun, as also the rights of heirs, devisees, mortgagees and creditors.

There may be some doubt as to what the word "derived" in this act may be held to mean, on adjudication. See L. 1893, Chap. 207.

Devisees or Grantees of Resident Aliens .- By same Law of 1845, § 5, if any resident alien die who has taken or may take real estate by conveyance, his alien or other devisees or grantees may take and hold the same, provided that if of full age, and any are aliens, they file said deposition, in order to hold as against the State.

See Callahan v. O'Brien, 72 Hun, 216; Stewart v. Russell, 91 App. Div. 310.

Devises to Resident Aliens by Citizens.—These confer a conditional title defeasible only by the State until the making and filing of the deposition to become a citizen. Hall v. Hall, 81 N. Y. 130.

Grants and Devises by Aliens who have filed the Deposition. - By same Law of 1845, § 6, any resident alien who has purchased and taken, or may take by deed or devise, and who has filed or shall file the deposition, may grant and devise the land to any citizen or to any alien resident of the State; but the latter, if a male of full age, must file the certificate.

Grants and Devises by Aliens who have Omitted to File the Deposition .-This does not defeat his grant or devise sanctioned by § 5 same law. Dusenberry v. Dawson, 9 Hun, 511; Hall v. Hall, 81 N. Y. 130.

Alien Resident Women Devisees.—By the same Law of 1845, §§ 7. 8. every alien resident woman may take and hold real estate under the will of her husband, or any other person capable of devising real estate, and may execute any lawful power, relative thereto.

She may also take beneficial interests under trusts theretofore, or thereafter created in lawful wills or marriages settlements, subject to the laws relative to uses and trusts.

Confirmation of Former and Future Grants, Leases, etc., by Aliens.—By the same Law, § 9, every grant, devise, demise, lease, or mortgage of any land or interest therein, within this State, theretofore duly executed by an alien to any citizen of the State or to any resident alien capable of taking and holding real estate, or which may thereafter be made by any resident alien capable of taking and holding real estate within this State, to any citizen of this State, or to any resident alien capable of taking and holding real estate, or any beneficial interest therein; and all rents reserved or hereafter reserved, and all lawful covenants and conditions in any such lease or demise, are thereby confirmed and made effectual, as if made by or between citizens of this State.

By § 13, all provisions of Part 1, Chap. 9, title 12 of the Revised Statutes (relative to escheats), inconsistent with this act, are repealed, and the provisions of § 19 (28), Part 2, Chap. 1, Title 1 (relative to aliens taking land sold under foreclosure of mortgages to them), are made applicable.

The Laws of April 29, 1833, and April 26, 1832 (relative to escheats), are

repealed.

Bona fide Rights not affected .- By same law, section 15, it is provided that nothing contained in the act shall prejudice the rights bona fide acquired by purchase or descent without notice before the act should take effect.

Escheat Suspended.—The act also provided that all future proceedings to recover land held by a resident alien, by reason of his alienage, shall be suspended on his filing the deposition aforesaid, but reserves the rights of

the State in proceedings commenced, and also vested interests of any person.

The act is not retrospective solely, but applies as well to aliens becoming residents subsequent to its passage. Hall v. Hall, 81 N. Y. 130.

Confirmation of Grants, Leases, etc.—By the Law of 1857. Chap. 576, it is provided that the several provisions of the above Act of 1845 are extended and applied to any such grant, demise, devise, lease, or mortgage, as are enumerated in said act, and which have been theretofore made, and shall be as effectual to pass the title thereto as though the persons by, from or through whom the title shall have so passed had been citizens of the United States, and as though the several provisions of said act had been, as they are, re-enacted. All aliens are to file the deposition.

"The deposition required to be made by the first section of said act shall be made and filed within two years from the time when this act shall take effect; and if any person who, according to the provisions of said act, is required to make and file such certificate, shall omit to file the same within the time herein limited, he or she so neglecting or omitting to make and file such deposition or affirmation shall not be entitled to the benefit of this act. (This act shall take effect immediately.)"

An alien cannot avoid fulfilling a contract to purchase land on the ground

that he is an alien. 1 Edw. 512.

A purchase-money mortgage given by an alien is valid, and only the equity of redemption escheats.

The privileges conferred by statute on aliens are local and territorial in their nature.

Leases by Aliens.— Vide "Estates for Years," Chap. VIII, infra.

By Laws 1893, Chap. 207, passed March 24, 1893, any person who would otherwise answer to the description of heir or devisee of a person, who, at the time of his death, was a citizen of the United States, shall be entitled to inherit or take from said citizen, and hold, enjoy, convey, transmit and devise any interest in real property situated in this State, in the same manner and to the same extent and with the same effect as if he was himself a citizen of the United States, notwithstanding the fact that he be a nonresident alien; and the fact that any person otherwise qualified to take, hold, enjoy, convey, transmit and devise any interest in real property situated in this State, is a nonresident alien, shall not prevent his taking, holding, enjoying, conveying, transmitting and devising such interest, providing his title, or that of some person under whom he claims, shall be derived, by descent or devise, from some person who was, at the time of his death, a citizen of the United States.

This act took effect immediately.

This act is not retroactive. Stewart v. Russell, 91 App. Div. 310; McCormack v. Coddington, 184 N. Y. 467.

If retroactive it would affect titles throughout the State, reaching back to its creation. Id.~477.

The passing of such an act, if intended to be retroactive should be by twothirds vote under Const. Art. 3, § 20. McCormack v. Coddington, 184 N. Y. 467, 478.

This act of 1893, and the previous acts then in force were repealed on the enactment of The Real Property Law, L. 1896, Chap. 547; G. L., Chap. XLVI. This law as amended by L. 1897, Chaps. 593 and 756, is now the established law of the State with reference to the rights of aliens to take, hold and transmit real property.

The law as it originally stood was not merely codified, but was subjected to many radical changes. Quere as to the effects of the changes.

L. 1896, Chap. 547, § 4, provides:

"An alien who, pursuant to the laws of the United States, has declared his intention of becoming a citizen, and who is, and intends to remain a resident thereof, may make a written deposition to such facts, before any officer authorized to take the acknowledgment or proof of deeds to entitle them to be recorded within the State. Such deposition must be certified by the officer before whom it is made, and may be filed in the office of the Secretary of State, and when so filed, must be recorded by him in a book kept for that purpose. Such deposition shall be presumptive evidence of the facts therein contained."

Section 5 provides:

"An alien may, for the term of six years after filing the deposition described in the last preceding section, take, hold, convey and devise real property. If such deposition be filed, or such alien be admitted to citizenship, a grant, devise, contract or mortgage theretofore made to or by him is as valid and effectual as if thereafter; provided, however, that a devise to an alien shall not be valid unless a deposition be filed by him, or he be admitted to citizenship, within one year after the death of the testator, or if the devisee is a minor, within one year after his majority. If a person who has filed such a deposition dies within six years thereafter, and before he is admitted to citizenship, his widow is entitled to dower in his real property and if he dies intestate, his heirs or the persons who would otherwise answer to the description of his heirs, inherit his real property, upon such persons being admitted to citizenship, or filing a deposition in their own behalf, within one year after such death, or if minors, within one year after their majority. If an action or proceeding is commenced by the State to recover real property held by an alien, such action or proceeding shall be suspended upon the

filing of such deposition, and the service of a certified copy thereof upon the Attorney-General, and the payment of the costs to the time of such service."

Section 6, as amended by L. 1897, Chap. 756, provides:

"Any woman born a citizen of the United States, who shall have married or shall marry an alien, and the foreign-born children and descendants of any such woman, shall, notwithstanding her or their residence or birth in a foreign country, be entitled to take, hold, convey and devise real property situated in this State, in like manner and with like effect, as if such woman and such foreign-born children and descendants were citizens of the United States; and the title to any such real property shall not be impaired or affected by reason of such marriage, or residence, or foreign birth; provided that the title to such real property shall have been or shall be derived from or through a citizen of the United States."

Section 7 provides:

"The right, title, or interest in or to real property of this State of any person entitled to hold the same cannot be questioned or impeached by reason of the alienage of any person through whom such title may have been derived. Nothing in this section affects or impairs the right of any heir, devisee, mortgagee, or creditor by judgment or otherwise."

Section 8 provides:

"Every alien holding real property in this State is subject to duties, assessments, taxes, and burdens as if he were a citizen of the State."

In 1897, a further liberalizing act was passed, which provided:

"Any citizen of a state or nation which, by its laws, confers similar privileges on citizens of the United States, may take, acquire, hold and convey lands or real estate within this State, in the same manner and with like effect as if such person were, at the time, a citizen of the United States; provided, however, that nothing in this act contained shall affect the rights of this State in any case in which proceedings for escheat have been or may be instituted before the passage of this Act." L. 1897, Chap. 593.

This Act is not retroactive. Stewart v. Russell, 91 App. Div. 310. See also other sections of The Real Property Law, § 294.

Except as otherwise changed by the above statutes, now in force, the rules of the common law are controlling now as formerly. The law has become more liberal only as the statutes have made it so.

See Branagh v. Smith, 46 Fed. Rep. 517; McCormack v. Coddington, 184 N. Y. 467, 475.

Trusts for Aliens.—Aliens were under like disabilities as to uses and trusts arising out of real estate. By the Revised Statutes, all escheated lands are liable to the same trusts as if they had descended.

It has been held that on a conveyance of land to a citizen upon express trust to hold for the benefit of an alien in fee, the trust estate is acquired for the State. Hubbard v. Goodwin, 3 Leigh, 492; Leggett v. Dubois, 5 Paige, 114. Such a trust in a will held void. Beekman v. Bonsor, 23 N. Y. 298. But see Marx v. McGlynn, 88 id. 357, 376; and cases cited, Fowler Real Property Law, 117. Vide, also, infra, p. 109.

On the other hand a conveyance of land to a citizen as trustee on express

On the other hand a conveyance of land to a citizen as trustee on express trust to sell the same and pay over the proceeds to a creditor who is an alien, is a valid trust. Craig v. Leslie, 3 Wheat. 503; Anstice v. Brown,

6 Paige, 448.

But not if done to avoid the alien laws. Leggett v. Dubois, 5 Paige, 114. Trusts on escheat recognized. See Public Lands Law, L. 1894, Chap. 317, G. L., Chap. XI, § 69.

Alien as Trustee.—An alien can act as trustee, if otherwise capable of holding lands. Duke of Cumberland v. Graves, 9 Barb. 595, 7 N. Y. 305. And see *infra*, "Trustees," Chap. X.

Widows of Aliens and Alien Wives of Citizens.—By the Revised Statutes of 1830, the widow of any alien, who at the time of his death, shall be entitled by law to hold any real estate, if she be an inhabitant of this State at the time of such death, shall be entitled to dower of such estate, in the same manner as if such alien had been a native citizen. I R. S. 740, § 2, repealed, L. 1896, Chap. 547, § 302.

See now L. 1896, Chap. 547, $\$ 6, as amended by L. 1897, Chap. 756; also L. 1896, Chap. 547, $\$ 170.

Alien Widows.—The naturalization of a feme covert, who is an alien, would not have a retroactive operation so as to entitle her to dower in lands of which her husband was seized during coverture, and which he had aliened previous to her naturalization. Priest v. Cummings, 20 Wend. 338.

Aliens Before 1802.—It is held that the widow of a natural born citizen, who was an alien when the Act of 1802 was passed, *supra*, is not entitled to dower under the provisions of that act, where the lands in which dower was claimed were acquired by the husband, and the marriage took place previous to the passage of the act. *Id*.

As to Act of 1825.—It has been held also, that, in view of the provisions of the Act of 1825, supra, an alien widow, whose husband being a citizen, purchased lands during their coverture in 1833 and died in 1838, was not entitled to dower. Currin v. Finn, 3 Den. 229; Sutliff v. Forgey, 1 Cow. 89, affd., 5 id. 713.

Dower of Wife of Alien Resident.—By above Law of April 30, 1845, § 2, id, the wife of an alien resident of this State who has heretofore taken by conveyance, grant or devise, and become seized of any real estate, and who has died before the passage of this act, and the wife of any alien resident of this State, who may hereafter take by conveyance, grant, or devise, any real estate within this State, shall be entitled to dower therein, whether she be an alien or citizen of the United States; but no such dower shall be claimed in land granted or conveyed by the husband before this act shall take effect.

Formerly an alien widow could not be endowed, though her husband were a citizen. Mick v. Mick, 10 Wend. 370; Connolly v. Smith, 21 id. 59.

Alien Wife of Citizen .- By same chapter, section 3, any alien woman who has heretofore married or who may hereafter marry a citizen of the United States, shall be entitled to dower in the real estate of her husband, within this State, as if she were a citizen of the United States.

Formerly the alien wife of a citizen could not have dower in lands purchased since the Act of 1825, unless she had filed the deposition as above.

Currin v. Finn, 3 Den. 229.

Held to apply to an alien woman residing abroad at time of marriage, although husband afterwards naturalized. Burton v. Burton, 1 Keyes. 359. See Goodrich v. Russell, 42 N. Y. 177.

By Act of Congress of 1855, any woman naturalized and married to a

citizen of the United States, shall be deemed a citizen. See above case of

Burton v. Burton, and supra, Tit. I, as to said Law of 1855.

This act is held to mean that whenever a woman who, under previous acts might be naturalized, is in a state of marriage to a citizen, she becomes

by that fact a citizen also. Kelly v. Owen, 7 Wallace, 496.

This Law of 1845 confers the right of dower on an alien widow of an alien resident, but is silent as to her rights where the land descended. By

the Revised Statutes, supra, this was covered.

Marriage with an Alien .- Neither the marriage of a female with an alien husband, nor her residence in a foreign country, will constitute her an alien so as to prevent her taking real estate in this country. Beck v. McGillis, 9 Barb. 35. See Real Property Law, § 6, as amd. by L. 1897, Chap. 756.

Law of 1868. Alienism of Ancestors.— The Law of May I. 1868, Chap. 513, provides as follows: The title of any citizen or citizens of this State to any land or lands within the State, and now in the actual possession of such citizen or citizens, shall not be questioned or impeached by reason of the alienism of any person or persons from or through whom such title may have been derived; provided, however, that nothing in this act shall affect the rights of the State in any case in which proceedings for escheat have been instituted.

See also Renner v. Muller, 44 Super. Ct. (J. & S.) 535; Real Property Law, § 7, supra.

As to Alienage of Former Owners, etc.—Act of March 27, 1872, Chap. 141.— The title of any citizen of this State to lands therein is not to be questioned or impeached by reason of the alienage of any persons from or through whom such title may have been derived. The rights of the State are reserved where proceedings for escheat have been commenced.

Nothing in the act is to affect or impair the right of any heir, devisee, mortgagee, or creditor by judgment or otherwise.

This act was re-enacted, L. 1875, Chap. 336.

Act of April 24, 1872, as to Title through Aliens .- By law of this date (Chap. 358), the title of citizens of the State to lands

therein "heretofore" purchased by such citizen from aliens, and for which a conveyance has been taken from such aliens, is not to be impeached on account of the alienage of such persons, or by any devise of any such lands to any such persons, in any will being inoperative or void on account of the alienage of such persons. All devises heretofore made to aliens, from whom a conveyance of such lands shall have been heretofore taken by citizens of this State, are declared effectual, so far that the title of such citizens shall not be affected by any invalidity of such devise.

The rights of the State are reserved where proceedings for escheat have been instituted prior to January 1, 1872.

These acts are now embodied, with slight changes in the Real Property Law. See Laws 1896, Chap. 547, § 7, supra.

Descendants of Female Citizens married to Aliens.— By Law of March 20, 1872, Chap. 120, it is provided that real estate in this State, now belonging to or hereafter coming or descending to any woman born in the United States, or who has been otherwise a citizen thereof, shall, upon her death, notwithstanding her marriage with an alien and residence in a foreign country, descend to her lawful children of such marriage, if any, and their descendants, in like manner and with like effect as if such children or their descendants were native born or naturalized citizens of the United States. Nor shall the title to any real estate now owned by, or which shall descend, be devised, or otherwise conveyed to such woman, or her lawful children, or to their descendants, be impaired or affected by reason of her marriage with an alien, or the alienage of such children or their descendants.

See L. 1889, Chap. 42, as to foreign-born children, etc., of female citizen married to an alien and residing abroad, taking, holding, conveying and devising realty here.

Children born after passage of an enabling act take to the exclusion of others previously born. 11 N. Y. Sup. 148. See Real Property Law, § 6, as

amended, supra.

Military Bounty Lands held by Aliens.—Early statutes were passed on this subject in 1790, 1794, 1798, 1807, and 1813. Vide 1 R. L. 209. See also L. 1893, Chap. 207.

Private Acts.— Various private acts have been passed authorizing individual aliens to take lands as if citizens. These acts have been in some cases held to confer upon the alien heirs also the right to hold lands. But this rule did not apply where the alien became a citizen. McCarty v. Terry, 7 Lans. 236.

Devises to Trustees for benefit of Aliens.— Although a direct devise to an alien might be void (2 R. S. 57, § 4), yet a devise to a

citizen in trust to receive the rents and profits of real estate and apply them to the use of an alien would be valid.

See Marx v. McGlynn, 88 N. Y. 357. Also see p. 107, supra.

Aliens as Trustees .- Where an alien has authority to hold lands for his own use, he may take and hold as trustee. Duke of Cumberland v. Graves. 9 Barb. 595; Howard v. Moot, 64 N. Y. 262.

One Citizen Among Aliens .- Where all the heirs were aliens but one, who had been naturalized, held under earlier law that he took the entire inheritance. Leary v. Leary, 50 How. Pr. 122, distinguished Callahan v. O'Brien, 72 Hun, 216.

Laws 1897, Chap. 593 .- This statute does away with the necessity of treaty as an enabling force equalizing aliens and citizens in capacity to take, hold and convey real property.

See Fay v. Taylor, 31 Misc. 32; Geofroy v. Riggs, 133 U. S. 258.

TITLE V. CORPORATIONS, LUNATICS, IDIOTS.

The right of the above classes to hold and convey land is reviewed at length in subsequent chapters.

TITLE VI. THOSE SENTENCED TO IMPRISONMENT.

A sentence of imprisonment in a State prison for any term less than life suspends all the civil rights of the person so sentenced during the sentence, and forfeits all public offices and all private trusts during the term of such imprisonment.

A person sentenced to a State prison for life shall thereafter be civilly dead. Penal Code, §§ 166, 708.

Re-enacting 2 R. S. of 1830, part 2, Chap. 1, title 7. This provision does not divest title by sentence for life. Avery v. Everett, 110 N. Y. 317.

Provision is made by statute for the appointment of a committee of the

estate of persons imprisoned for life. Their powers and duties are given in 2 R. S. 15; L. 1889, Chap. 401. Similar provision is made in case of imprisonment for a term of years

less than life, or for a longer term than one year in a penitentiary or county jail, for a trustee. Code Civ. Proc., § 2219, as amd. by L. 1895, Chap. 946.

As to service of process on such persons, see Phelps v. Phelps, 7 Paige, 150.

It is held that service of process upon a convict in the State prison is valid, and gives the court jurisdiction. Davis v. Duffie, 4 Abb. N. S. 478.

Entering a convent does not end life within the meaning of a will. Kilpatrick v. Burrow, 7 N. Y. Supp. 542.

As to conviction for treason and its effect. Code Crim. Proc., § 819. Convicts for life and care of their estates. See L. 1889, Chap. 401.

Appointment of a committee for a life convict — contents of the petition —

Appointment of a committee for a life convict — contents of the petition — jurisdiction of court. Stephani v. Stephani, 75 Hun, 188.

Section 707 of the Penal Code, which prescribes that "A sentence of imprisonment in a State prison for any term less than for life forfeits all the public offices and suspends, during the term of the sentence, all the civil rights and all private trusts, authority or powers of, or held by, the person sentenced," does not deprive a person so imprisoned of the power to take or convey by grant or devise. La Chapelle v. Burpee, 69 Hun, 436.

CHAPTER IV.

OF ESTATES IN LAND.

TITLE I. TRANSFER, BY WHAT LAW GOVERNED.
II. DEFINITION OF "ESTATES" AND "LANDS."

III. THE FEUDAL SYSTEM.

IV. THE FEUDAL PRINCIPLE IN THIS STATE.

V. SUBSTITUTION OF ALLODIAL ESTATES FOR FEUDAL TENURE.

VI. DIVISION OF ESTATES.

TITLE I. TRANSFER, BY WHAT LAW GOVERNED.

The title to real property, and all modes of its alienation or transfer, and the effect and construction of deeds conveying it, are exclusively governed by the law of the country where it is situated. Likewise, a title to land can only be lost under and by virtue of such law. In this country, rights affecting real estate are governed by the existing laws of the States where the lands are situated, respectively — the States being sovereign in that particular, and in all matters appertaining to their domestic concerns - anless it is otherwise provided by the Federal Constitution.

Clark v. Graham, 6 Wheat. 577; Story, Conflict of Laws, Chap. X, § 424; Kerr v. Moon, 9 Wheat. 565; Levy v. Levy, 33 N. Y. 97; McCormick v. Sullivan, 10 id. 192; White v. Howard, 52 Barb. 594, affd., 46 N. Y. 644; Oakley v. Bennett, 11 How. (U. S.) 33; McGoon v. Scales, 9 Wall. 23; Lynch v. Clarke, 1 Sandf. Ch. 583; Hosford v. Nichols, 1 Paige, 220; U. S. v. Fox, 4 Otto, 315; Brine v. Ins. Co., 6 id. 627.

Consequently, the sale of land in one State, under authority of the court of another State, would pass no title, unless the parties in interest submitted to the jurisdiction of the court. If the court obtained jurisdiction, so as to act in personam, it might compel a performance of contracts.

Williams v. Fitzhugh, 37 N. Y. 444, and cases cited. Remedy of mortgagee; Lex fori. Union Mut. Life Ins. Co. v. Hanford, 143 U. S. 187.

The decisions of the tribunals, acting under the common law, both in England and America, are in a practical sense, uniform on the above subject. All the authorities in both countries recognize the principle that real estate, or immovable property, is exclusively subject to the law of the government within whose territory it is situate.

As to the Capacity of Persons capable of Taking, etc.- In accordance with the above general principle, the party taking land must have capacity to take, according to the law of its situs: otherwise he will be be excluded from ownership. Thus, if the laws of a country or State exclude aliens from holding lands, either by succession, or by purchase, or by devise, such a title becomes wholly inoperative as to them, whatever may be the law of the place of their domicile. This principle extends to all persons incapacitated or restricted, in any way, by the laws of the place where the land lies, such as minors, married women, lunatics, etc. On the other hand, if, by the local law, aliens or others may take and hold lands. it is wholly immaterial what may be the law of their own domicile, either of origin or of choice.

This is the rule also generally prevailing among civil jurists, although there is a diversity of opinion among them; some claiming that the law of the capacity of an individual must be uniformly the same everywhere, and that the law of the domicile ought to regulate it. Doe v. Vardill, 5 Barn. & Cress. 438; Buchanan v. Deshon, 1 Har. & Gill, 280; Sewall v. Lee, 9 Mass. 363; Story, Conflict Laws, § 430; Boyce v. City of St. Louis, 29 Barb. 650. Vide supra, Chap. III, Tit. I, "Citizens;" also Id., Tit. VI, "Aliens." See also "Idiots," "Lunatics," "Infants," etc., infra.

In respect to real estate situated in this State, claimed by a foreign corporation, it is for the courts of this State to construe the charter of such corporation, and determine whether the corporation is authorized thereby to take or hold such real estate. A foreign corporation, not authorized by its charter, or by statute, to take and hold real estate as a general rule cannot take by devise lands lying within this State.

Boyce v. City of St. Louis, 29 Barb. 650. See also Chamberlain v. Chamberlain, 43 N. Y. 424.

A foreign corporation held not a citizen within the meaning of The Real Property Law. Duquesne Club v. Penn. Bank of Pittsburgh, 35 Hun, 390. But see *infra*, Chap. XXIV, Tit. I, as to modifications of above rules.

Medium of Transfer.— As regards the medium and forms of passing real estate, the rule is also that the local law governs. Hence, executory contracts for the sale, and devises and conveyances for the transfer of land, or any interest therein or lien thereon, must be made, executed, and delivered in accordance with the formalities of that law.

In relation to a will, also, or instrument made elsewhere, transferring or affecting real estate in this State, it is the province of the courts of this State to construe such instruments, and pass upon their validity or invalidity according to the laws of this State.

U. S. v. Crosby, 7 Cranch, 115; Cutler v. Davenport, 1 Pick. 81; Hosford v. Nichols, 1 Paige, 220; Willis v. Cowper, 2 Hamm. 124; Wilcox, 278; Kerr v. Moon, 9 Wheat. 566; McCormick v. Sullivant, 10 id. 192; Darby v. Mayer, 11 id. 465; White v. Howard, 52 Barb. 294, affd., 46 N. Y. 144; Goddar v. Sawyer, 9 Allen (Mass.), 78; Chapman v. Robertson, 6 Paige, 627; McCraney v. Alden, 46 Barb. 272.

An assignment of a mortgage, however, has been held to be governed by the law of the State where made, and not of the State where the property is. Dundas v. Bowler, 3 McLean, 397; 2 Story, Conflict of Laws, § 435.

Transfers by Operation of Law.— The principles above expressed apply equally (independent of any contract express or implied) to transfers of immovables by operation of law. estate of dower, or by the curtesy, or an inheritable estate or interest in immovable property, can be acquired, except by such persons and under such circumstances as the local law prescribes, and the law of the situs absolutely governs in regard to all rights, interests, and titles in and to immovable property transferred as well by operation of law as by acts of parties. Therefore the law of this State would control, as to real estate within it, the succession or right of succession to such real estate.

Brodie v. Barry, 2 Ves. & B. 127; Gambier v. Gambier, 7 Simm. 263; Story, Conflict of Laws, § 463; White v. Howard, 52 Barb. 294, affd., 46 N. Y. 144.

The Subject-Matter of Transfer.— The law as to the lex loci. prevailing as above stated, will apply not merely to what is actually immovable, but to what may be deemed to partake of an immovable or real nature by the law of the locality. In other words, resort must be had to the lex loci rei for determining what is technically immovable, heritable or real property.

Thus servitudes, easements, rents, and other incorporeal hereditaments and interests in, and appurtenances to land in this State, and structures thereon, would come within the legal definition of land or real property as subject to the laws of the State.

Chapman v. Robertson, 6 Paige, 627; Levy v. Levy, 33 N. Y. 97; Story, Conflict of Laws, § 464.

Conflict of Laws, § 464.

As regards personal property the rule is different. It is supposed to have no locality per se, and follows the domicile of its owner, and the law of his domicile would regulate its condition and transfer. White v. Howard, 52 Barb. 294, affd., 46 N. Y. 144.

Leasehold estate being personalty is governed by the law of domicile. Despard v. Churchill, 53 N. Y. 192. Compare Code Civ. Proc., § 2700.

For exception to the general rule in the matter of situs of personalty for purposes of taxation under the Transfer Tax Act, see Matter of Houdayer, 150 N. Y. 37; Matter of Blackstone, 171 id. 682; Blackstone v. Miller, 188 U. S. 189; Matter of Clinch, 180 N. Y. 300.

TITLE II. DEFINITION OF "ESTATE" AND "LAND."

The word "estate" means whatever and all interest a person has in land.

The terms "estate" and "interest in real property" include every such estate and interest, freehold or chattel, legal or equitable. present or future, vested or contingent.

Real Property Law, L. 1896, Chap. 547, § 205.

The word "land" comprehends, in legal signification, any ground or soil whatever, and all structures and things that are attached to or growing thereon. The word also includes "water," which, if the subject of conveyance, must be described as land covered by water.

See Chap. XLIII., infra, as to land under water. As to what is land with reference to taxation, Laws of 1881, Chap. 293; also infra, Chap. XLVI.

The Revised Statutes of 1830 provide that the terms "real estate" and "lands," as used in Chap. I, Part II, relative to estates in land, shall be construed as coextensive in meaning with "lands, tenements, and heredita-

ments." 1 R. S. 750.

The Real Property Law, L. 1896, Chap. 547, makes the terms "real property" and "lands" as used therein coextensive with "lands, tenements and hereditaments," § 1.

By "land" in a will or deed, expectant estates will pass. Pond v. Bergh,

10 Paige, 140.

The words "property" and "real property" declared, when used generally in statutes, to include real estate, lands, tenements and hereditaments, corporeal and incorporeal.

L. 1892, Chap. 677, §§ 2, 3.

The words "real estate," when applied to an interest in lands or other real property, include all estates or interests which are held for life, or some greater estate, but do not embrace terms for years and other chattel interests in land.

Westervelt v. The People, 20 Wend. 416. A servitude held an estate. Nellis v. Munson, 108 N. Y. 453, reversing 24 Hun, 575.

"Incorporeal hereditaments" also partake of the "realty" and are made the subject of conveyance and inheritance. The most important of them are: easements, ways, aquatic rights, rents, rights of common, offices, and franchises.

Land has also, legally, an indefinite extent upward as well as downward.

The legal maxim is, "Cujus est solum, ejus est usque ad cœlum."

2 Bl. 13; 3 Kent, 401; Norris v. Baker, 1 Rol. 393; Lodie v. Arnold, 2 Salk. 458; 3 Step. Com. 500; Masters v. Pollie, 2 Rol. 141; Crabbe on Real Prop. § 96; 2 Bour. Inst. 158, 1570, 1576.

Title deeds are so closely connected with land that the right to their

possession passes with it. But where executors have a power of sale they have a right to the title deeds superior to that of a devisee. Mead, 7 Hun, 36.

OTHER INTERESTS.

Timber.—The word "land," also, would apply to growing timber, and contracts or deeds for the same are within the recording statutes. Vorebeck v. Roe, 50 Barb. 302; Goodyear v. Vosburgh, 57 id. 243; Hutchins v. King, 1 Wall, 53; Warren v. Leland 2 Barb, 613.

Trees must be removed by a tenant of a nursery, or they become part of the reversion. So with structures. Brooks v. Galster, 51 Barb. 196; Loughran v. Ross, 45 N. Y. 792.

As to removal of trees from a nursery by a mortgagor, see Hamilton

v. Austin, 36 Hun, 138.

As regards trees, also, it is held that a person upon whose lands a tree wholly stands is the owner of the whole thereof, and is entitled to all its fruit notwithstanding some of its branches overhang the lands of another. Hoffman v. Armstrong, 48 N. Y. 201.

As to damage to trees on highway. Edsall v. Howell, 86 Hun, 424.

Crops, etc.—As to trees, fruits, grass and emblements, see infra, Chaps. VI,

VIII, XIV.

Growing grass partakes of the nature of realty; and upon the death of the owner of the land follows it, going to the heir or devisee, not to the personal representatives. Matter of Chamberlain, 140 N. Y. 390.

Coal as real estate. Genet v. D. & H. C. Co., 13 Misc. 409.

Partnership Property.—As to whether land held by business partners is to be treated as realty or personalty, see infra, Chap. XI.

Equitable Conversion.— See infra, Chaps. XIV and XV; and as to when proceeds of real estate are treated as land.

Stock of Land Company.—By L. 1853, Chap. 117, the stock of building and land companies authorized by the act is to be considered as personal estate. This accords with the general rule as to corporate stock.

Stock of R. R. Companies. - This is also considered to be personal estate.

Rent Charge.—A rent charge with condition of re-entry is held to be real estate. Van Rensselaer v. Hays, 19 N. Y. 68; Cruger v. McLaury, 41 id. 219; and see infra Chap. V., Tit. III; also, Fowler's Real Property Law, on Perpetual Rents (2d ed.), 172 et seq.: 180, n. 28.

Real Estate under the Statute of Descents.—As to this, see infra, Chap. XIV, and as to proceeds of infant's lands.

Pew. -- The interest of the lessee of a pew in perpetuity is an interest in real estate, and is subject to all the incidents thereof. It is, however, a mere right of occupancy, and gives no right to the soil or to the body of the church. The interest of the pew holder is a qualified interest. It is the church. The interest of the pew holder is a quained interest. It is limited to the use thereof during divine worship. It is limited, also, as respects time. If the house is burnt, or destroyed by time, the right is, in general, gone. The building and soil are vested in the religious corporation usually through trustees. In case of a destruction of a pew for convenience only, or in a wanton abuse of power by the trustees, the pewholder will have a right of action for damages. Voorhees v. The Presbyterian Church, 8 Barb. 135, affd., 17 id. 103; St. Paul's Church v. Ford,

As to rights of pew-holders, vide Cooper v. First Presbyterian Church, 32 Barb. 222; and also as to above point, see infra, Chap. XXIV, "Corporations;" also Woodworth v. Payne, 74 N. Y. 196, affg. 5 Hun, 551.

As to lease of seat in a theatre, vide Morse v. Cheney, 22 Blatch. 508; see also "Easements," infra, Chap. XXXVI.

Erections on Real Estate of Another.— It is a presumption of law that everything affixed to land passes with it. Quicquid planta-

tur solo, solo cedit. When a building is erected by one person on the land of another, it becomes part of the realty, and passes with a conveyance of the land. And this is likewise true generally of all other things affixed to the soil.

The presumption however is not irrebuttable and the courts have made certain exceptions, based on the doctrine of estoppel, in equity. An exception, also, exists with respect to unattached constructions erected for purposes of trade or farming, by a tenant, during the time the relation of landlord and tenant exists, when the right of removal must be exercised during the term, or immediately on its cessation.

Brooks v. Galsten, 51 Barb. 196; Loughran v. Ross, 45 N. Y. 792; Ritchmayer v. Morss, 3 Keyes, 349; Voorhees v. McGinnis, 48 N. Y. 278; Noyes v. Terry, 1 Lans. 219.

Soil removed and placed on the land of another becomes part of the realty in certain cases. Lacustrine Co. v. Lake Guano Co., 82 N. Y. 476.

A telegraph wire placed on property of a railroad company by a telegraph company as a mere addition to a line owned by the former, but

A telegraph wire placed on property of a rainfoal company by a telegraph company as a mere addition to a line owned by the former, but operated by the latter, becomes real estate, and passes by sale on foreclosure. N. Y., Ont. & W. R. R. Co. v. W. U. Tel. Co., 36 Hun, 205.

Intention may make a mere attachment a fixture. Funk v. Brigaldi, 4 Daly, 359; compare, however, Tifft v. Horton, 53 N. Y. 377.

Possession is necessary to bring an action for severance of fixtures. Johnson v. Elwood, 53 N. Y. 431.

Where a lessee who was bound to erect a building, put in also a boiler set in brick, which could not be removed without tearing up the sidewalk, the boiler was held a fixture. Finkelmeier v. Bates, 92 N. Y. 172.

Fixtures annexed by a tenant under a perpetual lease, are subject to a previous mortgage by lessor. Davidson v. Westch. G. L. Co., 99 N. Y. 558. If a tenant having the right to remove fixtures on demised premises, accepts a new lease of the land, without reservation of or making claim to the buildings, his right of removal is lost, even if his possession has been continuous. Loughran v. Ross, 45 N. Y. 792; Hayes v. Schultz, 33 Mise. 137; Stephens v. Ely, 14 App. Div. 202, affd., 162 N Y. 79.

See infra, "Leases," "Mortgages," etc.

An engine held to be removable, though landlord said, if put in, it should become a part of the land. Andrews v. Day Button Co., 55 Hun, 494, affd., 132 N. Y. 348.

Gas fixtures not paid for may be removed by seller as against innocent

Gas fixtures not paid for may be removed by seller as against innocent purchaser. Iden v. Sommers, 18 N. Y. Supp. 189, affd., id. 779.

But manure held to go to lessor. Elting v. Palen, 60 Hun, 306.

Mortgagee of lease takes any right of lessee to remove fixtures provided for in lease. Kribbs v. Alford, 120 N. Y. 519.

Both as against lessor and assignee of lessor, if he had notice of the

Under L. 1885, Chap. 342, building house on land of another with his knowledge does not imply his consent, and he cannot be charged with the value. Spruck v. McRoberts, 139 N. Y. 193.

Ordinarily, in determining whether a certain article is a fixture and a part of the realty, the purpose of the annexation and the intent with which it was made are the most important considerations. The intent is sometimes presumed or it may be inferred from circumstances. Re Eureka Mower

Vendor's right to remove fixtures stipulated for in contract will be protected even after passing of deed. Brunswick Con. Co. v. Burden, 116 App.

Div. 468.

TITLE III. THE FEUDAL SYSTEM.

The English estates at common law had their origin in the feudal system. The basis of this system was the allotment by the sovereign or military chief of tracts of lands to his barons, and these again subdivided them among others. These beneficial allotments were called feuds, fiefs, and secondarily fees, and in the course of time were allowed to become hereditary, under definite maxims of inheritance.

The paramount ownership of the land was still vested in the head of the community, who exacted, as a recognition of title and condition of tenure, allegiance and certain services, military or otherwise, and fines and penalties annexed to the estate. When allegiance was withdrawn, or, in case of the death of the feudatory (or subsequently of his heirs), the land fell back or escheated to the suzerain. The like tenure or relation existed between the mesne lord and the sub-feudatory or "vassal," except as modified by statute. The fundamental doctrine of English feudalism was that all land was held either mediately or immediately of the Crown. After the Norman conquest, feudalism was made systematic in England, from which country, the Common Law, based on feudal principles, became established in the Colonial government of this State, and was adopted by the State Constitutions of 1777, 1822, 1846 and 1894, except as modified by the statutory law, or the several constitutions of the State.

Common Law.— As to its existence here, vide supra, Chap. I, D. 22.

Feuds, how Created .- The mode of investiture of a feud was by the words "dedi et concessi," and by open notorious delivery of possession, generally, on the premises, and by a symbolical delivery of some article taken therefrom. This delivery of possession was called "livery of seizin." The grant might be for years or for life, or hereditary; the eldest male heirs taking in turn, as best calculated to defend the feud. A class of heirs also might be designated, creating a fee-tail.

Livery of seizin was necessary to give effect to a deed as a feoffment.

Schott v. Burton, 13 Barb. 173.

By the Revised Statutes of 1830, feoffment with livery of seizin was abolished. 1 R. S. 738, § 136.

Re-enacted as § 206 of the Real Property Law.

Feuds at First Inalienable.—Feuds were at first inalienable without the consent of the lord; being looked upon as a personal trust to the feudatory and those of his blood.

In time, as military yielded to civil rule, the stringency of the system was relaxed, and feuds became alienable; and various other modifications and changes were authorized by law, or established by usage, until the English system of tenures grew into complex and extensive proportions, the feudal base of the system still being the prominent and controlling element, as well as the key for its interpretation. At the restoration in 1660, and by subsequent statutes in the reign of Charles II, the feudal system of tenure was virtually abolished; and the tenure of land turned into that of free and common socage, that is to say, not military nor dependent on the will of the lord.

For a historical review of this subject, see Fowler's Real Property Law (2d ed.), Chap. I; also Fowler's Hist. of Law of Real Property, Chap. I.

TITLE IV. THE FEUDAL PRINCIPLE IN THIS STATE.

The reformed feudal principle of socage tenure existed in this State during its Colonial existence, as modified by English statutes and grants from the Crown. By an act of Parliament of April 25, 1660, all military tenures had been abolished from February 24, 1645. The provisions of the act of this State of 1787, infra, were partly taken from that English act. While the Colony was under the Dutch government these English tenures were unknown. The more correct view is that, as feudal tenures were abolished in 1660 in England, previous to the English occupation in 1664, the strictly feudal law of England was never in force in New York. The original New York estates were only such as the common law permitted in 1664 in lands.

People v. Van Rensselaer, 9 N. Y. 291, at p. 338. Revisers' Notes to Part II, Chap. I. See also Fowler's Real Property Law (2d ed.), 44, 134. The nearest semblance to feudal tenures was the order of "patroon." Under a provision of the Dutch West India Company, any person who should plant a colony of fifty souls should be deemed a "patroon," should be entitled to select land, except upon Manhattan Island, to a limited extent, and have an absolute property therein "to be holden of the company as an eternal inheritance, without its ever devolving again to the company," upon certain conditions of trading. The patroons had also the liberty of disposing of their estates by testament. By the articles of capitulation of 1664, with the English Colonel Nicolls, it was stipulated that the people should still continue free denizens, and should "enjoy their lands, houses and goods, wheresoever they are within this country, and dispose of them as they please," and the Dutch "were to enjoy their own customs concerning their own inheritances." The grant from Charles II to the Duke of York, of March 12, 1664 (confirmed in 1674), was of all the lands, etc., in the province, to have and hold "in free and common socage, and not in capite, by knight service, yielding annually forty beaver skins." The tenure of land in the State seems, therefore, always to have existed as of common socage—i. e., a 'service not military or dependent on the will of the lord, it being remembered that military tenures were abolished by the Act of 1660, 12 Charles II, Chap. 24, supra.

The rules of the former law adopted by our courts, as to the principles of tenure in this State are, that no ultimate estate can remain in the grantor of lands in fee simple; and he has no possible reversion, by escheat or otherwise; and there are no conditions implied by law in his favor incident to the estate, such as existed under the ancient common law rules, arising out of the feudal relation.

But in the decisions of the courts on this subject, an important distinction is now drawn between conditions implied by the law of feudal tenures and those which the parties to a grant expressly mention and create in the conveyance, for the purpose of avoiding or defeating the estate. Any condition of the latter kind is held valid, if consistent with the general rules of law; and if the condition expressed in a grant be valid, a right of entry for its breach, reserved to the grantor or his heirs or assigns by the express terms of the grant, is also held valid, wholly independent of tenure.

It has been held, therefore, that since the Act of 1787, infra, concerning tenures, whatever was the law before its passage, it has not been possible to create a feudal tenure in this State; although the owner of an estate might be liable to conditions of rents and services inserted in the deed (as are consistent with the general rules of law), which might run with the land and bind heirs and assigns. Van Rensselaer v. Hays, 19 N. Y. 68; Van Rensselaer v. Dennison, 35 id. 393; Cruger v. McLaury, 41 id. 219. See, also, cases in Tit. IV, Chap. V, infra.

Dutch Grants.—As to these, vide supra, Chap I.

Grants from the Crown after 1775.—Vide supra, Chap. I.

The Duke of York's Charter of 1683, provided for the removal of all feudal restrictions on real estate on the decease of the ancestor. This charter was revoked, supra, Chap. I. See, also, Act of 1691, repealed by the

Restraints on Alienation. - By the Constitution of 1846, Art, I, § 15, all fines, quarter sales, or other like restraints upon alienation, reserved in any grant of land thereafter to be made, are void. See Const. 1804, Art. I, § 14.

The constitutional provision is declaratory merely. De Peyster v. Michael, 6 N. Y. 467. See Overbagh v. Patrie, 8 Barb. 28, 6 N. Y. 510. See also more fully as to this, Chap. V, Tit. IV.

Socage tenure.—By the Statute of 1787, infra, rent certain, or other services, consistent with socage tenure, were still retained. By socage tenure is meant a fixed rent or service, not military nor liable to change by the will of the lord.

· See infra, Chap. V. Tit. IV, more fully as to this subject.

General Knowledge of the Feudal Law.— Some knowledge of the feudal system of tenures, in view of the principles of the common law growing out of them, is still not an unnecessary branch of legal knowledge in this State. The interpretation to be placed upon constitutional and statutory law, an intelligent appreciation of the purposes of the changes effected by them, and the elucidation of legal principles in their daily application to the various phases of present civil life, are often due to researches amid the dim ruins of this venerable, social and legal system.

In the consideration of the principles of the common law, applicable to the conditions determining "Grants and leases in fee," in connection with the various constitutional and statutory changes in this State, has the light to be derived from an investigation of the ancient law of tenures been most frequently required; and the variety and frequent change in the expression of the judicial mind, in the range of cases in this State on this subject, is a matter of remark. See a review of such cases, *infra*, Chap. V, Tit. IV.

As many of the important cases relating to such conditional estates have been decided within the last half century, it is evident that some knowledge of the ancient law bearing upon the subject is still necessary.

TITLE V. SUBSTITUTION OF ALLODIAL ESTATES FOR FEUDAL TEN-URE IN THIS STATE.

The statutes of 1779 and 1787 of this State, which in terms affected tenures, are here given at some length, as frequent reference is made to their provisions. Their application is considered in Chap. V, Tit. IV, infra.

Act of 1779, Transferring the Seigniory of Lands from the King to the People.—By statute of October 22, 1779, § 14, the absolute property of all messuages, lands, tenements and hereditaments, and of all rents, royalties franchises, prerogatives, privileges, escheates, forfeitures, debts, dues, duties and services, by whatsoever names respectively the same are called and known in the law, and all right and title to the same, which next and immediately before the 9th day of July, 1776, did vest in or belong, or was or were due to the Crown of Great Britain, were declared to be, and since the 9th day of July, 1776, to have been, and forever thereafter were to be, vested in the People of this State, in whom the sovereignty and seigniory thereof are and were united and vested, on and from the said 9th day of July, 1776. (1 Jones and Varick, 44.)

The Act Concerning Tenures, of February 20, 1787 (1 R. L. 70).—Section 1. The first section enacts, "That it shall forever hereafter be lawful for every freeholder to give, sell, or alien the lands or tenements whereof he or she is, or at any time hereafter shall be, seized in fee simple, or any part thereof, at his or her pleasure, so always that the purchaser shall hold the lands or tenements so given, sold or aliened, of the chief lord, if there be any, of the same fee, by the same services and customs, by which the person or persons making such gift, sale, or alienation before held the same lands or tenements; and if such freeholder give, sell, or alien only a part of such lands or tenements to any, the feoffee or alienee shall immediately hold such

part of the chief lord, and shall be forthwith charged with the services for so much as pertaineth, or ought to pertain, to the said chief lord for the said parcel, according to the quantity of the land or tenement so given, sold, or aliened; and so in this case, the same part of the service shall remain to the lord, to be taken by the hands of the feoffee or alienee, for which he or she ought to be attendant and answerable to the same chief lord, according to the quantity of the land or tenement given, sold, or aliened, for the parcel of the service so due."

By the second section, all wardships, liveries, primer seizins, etc., by reason of tenure of knight-service, and all mean rates, gifts, charges, etc., incident or arising for wardships, liveries, etc., are to be deemed taken away from or arising for wardships, liveries, etc., are to be deemed taken away from Aug. 30, 1664. Also, all fines for alienations, seizures and pardons for alienations, tenure by homage, and all charges arising from wardship, livery, tenure by knight service, relief, aids, etc., are taken away from the same date. All tenures by knights' service, and by knights' service in capite, and the fruits and consequents thereof happened, or to happen, are abolished, any law, custom, etc., to the contrary notwithstanding.

§ 3. All tenures of honors, manors, lands, tenements, or hereditaments of any estate of inheritance at the common law, held either of the king or of any other person or persons, bodies politic, or corporate, before July 4, 1776, are turned into free and common socage, and are so to be construed from the time of the creation thereof and forever thereafter; and said honors, manors, etc., shall be forever discharged of all tenure by homage, escuage and charges incident to tenure by knight-service,

By the fourth section, all conveyances and devises of manors, lands, tenements, or hereditaments, etc., shall be expounded as if said manors, etc., were held in free and common socage only.

By the 5th section, the act is not to be construed as taking away rents certain or other services incidental or belonging to tenure in common socage, due to the State or any mesne lord, or other private person, or the fealty or distresses incident thereto.

By the 6th section, the tenure, upon former gifts, grants, conveyance, etc., made, or hereafter to be made, of manors, lands, etc., of any estate of inheritance, by letters patent of the State, or in any other manner, by the people, or commissioners of forfeiture, shall be allodial, and not feudal; and shall be discharged from all wardships, aids, renders, fealty, etc., and all other services whatsoever.

This Act of 1787 was repealed (3 R. S. 129), and the provisions of Revised Statutes, 178, §§ 2, 3, and 4 substituted, as below given. See further, as to this act, Chap. V, Title IV, and as to the English statute, "Quia emptores," of which it was the substitute.

Provisions of the Revised Statutes Abolishing Tenures, etc.—

- § 1. The people of this State, in their right of sovereignty, are deemed to possess the original and ultimate property in and to all lands within the jurisdiction of the State; and all lands, the title to which shall fail from a defect of heirs, shall revert or escheat to the people.
- § 2. All escheated lands, when held by the State or its grantees, shall be subject to the same trusts, incumbrances, charges, rents, and services to which they would have been subject had they descended; and the Supreme Court shall have power to direct the attorney-general to convey such lands to the parties equitably entitled thereto, according to their respective rights, or to such new trustee as may be appointed by the court.

- § 3. All lands within this State are declared to be allodial; so that, subject only to the liability to escheat, the entire and absolute property is vested in the owners, according to the nature of their respective estates, and all feudal tenures of every description, with all their incidents. are abolished.
- § 4. The abolition of tenures shall not take away or discharge any rents or services certain, which at any time heretofore have been, or hereafter may be, created or reserved; nor shall it be construed to affect or change the powers or jurisdiction of any court of justice in this State.

1 R. S. 718, Tit. 1.

Provisions of the Constitutions of 1846 and 1894.— §§ 10, etc. The people of this State, in their right of sovereignty, are deemed to possess the original and ultimate property in and to all lands within the jurisdiction of the State; and all lands the title to which shall fail from a defect of heirs, shall revert or escheat to the people.

All feudal tenures of every description, with all their incidents, are declared to be abolished, saving, however, all rents and services certain, which at any time *heretofore*, have been lawfully created or reserved.

All lands within this State are declared to be *allodial*, so that, subject only to the liability to escheat, the entire and absolute property is vested in the owners, according to the nature of their respective estates.

No lease or grant of agricultural land, for a longer period than twelve years, hereafter made, in which shall be reserved any rent or service of any kind, shall be valid.

All fines, quarter sales or other like restraints upon alienation, reserved in any grant of land hereafter to be made, shall be void.

Prior to the Constitution of 1846, there was no rule of law in this State prohibiting the reservation of a perpetual yearly rent in a grant of land in fee, as a condition of the estate, the breach of which might determine the estate. Van Rensselaer v. Dennison, 35 N. Y. 393. (See 1 R. S. 718, § 4, supra.)

The above constitutions further provide that —

"All grants of land within this State, made by the king of Great Britain, or persons acting under his authority, after the fourteenth day of October, 1775, shall be null and void; but nothing contained in this Constitution shall affect any grants of land within this State, made by the authority of the said king or his predecessors, or shall annul any charters to bodies politic or corporate, by him or them

made, before that day; or shall affect any such grants or charters since made by this State, or by persons acting under its authority," etc.

Const. 1846, Art. I, § 18; Const. 1894, Art. I, § 17. Similar provisions are in the constitutions of 1777 and 1822.

Restraints on Alienation.— See infra, as to "Restraints on Alienation," Chap. V, Title IV.

Tenures in this State.—See further on this subject, infra, Chap. V, Title IV and Fowler's Real Property Law (2d ed.), passim.

TITLE VI. DIVISION OF ESTATES, ETC.

By Revised Statutes of 1830, part 2, chap. I, tit. 3, § I, es1 tes in land are divided into estates of inheritance, estates for life,
estates for years, and estates at will and by sufferance.

- "§ 2. Every estate of *inheritance*, notwithstanding the abolition of tenures, shall continue to be termed a *fee simple* or *fee*; and every such estate, when not defeasible or conditional, shall be termed a *fee simple absolute*, or an *absolute fee*.
- "§ 5. Estates of *inheritance* and for *life* shall continue to be denominated estates of *freehold*; estates for *years* shall be chattels *real*, and estates at *will* or by *sufferance* shall be *chattel interests*, but shall not be liable, as such, to sale on executions.
- "§ 6. An estate during the *life* of a *third* person, whether limited to heirs or otherwise, shall be deemed a *freehold* only during the life of the *grantee* or *devisee*, but after his death it shall be deemed a *chattel real*.
- "§ 7. Estates, as respects the time of their enjoyment, are divided into estates in possession and estates in expectancy.
- "§ 8. An estate in *possession* is where the owner has immediate right to the possession of the land. An estate in *expectancy* is where the right to the possession is postponed to a future period."

These definitions of estates in "real property" were adopted and made part of the Real Property Law of 1896, with certain formal changes. See L. 1896, Chap. 547, §§ 20, 21, 23, 24, 25. See *infra*, in following chapters:

As to definition of estate, land, property, etc., vide supra, p. 113.

Vested Rights.— None of the provisions of the chapter of the Revised Statutes relative to estates in land, except those converting formal trusts into legal estates, shall be construed as altering or impairing any vested estate, interest, or right; or as altering or affecting the construction of any deed, will, or other instrument, which shall have taken effect at any time before the chapter should be in force as a law. 1 R. S. 750.

Brewster v. Brewster, 32 Barb. 429; De Peyster v. Clendening, 8 Paige,

304; 26 Wend. 23.

As to estates in expectancy or in future, see Chap. IX.

As to freehold estates of inheritance and not of inheritance. See Chaps. V and VI.

CHAPTER V.

FREEHOLD ESTATES OF INHERITANCE.

TITLE I. FEES SIMPLE ABSOLUTE.

II. FEES TAIL.

III. CONDITIONAL AND QUALIFIED FEES.

IV. GRANTS AND LEASES IN FEE CONTAINING CONDITIONS OF FORFEITURE.

A freehold estate was, by feudal law, an estate held by a freeman independently of the will of the lord, as opposed to those of a lower order liable to be determined at his pleasure.

The English common law writers divide estates into estates of inheritance or not of inheritance. The former were divided into —

I. Absolute, or fee simple.

2. Limited, such as estates in fee tail.

Our Revised Statutes of 1830 provide that "Every estate of inheritance, notwithstanding the abolition of feudal tenures, shall continue to be termed a *fee simple*, or fee; and every such estate, when not defeasible or conditional, shall be termed a fee simple absolute, or an absolute fee."

1 R. S. 722, § 2.

The Real Property Law re-enacted this as follows:

"An estate of inheritance continues to be termed a fee simple, or fee, and, when not defeasible or conditional, a fee simple absolute, or an absolute fee."

L. 1896, Chap. 547, § 21.

TITLE I. FEES SIMPLE ABSOLUTE.

Fee Simple.—A tenant in fee simple absolutely holds to himself and his heirs forever. It is the highest estate in law, and was the most extensive interest that one, by the common law, could have in a feud: being an absolute inheritance, clear of any condition of limitation or duration, or restrictions to particular heirs, but descendible to heirs generally. The estate confers an unlimited power of alienation. The word "heirs," by the common law is necessary, in some part of the grant, in order to confer a fee. If that word was omitted, only a life estate passed. This was a relic of the feudal rule, the donation being made in consideration of the

personal abilities of the feudatory, and for his benefit alone, unless otherwise provided. The rule continued in force in this State until abolished by the Revised Statutes of 1830, *infra*.

Under the Duke of York's laws (1665), promulgated by the first English governor, Nicolis, estates of inheritance in fee could only pass under these words or words of a like effect, viz., "to have and to hold to, etc., his heirs and assigns forever."

The strictness of the rule was modified by other rules, and when the transfer of the estate was by "fine" or "common recovery," releases by way of the extinguishment or discharge, partition, or to a "corporation;" and transfers between joint tenants and tenants in common; also, where the *intent* of a testator in a will is evident to convey a fee; then a fee might pass.

See more fully as to title by devise, infra, Chap. XV.

Words of Inheritance not necessary since 1830, to pass a fee.— In this State the Revised Statutes of 1830 provide: "The term 'heirs,' or other words of inheritance, shall not be requisite to create or convey an estate in fee; and every grant or devise of real estate, or any interest therein, thereafter to be executed, shall pass all the estate or interest of the grantor or testator, unless the intent to pass a less estate or interest shall appear, by express terms or be necessarily implied in the terms of such grant."

Vol. 1, 748, § 1.

The Real Property Law provides: "The term 'heirs' or other words of inheritance are not requisite to create or convey an estate in fee," * * * and "a grant or devise of real property passes all the estate or interest of the grantor or testator unless the intent to pass a less estate or interest appears by the express terms of such grant or devise or by necessary implication therefrom." * * *

L. 1896, Chap. 547, §§ 205, 210.

The Revised Statutes also provide that in the construction of instruments the courts shall carry out the manifest *intent* of parties.

See also to same effect, The Real Property Law, § 205.

It will therefore be necessary, pursuant to the above common law rule, in examining title to real estate where the property passed before 1830, to observe, whether in the deed or will transferring an estate, the proper words of inheritance are used.

As to exceptions to the former rule in cases of devises, see infra, Chap. XV.

TITLE II. FEES TAIL.

Among conditional fees at the common law was a fee restrained to some particular heirs — as to the heirs of a man's body, or to the heirs male of his body; in which cases only his lineal descendants, or his lineal male descendants, were admitted, to the exclusion of collateral heirs and lineal females respectively.

On failure of these, the land reverted to the lord of the feud or his heirs.

These gifts being on condition, if the grantee had the heirs, indicated, the condition was considered as performed, and the estate to which the condition was annexed became absolute, and the grantee could alien the estate, absolutely, after the designated class of heirs were in esse, and thus cut off the reversion. He could even alien on condition, prior to the birth of such issue.

To prevent this action of tenants, the statute "De donis conditionalibus," 13 Edw. I, Chap. I, was passed, which restored, in a measure, the feudal restraints and prevented the alienation, on heirs being born and thus preserved the reversion.

Year Book, Edw. I, Vol. 22, preface.

Under this statute it was determined that the donee took a fee tail (or fee taille, or cut-off), and the reversionary fee simple of the land remained in the donor expectant on the failure of issue of the donee. It was also determined that the grantee should have no power to alien the land, and so cut off the prescribed heirs.

The several species or varieties of estates tail need not here be enumerated, as the estate, by our law, has been abolished; although some of the principles and the history of these estates are given, as they have been in existence in this State up to a not very remote period, being now turned by the Revised Statutes into fees simple; even at the present day, however, they are occasionally subjects of investigation before our courts.

As the word heirs was necessary to create a fee, so the word body, or some other word of procreation was necessary to create a fee tail as a designation of the class to whom the estate was limited. Both words of inheritance and words of procreation were therefore required; and an estate tail necessarily implied issue in an indefinite succession.

In wills, however, wherein greater indulgence is allowed, an *estate tail* might be created by less regular and technical mode of expression, provided the intent were manifest.

Estates tail thus established remained for a certain time in full force and effect, under the influence of great landed proprietors, being conducive to their power and influence, by preserving their estates in each family.

A subsequent policy, however, allowed the heirs to be cut off and turned the estate into a fee simple through a "common recovery," which was a fictitious proceeding introduced to evade the effect of the statute "De donis," and operating in law as an assurance and conveyance of the land. A fine had, as against issue, the same effect. These proceedings gave an absolute power of disposal of the estate, as if the tenant in tail were tenant in fee simple.

In England fines were regulated by statute subsequent to the reign of Edward I. 18 Edw. I, Chap. 4; 34 Edw. III, Chap. 16; 4 Hen. VII, Chap. 24. Eventually they were declared by statute, when levied by tenant in tail to be a bar to him and his issue, 29 Hen. VIII Chap. 36

Fines and recoveries were established by the statutes of this State. For the proceedings under them see "An Act concerning Fines and Recoveries, etc.," Law of February 26, 1787 (1 Green. 377), April 8, 1808 (5 Web. 405), April 5, 1813, April 14, 1827. 1 R. L. 358. The Revised Statutes, however, expressly abolish them. 2 R. S. 343, § 24; McGregor v. Comstock, 17 N. Y. 162.

This statute, 2 R. S. 343, § 24, abolishing fines and recoveries was in its turn repealed, without reviving the fines and recoveries, however. See L. 1880, Chap. 245, §§ 1, 10.

Estates Tail Abolished.— Estates tail were introduced into the former part of the law of this State, subject to being barred by a fine or common recovery, until by Statutes of July 12, 1782, and of February 23, 1786 (I Greenleaf, 205) repealing the Act of 1782, and I R. L. 52, they were abolished and persons seized in fee tail were to be deemed seized of the same, in fee simple absolute.

Grant v. Townsend, 2 Denio, 336; Lott v. Wykoff, 2 N. Y. 355; Jackson v. Brown, 13 Wend. 347. The Act of July, 1782, acted prospectively. Jackson v. Van Zandt, 12 Johns. 169.

It has been held that this Statute of 1786, included an estate tail in remainder, as well as in possession. Wendell v. Crandall, 1 N. Y. 491; Van Rensselaer v. Poucher, 5 Denio, 35; Van Rensselaer v. Kearney, 11 How. (U. S.) 298.

Estates tail are not prohibited by this statute, but when created are turned into fees simple. Lott v. Wykoff, 2 N. Y. 355; Prindle v. Beveridge, 7 Lans. 225, affd. as Lytle v. Beveridge, 58 N. Y. 592; Rivard v. Gisenhof, 35 Hun, 247; Buel v. Southwick, 70 N. Y. 581; Nellis v. Nellis, 99 id. 505, 511.

By the Revised Statutes of 1830, it is provided: "Estates tail have been abolished; and every estate which would be adjudged a

fee tail, according to the law of this State, as it existed previous to the twelfth day of July, one thousand seven hundred and eighty-two, shall thereafter be adjudged a fee simple, and if no valid remainder be limited thereon, shall be a fee simple absolute," and "where a remainder in fee shall be limited upon any estate, which would be adjudged a fee tail, according to the law of this State, as it existed previous to the time mentioned in the last section, such remainder shall be valid as a contingent limitation upon a fee, and shall vest in possession on the death of the first taker, without issue living at the time of such death."

Vol. I, 723, §§ 3, 4.

With reference to the saving of remainders on a fee tail, see Matter of Moore, 152 N. Y. 602; Harriott v. Harriot, 25 App. Div. 245, 248.

These two sections are now comprised in § 22 of the Real Property Law, L. 1896. Chap. 547.

Right to Alienate Lands.— By the Act of Feb. 20, 1878 (Sess. 10, Chap. 36), all freeholders were authorized to alien at pleasure any lands whereof they were seized in fee simple, subject to any services or charges thereon, and by the Revised Laws of 1813 any person seized of an estate in lands may alien the same. Also by I R. S. 719, § 10, any person capable of holding lands may alien the same, or any interest therein subject to the restrictions and regulations of law. This provision authorizing alienation is now § 3 of the Real Property Law; L. 1896, Chap. 547.

As to the Law of 1787 more fully, infra, Title IV.

TITLE III. CONDITIONAL AND QUALIFIED FEES.

A base or qualified fee is one that has a qualification subjoined, and which must be determined whenever the qualification annexed to it is at an end; e. g., as a fee to one and his heirs, tenants of such a manor, or until the marriage of A. This estate, though a fee, and one which might endure forever, yet, as its duration might be determined by collateral circumstances, was considered not an absolute, but a qualified or base fee, the condition being subsequent. Other qualified fees have conditions annexed, the performance of which is necessary to the vesting of the estate. The determinable quality of these fees follows any transfer thereof.

The following conditions, or limitations, on fees have been held valid in this State:

A grant on condition that the grantee, his heirs and assigns, shall not at any time manufacture or sell intoxicating liquor, etc., on the premises. Plumb v. Tubbs, 41 N. Y. 442; Smith v. Barrie, 32 Alb. Law Journal, 89 (Mich. 1885). Or keep a tavern there. Post v. Weil, 115 N. Y. 361.

On condition not to build on the land under penalty of forfeiture. Gibert v. Peteler, 38 N. Y. 165.

On condition that the grantee should support the grantors. Spaulding v. Hallenbeck, 39 Barb. 80.

A devise to a person "until Gloversville shall be incorporated as a village." Leonard v. Burr, 18 N. Y. 96.

A grant to the corporation of New York of lands to be appropriated

and used for a public square, etc. Stuyvesant v. Mayor of New York, 11 Paige, 415; Mayor v. Stuyvesant, 17 N. Y. 34.

A grant on a condition to build and maintain a certain dam. 20 Barb. 455.

To erect salt works. Parmelee v. O. & S. R. R. Co., 6 N. Y. 74.

In Massachusetts, a devise of land to a town for a school house, provided it be built within a certain distance of the church, has been held valid, as a condition subsequent; and the vested estate would be forfeited and go over

a condition subsequent; and the vested estate would be forfeited and go over to the residuary devisee, as a contingent interest, on noncompliance, within a reasonable time, of the condition. Hayden v. Stoughton, 5 Pick. 528.

A-base fee held in trust on conditions determining it, is capable of transfer. Grant v. Townsend, 2 Den. 336; Mayor v. Stuyvesant, 17 N. Y. 34; 4 Kent, 10. And see fully on the point of leases in fee, rights of re-entry, determinable fees, and restraints on alienation, infra, Title IV.

The conditions, on which qualified or conditional fees are held. are either precedent or subsequent. A precedent condition is one which must take place before the estate can vest; and in general the performance is necessary, and courts cannot relieve from the consequences of a nonperformance. Whether a condition is precedent or subsequent depends upon the intention of the parties as expressed in the deed, or to be implied, therefrom; no express form of words being requisite.

Towle v. Remsen, 70 N. Y. 303, 311; Craig v. Wells, 11 id. 315.

Subsequent conditions act upon estates already created or vested. and render them liable to be defeated - such as on failure to pay rent, or the performance of other stipulations. The effect of a deed with condition subsequent is to vest the estate in fee, subject to be defeated by omission to perform, and entry by the grantor or his heirs, even though there be no clause of re-entry in the deed.

Where the condition has been once performed, and the estate vested thereunder, a subsequent failure to continue the performance of the condition does not, of itself, divest the estate. As the breach of a condition subsequent does not forfeit or divest the estate vested, but confers merely a right of entry on the grantor or his heirs, the performance of the condition may be specifically or impliedly waived by them. The grantor or his heirs can alone enter for the breach of a condition subsequent. A stranger cannot do so.

Also see with reference to the above principles: Ives v. Van Auken, 34 Barb. 566; Spaulding v. Hallenbeck, 39 $i\bar{d}$. 79; Ludlow v. N. Y. & H. R. R., 12 id. 440; Nicoll v. N. Y. & E. R. Co., 12 N. Y. 121; Mead v. Ballard, 7

Wall. (U.S.) 290; Fonda v. Sparrow, 46 Barb. 109; Underhill v. Saratoga, etc., R. R., 20 id. 456; Duryee v. Mayor of N. Y., 96 N. Y. 477; Wheeler v. Dunning, 33 Hun, 205; Towle v. Remsen, 70 N. Y. 303. As to who is a stranger, see Post v. Weil, 115 N. Y. 361.

It is also a principle that if land is granted as one piece, subject to a condition, the condition is entire, and a breach of it gives a right to re-enter for *all* the land.

Tinkham v. E. R. R., 53 Barb. 393. See also Title IV, infra.

If the condition be destroyed, performed, released or barred by estoppel or limitation, the estate is no longer defeasible, but becomes absolute; and if the forfeiture is once waived, the courts will not enforce it thereafter.

So also, if the reversion is granted by the maker of a condition contained in a previous grant, the condition is gone.

Tinkham v. E. R. R., 53 Barb. 393; Co. Litt. 215, a. b.; Towle v. Remsen, 70 N. Y. 303; Wheeler v. Dunning, 33 Hun, 205.

Determination of the Nature of the Condition.— Whether the words in an instrument amount to a condition precedent or subsequent, or a limitation, or a covenant (sounding merely in damages), is matter of construction, and the distinctions on the subject are nice and artificial, but in the main depend on the sense and meaning of the entire instrument.

Erwin v. Hurd, 13 Abb. N. C. 91; Stanley v. Colt, 5 Wall. 119; McCullough v. Cox, 6 Barb. 387; Underhill v. The Saratoga, etc., R. R., 20 id. 455; Parmelee v. Oswego, etc., R. R., 6 N. Y. 74; Fonda v. Sage, 46 Barb. 109, affd., 48 N. Y. 173, and see infra, this chapter. See Anonymous, 2 Abb. N. C. 56; Post v. Wiel, 115 N. Y. 361; Kelley v. Hogan, 71 App. Div. 343.

In determining whether a condition in a deed is precedent or subsequent, the main test is whether the *vesting* or enlarging of the estate granted by the instrument containing it, is postponed until the happening of the contingent event forming the condition, or is to be divested by it. If the act or condition does not necessarily precede the vesting of the estate, but may accompany or follow it, and if the act may as well be done after as before the vesting of the estate, or if, from the nature of the act, it is evidently the intention of the parties that the estate shall vest and the grantee perform the act after taking possession, then the condition is subsequent. The precedence of conditions, therefore, depends upon the order of time in which the intent of the transaction requires their performance.

Illegal, Impossible and Personal Conditions.—If the condition be impossible at the time of making it, or against law, the estate, being once vested, becomes absolute. So if the condition be personal, as that the lessee shall not sell without leave, the executors of the lessee, not being named, may sell without incurring a breach.

So also illegal conditions would be nugatory, such as a general restraint against marriage (except as against the testator's widow), or conditions against public morals or policy.

So also if the performance of the condition which is to divest an estate, becomes impossible by the act of God, the condition is discharged.

McLachlan v. McLachlan, 9 Paige, 534.

Nonperformance of a Condition Precedent .- Advantage cannot be taken of the nonperformance of a condition precedent by one who has himself prevented its performance. Jones v. Walker, 12 B. Mon. 163; Lamb v. Clark, 2 Wms. (29 Vt.) 273.

And, under a condition precedent, the right to the estate does not accrue,

although the performance of the condition becomes impossible by the act of God. Mizell v. Burnett, 4 Jones' Law (N. C.), 249; Wells v. Smith, 2 Edw. 78, affd., 7 Paige, 22.

Condition lost by License.—If a lease contained a condition that the lessees or their assigns should not alien without license, a license given to one of three lessees dispenses with the condition as to all, on the ground that, the condition being entire, it cannot be apportioned or divided. This, however, would not be the case with a covenant not coupled with a condition. Smith's Leading Cases; Dumpor's Case, 4 Co. 119, b; 4 Taunt. 735; 14 Vesey, 173; Dakin v. Williams, 17 Wend. 447, affd., 22 id. 201.

Tender of Performance.—A tender of performance at the day, will save a condition; and, if the tender be refused, the land may be discharged, as in the case of a mortgage, while the debt remains. 4 Kent, 146.

Covenants as Conditions.—Where mutual covenants in an instrument go to the whole consideration on both sides they are held mutual conditions, the one precedent of the other; but when the covenants go only to a part of the consideration, the remedy is by damages, and the covenant is held not a condition precedent.

Boone v. Eyre, 1 H. Bl. 254; McCullough v. Cox, 6 Barb. 387; Anonymous,

2 Abb. N. C. 56; Countryman v. Beck, 13 id. 110. In the case of Grant v. Johnson, 5 N. Y. 247, the dependence or independence

of covenants is held determined by the order of time of their performance.

The courts will incline to consider a clause a covenant rather than a condition. Countryman v. Beck, 13 Abb. N. C. 110; Howell v. L. I. R. R. Co., 37 Hun, 381; Post v. Weil, 115 N. Y. 361.

Graves v. Deterling, 120 N. Y. 447; Cunningham v. Parker, 146 id. 29.

Conditions Implied by Law.—The doctrine of estates upon condition in law, that is, such estates as had a condition impliedly annexed to them, without any condition expressed in the deed or

will, resulted from the obligations arising out of the feudal relation. Estates for life or years were held on implied conditions that the tenant should not alien nor commit waste, or do any other act prejudicing the reversion. Rents and services of the feudatory also were considered as conditions annexed to the fief, and, on default, the donor or his heirs might resume possession, and no other persons could, by the common law, take advantage of conditions that required a re-entry to revest the estate.

When the grantor entered he was seized as of his former estate. His entry, or that of his heirs, defeated the livery made on the creation of the original estate, and, consequently all subsequent estate or remainders dependent thereon.

Conditions in Terms for Years.—Where land is given for a term of years, and a condition is annexed determining it, the estate ipso facto ceases as soon as the condition is broken without an entry. An exception to the rule is where the lease provides, expressly, that the landlord shall enter in case of a breach of the condition. 6 Bar. & Cress. 519; Parmelee v. Oswego, etc., R. R., 6 N. Y. 74; Brown v. Evans, 34 Barb. 494; Beach v. Nixon, 9 N. Y. 35; Stuyvesant v. Davis, 9 Paige, 427, 431.

Actions by Third Parties.—It is held that persons not parties to a conveyance may have an action in equity for breach of covenants made for their benefit. Gilbert v. Peteler, 38 N. Y. 165.

As for example, restrictions against nuisances. Barrow v. Richard, 8 Paige, 351; Bleecker v. Bingham, 3 id. 246.

But breach of a condition will not be enjoined. Erwin v. Hurd, 13 Abb. N. C. 91.

And it is a general rule that any one who has an interest in the condition, or in the lands to which it relates, may perform it. Wilson v. Wilson, 38 Me. 18.

Conditions Subsequent, as Restraints on Alienation, etc.-Courts will relieve parties, if possible, against the results of nonperformance of conditions subsequent, especially where the result of accident or omission; although they will not relieve against acts of commission directly in the face of the instrument.

Conditions subsequent are not favored by law, and are construed strictly, and if they are or become impossible, either by the act of God or of the law, or of the grantor, the estate is relieved from them. Conditions are not sustained when they are repugnant to the estate granted, such as a condition annexed to a conveyance or devise in fee, that the grantee or devisee should not alien, or commit waste, nor his wife have dower.

Newkirk v. Newkirk, 2 Caines, 345; De Peyster v. Michael, 6 N. Y. 467;

Newkirk v. Newkirk, z Caines, 340; De reyster v. Michael, o N. 1. 401; Jackson v. Delancey, 13 Johns. 537; Jackson v. Robbins, 16 id. 537; Horne v. Campbell, 100 N. Y. 287; Greyston v. Clark, 41 Hun, 125.

A devise to one with the right to convey by deed or will is an absolute gift, and a limitation over in case the devisee dies seized of the property and without disposing of it in his will, is void as repugnant. Kelley v. Hogan, 71 App. Div. 343.

As to strictness of construction of condition, see Woodworth v. Pavne.

As to condition reserved in leases in fee, rights of entry, etc., see infra, Title IV.

Limitations.—If the estate be limited in duration, the defeasance is the result of a "limitation" which determines the estate without entry by the grantor or his heirs, or him who has the expectant interest - whereas on "condition" broken the estate is not defeated until entry, or by ejectment, its substitute.

Conditional Limitations.— These were of a mixed nature, and generally found in wills and conveyances to uses. They tended to divest, by condition subsequent, the estate before the time limited; and the estate would vest in a stranger having the expectant estate, without entry, contrary to the rule of law that a stranger could not take advantage of a condition broken.

The Revised Statutes provide: "A remainder may be limited on a contingency, which, in case it should happen, will operate to abridge or determine the precedent estate; every such remainder shall be construed a conditional limitation, and shall have the same effect as a limitation would have by law."

1 R. S. 725, § 27.

The Real Property Law provides: "A remainder may be limited on a contingency, which, if it happens, will operate to abridge or determine the precedent estate; and every such remainder shall be a conditional limitation."

L. 1896, Chap. 547, § 43; Parmelee v. Oswego R. R., 6 N. Y. 74; Kelley v. Hogan, 71 App. Div. 343.

As to the difference between a condition and a conditional limitation, see Beach v. Nixon, 9 N. Y. 35.

There were other refinements of law on this abstruse subject which can-

not here be further pursued. See also Mayor v. Stuyvesant, 17 N. Y. 34.

On the determining of a conditional limitation, the land becomes divested, v. Evans, 34 Barb. 594; Stanley v. Cox, 5 Wall. 119.

As to necessity of watching for breach of condition. Rose v. Hawley, 118 N. Y. 502; 133 id. 315; 141 id. 366.

For a fuller consideration of this subject, see Fowler's Real Property Law (2d ed.), 156 et seq.

Infants and Married Women .- These are under equal obligation as others in the performance of conditions annexed to real estate.

Garret v. Scouten, 3 Denio, 334; Co. Litt. 246b; Havens v. Patterson, 43 N. Y. 218; Ludlow v. N. Y. & H. R., 12 Barb. 440.

TITLE IV. GRANTS AND LEASES IN FEE CONTAINING CONDITIONS OF FORFEITURE.

Questions on the legality and effect of restrictions or conditions determining estates transferred under leases or grants in fee, have been a fruitful source of litigation in this State, and have called forth much legal research and learning in their investigation.

The points raised are of interest, and a brief summary of the legislation and judicial determination bearing on the subject is given, particularly, as such grants and leases are still frequently presented to the courts for construction, although generally of quite remote origin, many dating back to the Colonial period.

According to the English feudal system, tenants, whether holding mediately or immediately of the king, had no right to alien or devise the feud, without consent of the immediate lord of whom they held. This practice was detrimental to the great lords holding fiefs of the crown, as they were deprived of escheats, wardships, fines, and other fruits of the tenure.

By charter of Henry III (1225), and the statute of Westminster, commonly called "Quia emptores," (18th Ed. I, Chap. 1), enacted in 1290, important changes were made. This statute recited that purchasers of fees had entered into them to the prejudice of chief lords, who had thereby lost their escheats, and enacted that thenceforward every freeman should be authorized at pleasure to alien his estates; to be holden, however, by the same services and customs, and of the same chief lord of whom it was held before. Tenants in capite, holding of the king, had still to procure a license to alien.

The effect of this act was that thenceforth no new tenure of lands which had already been granted by the sovereign could be created. Every subsequent alienation placed the feoffee in the same feudal relation which his feoffor before occupied; that is, he held of the same superior lord, by the same services, and not of his feoffor. The principle of tenures was left untouched by the act, but the progress of subinfeudations was arrested.

This statute, also, by declaring that every freeman might sell his lands at his pleasure, removed the former feudal restraints, which prevented the tenant from selling his land, without the license of his grantor, who was, before the statute, his feudal lord.

The statute, by changing the tenure from the immediate to the superior lord, took away the reversion from the immediate lord, i. e., the grantor, and thus deprived him of the power of imposing by expressed condition, the same restraints as theretofore existed by force of and under the feudal law. This right to restrain

alienation ceased when the statute abolished the feudal relation between him and his grantee.

Such restraints on alienation were therefore held to be lawful before the statute "Quia emptores," but unlawful thereafter, except as far as the king was concerned, whom the statute did not reach.

As between the grantor and grantee, also, the statute made all the covenants of the latter personal, and not binding the land in the hands of the assignee; thus practically preventing subinfeudations.

The main object of that statute "Quia emptores," and of the first section of our act concerning tenures (1787, infra), was to reverse the old rule restraining alienation by tenants, so that the right of alienation was made incident to the great and followed of sources.

incident to the grant, and followed, of course.

By Stat. Edw. III, Chap. 12, tenants holding in capite of the Crown directly could purchase a license; and if they sold without one they suffered a specified fine for the alienation.

The Statute of Charles II.—By the Stat. of 12 Charles II, Chap. 24, fines on alienation were abolished, with exception of certain tenants in capite and by copyhold.

The same statute abolished tenancy by knight service, or military tenure; and converted tenures into that of free and common socage; that is, into a fixed and determinate service not military.

The Statute Quia Emptores in this State.— It has been questioned in the range of cases that have passed before our courts, bearing on this subject, whether the statute "Quia emptores" ever actually was in force in this State. It has been considered to have been reenacted here by the Act of Feb. 20, 1787, concerning tenures (supra Chap. IV, and infra), and by some jurists held not to have been in force at all under the Colonial or State governments.

See the case of De Peyster v. Michael, 6 N. Y. 467, supra. Cf. Fowler's History of the Law of Real Property, 54 et seq.; Fowler's Real Property Law (2d ed.), 54, 63, 106, 83, note 37.

Under the decisions in other cases, however, the principles of the statute "Quia emptores," were supposed to have been transmitted and established here as part of our colonial legal system, And this view must now be held to be clearly established as correct,

In the latter cases, lands were deemed to be holden in this State under grants from the Crown; and, as the king was not within the statute "Quia emptores," a certain tenure, which, after the act of 12 Charles II, Chap. 24, supra, abolishing military tenures, must have been merely that of free and common socage, was created between the king and his grantees.

The latter view is entertained, among others, in the case of Van Rensselaer v. Hays, 19 N. Y. 96, Judge Denio also expressly holding that the law forbidding the creating of new tenants by means of subinfeudation was always the law of the colony, and that it was the law of the State, both before and after the Act of 1787, concerning tenures, below mentioned. Consequently no tenures, it was held, arose in the colony upon grants made by others than the Crown, although the King could license his immediate tenants to create seigniories, and to grant land to be holden of the patentees. The court, in the latter case, comments upon the opinions expressed in the above cited case of De Peyster v. Michael, as to the existence of the statute Quia emptores in this colony and State, and holds that there was a misconception of the law as expressed in that case, founded on an erroneous view of the history of tenures in this colony.

Under the colonial rule, it is to be observed, a number of manor grants were made, by which manors were created within the province, and the patentees were authorized to grant land within those manors to be holden of them and their heirs as immediate lords, to whom, by the feudal tenures thus created, fealty was due, and who were entitled to the reversions or escheats in the same manner as the mesne lords in England before the

statute "Quia emptores."

In the above case of De Peyster v. Michael, it is urged as one argument against the existence of that statute in this colony, that if it had existed, such patents as above would not have been made; and it is claimed there, that the Statute of 1787 recognizes them, in excepting from the operation of that statute the fealty and feudal services due to mesne lords on conveyances made before July 4, 1776.

The questions that have arisen and been determined with respect to these

manor grants, will be given in a subsequent part of this title.

The case of De Peyster v. Michael also holds that, inasmuch as the statute "Quia emptores" was never in force here, it follows that restraints on alienation in grants in fee made in the colony, before the Acts of 1779 and

alienation in grants in fee made in the colony, before the Acts of 1779 and 1787, were valid, and that these statutes by their terms acted retrospectively, the one from the 9th and the other from the 4th of July, 1776.

The Statute of 1779, it was held, transferred the seigniory and escheat of lands to the people of the State, who then became the chief lords of the fee; and, by the operation of the Statute of Tenures (1787), the right to escheat lands in fee granted by proprietors of patents before the Revolution became vested in the people, on any transfer being made, if not immediately on the passage of the act. Thus tenures between the landholder and the people were substituted for those between landholders and individuals; and the above statutes converted rents upon leases in fee from rent service, and by taking away the grantor's right of into rent charges, or rent seck; and by taking away the grantor's right of

reversion or escheat, they removed the entire foundation on which the power of a grantor to restrain alienation by his grantee formerly rested.

In Van Rensselaer v. Hays, 19 N. Y. 96, however, the court expresses the opinion that the Statute of 1787 had no retrospective effect upon tenures. Any change in the common law of tenures in the State affecting grants made before that statute took effect would consequently, under such view, have resulted from the effect of the statute "Quia emptores," which, the court holds, was brought by our ancestors to the colony, and became part of its

law, and the law of the State.

The decision of Van Rensselaer v. Hays must be considered as overruling other decisions in the State, and particularly certain dicta in Van Rensselaer v. Smith, 27 Barb. 104, where it is held that the statute "Quia emptores" was never in existence in this State; and, therefore, did not affect fee farm grants or leases here; but that the rules of the common law applied to them, until modified by the subsequent statutes. See Delancey v. Piepgras, 138 N. Y. 26, to the effect that tenure created by royal grant was not affected by the statute Quia emptores and every conveyance emanating from the crown reserving rent still created a rent service involving the possibility of forfeiture.

These subsequent statutes of 1779 and 1787, infra, while in terms destroying feudal tenure and substituting allodial estates, preserved some feudal incidents, such as rents certain or other services incident to tenure in common socage; and the feudal incidents of fealty and distress were reserved to grantors of lands in fee or for life or years; but the right of escheat was

The following is a digest of the statutes of 1779 and 1787, above referred to:

The Statute of 1779.—By the 14th section of the Act of Oct. 22, 1779, the absolute property of all messuages, lands, tenements, etc., and of all rents, royalties, debts, dues, services, etc., and all right to the same which before July 9, 1776, belong to or were due to the crown of Great Britain, were declared to be since said day vested in the people of the State, in whom the sovereignty and seigniory thereof are and were declared to be united and vested since said day.

The Statute of 1787 (1 R. L. 70), following the principle of the statute "Quia emptores," made the right of alienation necessarily incident to a grant, unless the parties qualified the right by express condition or stipulation, which, according to the general rules of law, had to be of such a nature, however, as not to be entirely repugnant to the grant, nor unlawful, nor impossible of performance.

That statute provided as follows, in its first section, which is substantially a transcript of the statute "Quia emptores:" "That it shall forever hereafter be lawful for every freeholder to give, sell or alien the lands or tenements whereof he or she is. or at any time hereafter shall be, seized in fee simple, or any part thereof, at his or her pleasure, so always that the purchaser shall hold the lands or tenements so given, sold or aliened, of the chief lord, if there be any, of the same fee, by the same services and customs by which the person or persons making such gift, sale or alienation, before held the same lands or tenements."

The rest of the section provided that any alienee, as above, should hold of the chief lord, and should be charged with the proportionate part of the service for the part aliened, to the chief lord.

The rest of the section is given in full, supra, Chap. IV; also a digest of

the other sections of said act.

This statute was based upon an Act of April, 1691 (Brad. 1, 4, repealed in 1697 by the Crown), which abolished all feudal military services and incidents, also all fines for alienation, seizures, and pardons for alienations, tenure by homage, and all charges incident or arising by reason of wardship, livery, etc., from date of August 30, 1664, when the province was surrendered by the Dutch to the English. This Act of 1787 also abolished all tenure in socage, in capite; converted all manorial and other tenures into free and common socoge; and required all conveyances and devises of lands, etc., to be expounded as if so held in free and common socoge. The 5th section reserves rents and services due to tenure in free and common socage to those entitled to them; i. e., to the People, or any mesne lord, or other person, or the fealty or distress incident thereto. See the act, more fully given, Chap. IV, supra. The sections of this act, except the first, are a substantial re-enactment of the Act of 12 Charles II, Chap. 24, abolishing military and other incidents of

The Statute of 1787 was repealed by the general repealing Act of 1828, and the provisions of the Revised Statutes of 1830 (§§ 3 and 4, 1 R. S. 714), were substituted (supra, Chap. IV). The revisers, in their notes, expressed the opinion that the Act of 1787 was unnecessary, and that no feudal tenures had existed here before its enactment.

The question as to whether the statute "Quia emptores" ever had existence here had especial reference to the construction of the effect of restraints on

alienation and conditions of forfeiture in grants or leases in fee.

Such leases in fee created an estate of inheritance in the grantee, his heirs and assigns, subject to the payment of rent reserved and performance of certain conditions. They created what was anciently called a fee farm estate, and the fee farm rent was a perpetual rent charge issuing out of the estate in fee, or a "rent service," if a reversion were deemed to be still remaining in the grantor.

Being estates in fee simple, vested in the grantees thereof, it was urged that no reversionary interest whatever remained in the grantors or lessors, and that they were therefore subject to the operation of the general legal principles which forbid restraints on alienation, in all cases where no feudal relation existed between the grantor and grantee. The important question was to determine whether that technical feudal relation ever existed at all in the

Colony, and if it did, how far it had been modified by statute.

Definition of Rent Charge and Rent Service, etc.—Rent service was so called because it had some corporeal service incident to it, at least fealty, or the feudal oath of fidelity. Where fealty was due, therefore, with a pecuniary rent, and the landlord had the reversionary interest in the demised premises, then the landlord had, by common law, a right to distrain without any power in the lease.

Rent charge is a rent reserved where the landlord has no reversionary interest. He would have, for such rent, no right to distrain, unless the powers were contained in the lease, or specially conferred by statute.

Rent seck is the same as rent charge, except that there is no right to distrain reserved. See De Lancey v. Piepgras, 138 N. Y. 26.

Restrictions and Conditions.—As a remnant of the policy of feudal proprietorship, it had become the habit of the great landholders in the Colony, since its earliest history, for the purpose of retaining property more or less under the control of the grantors, and of restricting its occupation to tenants of their own selection, to grant leases for lives, or perpetual leases in fee, to the grantees or lessees and their heirs, on one or more of the conditions, that, in case of sale by the lessee, his executors, etc., or assigns, the lessor or his heirs, etc., should have a pre-emptive right, or refusal of buying, or that there should be no sale without written permission of the lessors, their heirs, etc.; or that, in case of sale, there should be a proportion of the purchase-money paid to the lessor, etc., within a specified time.

In case these conditions were not performed, there was provision that the granted or demised estate should cease, and a right of entry thereupon result.

Questions arose as to whether or not these conditions were opposed to the provisions of the law of "Quia emptores," if it ever existed here, and to that of 1787, as imposing restraints on alienation, and were or were not repugnant to the estate conveyed, and therefore void under the general principles of law; or whether under the operation of the common law they were not valid as not being within the operation of any statutes.

It was held at first, by the courts of this State, that the power to make such leases existed, and particularly that the clause in the lease restricting assignment unless by permit, was not repugnant to the grant and as such

The estate conveyed was held a valid "fee simple conditional" according to the common law, and not a mere tenure by lease.

It was held also that these covenants bound all assignees or holders of the lease, and that the estate became forfeited on non-compliance with the conditions.

The following early cases sustained these positions:

Jackson v. Silvernail, 15 Johns. 278; Jackson v. Schutz. 18 Johns. 174; Jackson v. Groat, 7 Cow. 285.

It was held, moreover, and these are principles of law that have not been disturbed, that to work a forfeiture under the clause against transfer without consent, the lessee must have parted with his entire legal interest; and that all such restrictions as above are to be strictly construed.

See also Livingstone v. Stickles, 7 Hill; affg. 8 Paige, 398. It was also determined that the forfeiture, by reason of alienation without

consent, would not apply to forced judicial sales in invitum.

Jackson v. Corliss, 7 Johns. 531; Jackson v. Silvernail, 15 Johns. 277; Jackson v. Kipp, 3 Wend. 230.

Reservation of Part Proceeds of Sale .- The question of the validity of the condition reserving a proportion of the proceeds of sale to be paid within a fixed time to the landlord, and of that requiring assent before a transfer, were subsequently considered in more recent cases with great care, and it has been determined (overruling in those particulars the cases of Jackson v. Silvernail, Jackson v. Schultz and Jackson v. Groat, above cited) that such reservation contained in leases in fee, made since 1776 at least, were void, although they would be valid in a lease for years or for lives; and that even in the latter class of leases nothing short of a violation of the covenant, on the most literal and rigid interpretation, would subject to a forfeiture.

The courts overruled the previous cases establishing the validity of such conditions in leases in fee, on the principle that the whole estate had been granted, and that no technical reversion, or possibility of reversion, was left to the grantor in the estate by the terms of its limitation. But the conditions restricting transfer without assent, and that reserving a portion of the purchase money, were held to be in restraint of alienation, and, as such, repugnant to the grant and void, and the void conditions being conditions subsequent, the estate would stand divested of them. The reservation to the grantor of a portion of the purchase proceeds on a sale, was also considered in the nature of a fine on alienation, and, on that account, void, and also on the ground that such reservations were against public policy and the general spirit of our laws and institutions.

Huntington v. Forkson, 6 Hill, 195; Payn v. Beal, 4 Den. 405; overruling People v. Haskins, 7 Wend. 463; Overbagh v. Patrie, 8 Barb. 28, affd., 6 N. Y. 510; De Peyster v. Michael, *Id.* 467.

The court, in the above cited case of De Peyster v. Michael, holds that such restraints upon alienation could, by the common law, be only imposed by persons having, at least, a reversion, or possibility of reversion, therein, and that a mere right of re-entry, for nonpayment of rent, or nonperformance of any other condition in a lease in fee, as well as in an absolute conveyance, was neither a reversion, or possibility of reversion; that it was not an estate in the land, but a mere right of action, and that if enforced the person entering would be in by a forfeiture of condition, and not by reverter

The court also intimated the opinion, as before stated, that, under the Colonial government, the English statute "Quia emptores" was not regarded as in force, and citizens could therefore convey their lands in fee, to be holden directly of them and their heirs, etc., and such grantors being entitled to the reversion or escheat on failure of the issue of the grantee, could lawfully, during the Colonial term, annex conditions to the power of alienation. This view, as seen above, p. 135, as to the existence of the law of "Quia emptores" in this colony, was not sustained in the case of Van Rensselaer v. Hays, 19 N. Y. 96, supra, although the general determination in the two cases is similar.

The court further held, in De Peyster v. Michael, that the Act of October 22, 1779, infra (1 Jones & Varick, 44), transferring the seigniory of all lands, escheats, etc., from the king to the people of the State, and the above Act of February 20, 1787, concerning tenures, put an end to all feudal tenures between one citizen and another, and substituted in their place a tenure between each landholder and the people, in their sovereign capacity, and thus removed the entire foundation on which the right of the grantor to restrain alienation had formerly rested.

In the subsequent case of Van Rensselaer v. Dennison, 35 N. Y. 393, it was held, that a conveyance in fee executed in 1789, i. e., after the statute of 1787, with a stipulation for rent, operated in law as a deed of assignment, and not as a deed of lease, and left in the assignor or grantor neither any reversion or possibility of reverter. The case was decided on the principle that since the Statute of 1787, whatever was the law before its passage, it has been impossible to create a feudal tenure in this State; and consequently none of the peculiar incidents of that tenure attach to an estate granted by one citizen to another, since that act took effect. Such feudal rules, therefore, it was held, as that an ultimate estate remained in the grantor of a fee simple, or that he had a possible reversion by escheat or otherwise, or that the estate granted was subject to certain inseparable conditions implied by law in his favor, as that the grantee should not alien, or should render service or rent, under a penalty of forfeiture, and other rules of feudal extraction, were abrogated. The case holds, however, that the assignment of the estate may be under expressed conditions of rents and services consistent with the general rules of law, and independent of the tenure of the land, and that a right of entry for breach of such conditions, reserved to the grantor, his heirs or assigns, in the grant, was valid.

Before the Constitution of 1846, cited infra, a perpetual yearly rent in a grant of land in fee, it was also held, might be lawfully reserved as a condition of the estate, and such a rent thus reserved, although not a rent service, for want of a reversion in the grantor. was considered a rent charge in fee. Such a rent charge or condition thus expressly mentioned, it was decided, ran with the land, and bound the heirs and assigns of the covenantor; and an assignee of the rent and right of entry might maintain ejectment.

To the same effect was Van Rensselaer v. Slingerland, 26 N. Y. 580, which held that conveyances in fee under a rent charge operated as assignments, and not as leases, and left no reversion in the grantor. Such rent was held to be a hereditament, and descended, and was devisable and assignable.

Under the above view of the nature of such conveyances the strict relation of landlord and tenant, as under the feudal rule, was not created between the parties to them. Cagger v. Lansing, 64 N. Y. 417. See also Lyon v. Chase, 51 Barb. 13. This case was, however, disapproved in Lyon v. Adde, 63 Barb. 89; holding that release of rent charge must be by deed.

In the case of Van Rensselaer v. Hays, 19 N. Y. 68, it was also held as to these conveyances in fee reserving rent, that as there was no reversion in the grantor there was no right to distrain, which is necessarily incident to the reversion, unless there was a clause of distress; that the rent reserved was a rent charge, which was not an estate in the land but a hereditament, and that it was subject to alienation and descent to heirs as a heritable estate. To the same effect, Tyler v. Heidern, 46 Barb. 439.

In the absence of a right of entry reserved payment of the rent charge is only a covenant, and not a condition, and ejectment will not lie. Delancey v. Ganong, 9 N. Y. 25. See also Jones v. Reiley, 174 N. Y. 97.

As to necessity of demand and re-entry before suit. Hosford v. Ballard, 39

N. Y. 147.

Restraints on Alienation since 1846.—The Revised Statutes (I R. S. 718, § 5), provide that feudal tenures shall be abolished except as to rents or services certain, which at any time theretofore might have been, or "hereafter might be created or reserved." By the Constitution of 1846, the words "hereafter created or reserved," are omitted, and it is also provided that leases or grants of agricultural land, wherein rent or service is reserved for a longer term than twelve years, shall be invalid. Art. I, §§ 12, 14.

It is also provided in said Constitution, Art. I, § 15, that all fines, quarter sales, or other like restraints on alienation, reserved in any grant of land thereafter to be made, should be void.

Const. 1894, Art. I, §§ 11, 13, 14.

Although, therefore, since the Act of 1787, feudal tenures could not be created, by which the estate could be subjected to conditions determining the estate, still conditions of rent and service might be stipulated in the instrument creating the estate, the nonperformance of which might terminate its existence. The Constitution of 1846, however, has altered the rule, and forbidden such reservation of a perpetual rent or service as the determinable condition

Van Rensselaer v. Dennison, 35 N. Y. 393.

Const. 1894, Art. I, §§ 11, 13, 14.

For a general historical survey of the development of this subject, see Fowler's Real Property Law (2d ed.), 172-184.

Manorial Grants. - Manorial grants were issued in many instances by the royal governors of the Province, with a reservation Sub-leases were made by the patentees with reserof service. vations of rent in produce or otherwise. The rents due the Crown, or, as its successor, the State, were in general subsequently commuted and released for a gross sum. These manorial patents also constituted the land granted a "lordship and manor," and gave the patentees, their heirs and assigns, power to hold courts "leete" and "baron," and to enjoy other manorial privileges.

In the State Legislature, April 6, 1848, a resolution was passed whereby the Atterney-General was directed to ascertain whether the titles of landlords who had made leases under such grants were valid, and to institute suits for the purpose of ascertaining whether the lands held had not escheated to the State.

Actions were brought, pursuant to said law, to determine the rights of

parties claiming under such manorial grants or patents.

The grounds taken in said actions were, among others, that the parties claiming possession had no authority or claim of right thereto, and that the lands claimed belonged to the People as sovereigns of the country and original proprietors thereof, and that neither the Colony nor the State had by any acts recognized the possession or claim of the patentees or those under them, but that the people of the State, since the revolution, became the rightful owners of such lands, and were entitled to the possession.

It was also urged that the provisions of such patents, whereby manorial privileges and franchises were conferred upon the lord of the manor, were in express violation of the established law, not only of England but of the Colony, when they were made, and were, therefore, void; and that the Act of 1691, passed upon the accession of William and Mary, for the purpose of confirming certain grants, had no application to these patents; also, that the mere voluntary payment of quit-rents, or the reception of a commutation by the State, did not amount to a release of the right of the people, or a con-

firmation of the patentees' rights.

The important legal questions arising under such patents were fully reviewed in the case of The People v. Van Rensselaer, 9 N. Y. 291. The decision of the court was to the effect, that such grants were in the power of the Crown to issue, and the king had a right to grant to his immediate tenant the right to make grants to be held of himself, the tenant, since thus there would be the assent of all the lords, mediate and immediate; and that both before and since the statute "Quia emptores," the king could license his immediate tenant, or tenant in capite, to alien to hold of himself the tenant; and that, inasmuch as the statute was made for the advantage of the chief lord, the king might dispense with and license his tenant to reserve any new service. On the making of such grants, therefore, the patentees became the mesne lords, holding of the king, and the grantees of the patentees were the tenants paravail, holding (by license from the king as lord paramount) of their immediate lords, the patentees.

The court further held, that whether the statute "Quia emptores" was ever in force here or not was immaterial—and that, if it was, it had no application to the ungranted crown lands in the colonies—but that, in respect to those, the king was competent to authorize his immediate grantees to create tenants of a freehold manor, by granting lands to be held of them-selves. See De Lancey v. Piepgras, 138 N. Y. 26.

The court also was of opinion that even if the provisions in the patents relating to a lordship, and manor courts, and other feudal privileges were inoperative and void, under the statute against subinfeudations or any other statute, it would not follow that the grants of the lands were void; and there would be no legal difficulty in declaring that the patentee was entitled to retain the land, but holding that his alience must hold of the crown and its successors, instead of holding of the patentee and his heirs.

The court also held, that the action of the people in the matter was barred by the statute of limitations (Laws of 1788, 2 Greenl. 93; Laws of 1801, Chaps. 183, 189; 1 R. L. 484); and that, although there had not been actual adverse occupation, the consent, recognition, payment, and reception of the quit-rents, as between the parties, caused the possession to be recognized as in the grantees, and certainly that it was out of the grantors, and the propriet was proposed to be recognized to the propriet was proposed to the propriet to the and the people were estopped from impeaching the validity of the patents.

It was also determined that such patents, under any circumstances, would be protected under the confirmatory Colonial Act of May, 1691, if not otherwise (Brad. Laws, 7, 77; 8 Barb. 291), which ratified and confirmed patents

of the nature of that under review.

The opinion of the court, with reference to the limitation of the time for the action, and of the estoppel of plaintiffs by the reception of rent, was approved in the case of The People v. Trinity Church, 22 N. Y. 44.

Without the manors the reservation of a perpetual rent on grants in fee, without a rent charge or clause of re-entry was no doubt invalid. Co. Litt, 144a and Hargrave's note; Watkins, Descents (4th Eng. ed.), note, 247; Van Rensselaer v. Hays, 19 N. Y. 68, 76; 1 Sanders, Uses and Trusts, 208, 209, Chap. 14, N. Y. Laws of 1774.

See Fowler's Real Property Law, 176, 179.

Rights of Assignees under Conveyances and Leases in Fee.-It has been seen, as above, that conveyances in fee, under a rent charge, operate as assignments, and leave no reversion in the grantor.

Such rent is held a hereditament, and descends, and is devisable and assignable. Hunter v. Hunter, 17 Barb. 25, and cases cited, supra, 140.

It is held in the above quoted cases of Van Rensselaer v. Slingerland, 26 N. Y. 580, and Van Rensselaer v. Dennison, 35 N. Y. 393, that rent charges, under such leases or conveyances in fee, run with the land, and bind the heirs and assignse of the covenantors; and that an assignee of the rent and right of entry may maintain ejectment. Also that covenant will lie by the assignee of the lessor against the assignee of the lessee. See also Van Rensselaer v. Read, 26 N. Y. 558; De Peyster v. Michael, 6 id. 467, 506.

Kensselaer v. Kead, 26 N. Y. 508; De Feyster v. Michael, 6 1d. 467, 506.

The following cases also held that the covenant to pay rent runs with the land, and binds devisees, heirs, and assignees independent of tenure and reversion, and is not a mere personal covenant. Main v. Feathers, 21 Barb. 646; Van Rensselaer v. Hays, 19 N. Y. 68; Tyler v. Heidorn, 46 Barb. 439; Van Rensselaer v. Ball, 19 N. Y. 100; Cagger v. Lansing, 64 N. Y. 417.

Before the Code of Civil Procedure it was held that a grantee could not maintain actions against lessees in his own name, but only in that of his

grantor. Harbeck v. Sylvester, 13 Wend. 608.

The above decisions, to the effect that rent runs with the land, were made in opposition to the view taken that the statute of February 20, 1787, destroyed all tenure under a lease in fee, and did away with the relation of landlord and tenant as between the lessor and lessee in such lease, and discharged the land from the payment of rent to anybody. See also cases below cited. Also Delancey v. Piepgras, 138 N. Y. 26.

Rights of Lessors' and Lessees' Assigns, Etc. Act of Feb. 6, 1788.—An act was passed of this date (2 Greenl. 13), providing that all persons or corporations, their heirs and assigns, holding, or who may hold lands, manors, tenements, rents, or other hereditaments, or reversions thereof, by gift or grant of the people, or coming from others through the people, or from any others, should have the same advantages against lessees, their executors, etc., or assigns, by entry, for nonpayment of rent, for waste or other forfeiture, and on nonperformance of conditions, covenants, etc., as if the reversions had remained in the original lessors.

By the same act, lessees or grantees of lands, manors, etc., their executors, etc., or assigns, under leases for years or life, have the same rights against heirs, successors, or assigns, holding from the people or from others, as the lessees had, with exception of recoveries of value by reason of warranty in

deed or in law, or by voucher or otherwise.

Act of 1805.—By Act of April 9, 1805, Chap. 98, after reciting the above Act of 1788, it is provided that the provisions of said act, and the remedies thereby given, should be construed to extend as well to grants or leases in fee, reserving rents, as to leases for life or years.

The above two acts were re-enacted in the revision of 1813. 1 R. L. 363,

Chap. 31, § 3.

This act was somewhat modified and re-enacted in the Revised Statutes of 1830, infra.

For the history of this act, see Van Rensselaer v. Smith, 27 Barb. 104, in which it is held that the provisions of this act are retroactive. This case was affirmed. 19 N. Y. 100.

Provisions of the Revised Statutes of 1830.—1 R. S. 747, Part II, Chap. 1,

Title IV.

(§ 23.) The grantees of any demised land, tenements, rents or other hereditaments, or of the reversion thereof, the assignees of the lessor of any demise, and the heirs and personal representatives of the lessor, grantee, or assignee, shall have the same remedies by entry action or otherwise for the nonperformance of any agreement contained in the lease so assigned, or for the recovery of any rent, or for the doing of any waste or other cause of forfeiture, as their grantor or lessor had, or might have had, if such reversion had remained in such lessor or grantor. (As modified by Chap. 274 of Laws of 1846.)

(§ 24.) The lessees of any lands, their assigns or personal representatives, shall have the same remedy by action or otherwise against the lessor, his grantees, assignees, or his or her representatives, for the breach of any covenant or agreement in such lease contained, as such lessee might have had against his immediate lessor, except covenants against incumbrances, or

relating to the title or possession of the premises demised.

(§ 25.) The provisions of the two last sections shall extend as well to grants or leases in fee, reserving rents, as to leases for life and for years.

Act of 1846. Abolishing Distress for Rent.—By Act of May 13, 1846, Chap. 274, the 12th to the 17th sections of Tit. IV, Chap. 1, Part II of the Revised Statutes were repealed relative to distress, and distress for rent was

abolished.

The 3d section provides as follows: "Whenever the right of re-entry is reserved and given to a grantor or lessor in any grant or lease, in default of a sufficiency of goods and chattels whereon to distrain for the satisfaction of any rent due, such re-entry may be made at any time after default in the payment of such rent, provided fifteen days' previous notice of such intention to re-enter, in writing, be given by such grantor or lessor, or his heirs or assigns, to the grantee or lessee, his heirs, executors, administrators or assigns, notwithstanding there may be a sufficiency of goods and chattels on the lands granted or demised for the satisfaction thereof. The said notice may be served personally on such grantee or lessee, or by leaving it at his dwelling-house on the premises. Further as to this see infra, Chap. VIII.

Act of April 14, 1860.—By act of this date (Chap. 396), the above Law of 1805, and § 3 of the Revised Laws of 1813, Chap. 31, and also § 25 of Chap. I, Title IV, Part II, of the Revised Statutes, as above given, are not to apply to deeds of conveyance in fee made before April 9, 1805, nor to such deeds "hereafter to be made."

The above provisions were embodied in the Real Property Law of 1896,

with very little change.

"The grantee of leased real property or of a reversion thereof, or of any rent, the devisee or assignee of the lessor of such lease, or the heir or personal representative of either of them, has the same remedies, by entry, action, or otherwise, for the nonperformance of any agreement contained in the assigned lease for the recovery of rent, for the doing of any waste, or for other cause of forfeiture as his grantor or lessor had, or would have had, if the reversion had remained in him. A lessee of real property, his assignee or personal representative, has the same remedy against the lessor, his grantee or assignee, or the representative of either, for the breach of an agreement contained in the lease, that the lessee might have had against his immediate lessor, except a covenant against incumbrances or relating to the title or possession of the premises leased. This section applies as well to a grant or lease in fee, reserving rent, as to a lease for life or for years; but not to a deed of conveyance in fee, made before the ninth day of April, 1805. or after the fourteenth day of April, 1860." Real Property Law, L. 1896, Chap. 547, § 193.

Construction of the above Acts of 1805, 1830, 1846 and 1860.—Various decisions have been made as to effect of the above statutes on leases in fee. Of the most recent and important of them a summary is here given.

It is held, that notwithstanding the provisions of the above acts, excepting from their application conveyances in fee made before 1805, an action of ejectment would lie for nonpayment of rent by the assignee of the devisee of the grantor, upon a lease made prior to 1805, where the plaintiff had acquired the rights and remedies of the original lessor previous to the Act of 1860; that that act could not disturb vested rights; and it was held to apply only to rights acquired under conveyances made prior to 1805 and since 1860, through transfers or assignments executed since the Act of 1860.

It has been held also, that although, in general, a right of entry is not assignable, so as to allow an assignee to sue in his own name, that an assignee of the lessor, while the acts of 1805, 1813 and 1830 were in force, could, before the Act of 1860 was passed, under § 111 of the Code, requiring actions to be brought in the name of the party in interest, bring ejectment. Van Rensselaer v. Snyder, 13 N. Y. 299; Main v. Green, 32 Barb. 448, 33 id. 136; Main v. Davis, 32 id. 461.

The case of Van Rensselaer v. Hayes, 19 N. Y. 68, also holds that the assignee of the grantor of such lessee in fee, whatever might have been his rights before the statute of 1805, since that statute has the same remedies which his grantor had; and could have an action of covenant for nonpayment

It also holds said statute constitutional as to leases theretofore made, i. e., as not impairing the validity of contracts in relation to the rights of parties existing in leases in fee at the time the statute was passed. See also Van Rensselaer v. Ball, 19 N. Y. 100.

These two cases were decided, it is to be observed, before the statute of

1860.

The case of Van Rensselaer v. Slingerland, 26 N. Y. 580, holds that the statute of 1846, Chap. 274, § 3 (abolishing distress for rent), recognizes the assignable quality of a condition for re-entry for nonpayment of rent, reserved in a grant in fee, and gives to an assignee of the rent the same right to maintain ejectment as was conferred by Chap. 98 of 1805, repealed by Chap. 396 of 1860, as to grants made prior to its passage.

The case of Van Rensselaer v. Read (26 N. Y. 558), decides that the legal right of action, on a covenant for the payment of rent reserved on a conveyance in fee, passes to the assignee of the rent, at common law, independently of the Act of 1805, or of the Code. The principle of the decision is that a privity of estate subsists between the grantee of the rent and the grantee of the land, although there is no reversion in the former or his grantor.

This case also holds that the partial repeal of the statute of 1805 by that

of 1860 is constitutional as to leases existing.

The case further holds that the personal representatives of the original grantor can maintain no action for rent payable after the decease of the grantor; and that a devisee or assignee of the rent can maintain no action against the personal representatives of the original covenantor for default accruing after the death of the covenantor.

Apportionments of Rents Reserved in a "Lease in fee."- Rents reserved in a lease in fee are considered apportionable among the several tenants occupying the demised premises, and ejectment will lie against a tenant occupy-

ing a portion of the land. Main v. Green 32 Barb. 448.

It is held also that the owner by inheritance of one undivided portion of a rent charge, under a lease in fee, may bring ejectment for his proportionate part of the lands leased; and that such a rent charge, though it cannot be apportioned by act of the parties may be by force of law. Cruger v. McLaury, 41 N. Y. 219.

Where land, therefore, is divided by acts of parties, the condition still remains entire; and a breach of it as to one piece gives the grantor, etc., the right to re-enter for the whole land. Tinkham v. Erie R. R. 53 Barb. Or for a separate parcel. Van Rensselaer v. Jewett, 5 Den. 1; affd., 2 N. Y. 135.

Tenants in common, under a rent charge, however, may, on partition, apportion the rent, if the lessor concur; and the release of the lessor to one tenant would only extinguish rent as to the portion released. Van Rensselaer v. Chadwick, 22 N. Y. 32.

See also as to apportionment of rent under leases in fee. Van Rensselaer v. Gallup, 5 Den. 454; Church v. Seeley, 110 N. Y. 457.

Fowler's Real Property Law (2d ed.), 185.

See also as to apportionment of rent between life tenant, remainderman, etc., infra, Chap. VIII., Tit. XI.

Certain Taxes under Leases in Perpetuity.—Under a covenant to pay taxes imposed for or in respect of the premises, it has been held that lessees are not obliged to pay taxes imposed on the landlord under Law of May 13. 1846. Van Rensselaer v. Dennison, 8 Barb. 23; 35 N. Y. 393.

Forfeiture, Re-entry, and Ejectment.—It has been seen that conditions annexed to conveyances in fee stipulating for the payment of rent, with a right of re-entry to the grantor or his heirs. on default, are lawful conditions.

Van Rensselaer v. Ball, 19 N. Y. 100; Tyler v. Heidorn, 46 Barb. 439; and cases cited supra, p. 139.

No one but the grantor or his heirs, however, could re-enter for the breach of such a condition "subsequent," at common law. And this principle the courts hold, notwithstanding certain excepting statutes, is still a general principle of law in the State.

It is held, however, that although it is a rule of law that conditions in a deed can only be reserved for the grantor and his heirs, and therefore do not pass a right of re-entry for condition broken, by conveyance before or after such breach, that this principle does not extend to leases in fee reserving rents, nor to leases for life or years in the State of New York.

The modification of the common law rule is based upon the provisions of the above statute of 1805, and its re-enactment in 1830, above quoted. Supra, p. 143, as modified by the Law of 1860, and re-enacted later in the Real Property Law.

Nicoll v. The N. Y. & Erie R. R., 12 Barb. 604, affd., 12 N. Y. 121.

As to the remedies for rent, the common law rule of demand, and the statutory remedy by ejectment, see *infra*, Chap. VIII.

It is held that the words "yielding and rendering" in a lease import a covenant but not a condition, unless the landlord would otherwise be without remedy in case the rent should not be paid. De Lancey v. Ganong, 12 Barb. 120, affd., 9 N. Y., 9.

The case of Main v. Feathers, 21 Barb. 646, had intimated, contra, that the words "yielding and rendering," etc., in leases in fee, implied a condition for breach of which a forfeiture and re-entry could be had at com-

The subsequent cases of Van Rensselaer v. Smith, 27 Barb. 104; Van Rensselaer v. Ball, 19 N. Y. 100; Van Rensselaer v. Hays, 19 N. Y. 68, hold that parties to such leases stand in the privity or relation of landlord and tenant under a rent service as an incident of socage tenure, and that the words of rendering imply a covenant to perform the condition, which runs

with the land, binding assignees.

The statutes giving the remedy of ejectment in place of demand and re-entry are held not limited to rent service, but are applicable to all cases

where there was a right to re-enter at common law, including an annual payment or rent reserved upon a conveyance or lease in fee, as well as to leases for life or years. Van Rensselaer v. Ball, 19 N. Y. 100; Hosford v. Ballard, 39 N. Y. 147; see Chap. "Ejectment." XLI.

The case of Van Rensselaer v. Barringer, 39 N. Y. 14, holds that the assignee of the grantor can bring ejectment for condition broken, and con-

firms other cases, supra.

The case of Van Rensselaer v. Gallup, 5 Denio, 454, and Hosford v. Ballard, 39 N. Y. 147, holds that no demand is necessary prior to ejectment for nonpayment of rent, on a grant in fee; that ejectment stands in place of such demand.

CHAPTER VI.

FREEHOLD ESTATES NOT OF INHERITANCE.

TITLE I .- ESTATES FOR LIFE. II .- INCIDENTS OF ESTATES FOR LIFE.

TITLE I.— ESTATES FOR LIFE.

An estate for life is a freehold estate, but not of inheritance.

Estates for Life are held for the term of the grantee's life, or during that of a third person; they were created by livery of seizin, and formerly held by the feudal tenure of fealty and service.

When the estate is held during the life of another person, it is termed an estate per autre vie, and esteemed a lower species of freehold than an estate for the grantee's life.

By the Revised Statutes of 1830, an estate, during the life of a third person, whether limited to heirs or otherwise, shall be deemed a freehold only during the life of the grantee or devisee, but after his death it shall be deemed a chattel real.

1 R. S. 723, § 6. This provision was re-enacted in the Real Property Law, L. 1896, Chap. 547, § 24.

It is then excluded from the statutes of descent (I R. S., 755, § 28; L. 1896, Chap. 547, §§ 280-296), and is an asset for administration.

2 R. S. 182. The subject is now regulated by the Code Civ. Proc., § 2712.

It has been shown above that, by the common law, the granting of an estate without words of inheritance or other limitation created an estate for the life of the grantee only, but that the rule is altered by the Revised Statutes of 1830; and, since those statutes, the conveyance or devise of land to a man generally passed to him all the estate held by the grantor.

See supra, Chap. V, Title I. See infra, Chap. XV. A grant on its face in fee simple may be shown aliunde to be only life.

Moyer v. Moyer, 21 Hun, 67; Collins v. Collins, 32 id. 156.

There may be conditional estates for life, determining upon a future contingency, but otherwise enduring until the life for which they were created expires.

As to provisos restraining alienation annexed to a life estate, vide supra, p. 132. The case of Rockford v. Hackman, 10 Eng. L. & Eq. 64, holds, however, with the other English cases of Brandon v. Robinson, 18 Ves. 429, and Graves v. Dolphin, 1 Simm. 67, that provisos restraining alienation on a life estate are void, as much as if annexed to an estate in fee. See, however, De Peyster v. Michael, 6 N. Y. at p. 491; Livingston v. Stickles, 7 Hill, 253; Jackson v. Groat, 7 Cow. 285; Jackson v. Silvernail, 15 Johns. 278.

Presumption of Decease of Life Tenant .- By the Revised Statutes of 1830 Presumption of Decease of Life Tenant.—By the Revised Statutes of 1830 (1 R. S., 749, § 6), a person upon whose life an estate may depend shall be presumed dead, if he remain beyond sea, or shall absent himself in this State or elsewhere for seven years together, unless proof to the contrary be given. What is a reasonable search and inquiry is a mixed question of law and fact, to be determined upon the circumstances of each case. Clark v. Cummings, 5 Barb. 339. See also Gerry v. Post, 13 How. Pr. 120; Eagle's Case, 3 Abb. 224; McCartee v. Camel, 1 Barb. Ch. 455.

Code Civ. Proc., § 841 (amd. L. 1891, Chap. 364), contains the same provision, except that "without the United States" is substituted for "beyond sea," and the presumption of death relegated back to the time of the sale.

By L. 1875, Chap. 519, trustees of all property of a person absent for three years might be appointed. But this act is now repealed. L. 1880, Chap. 245.

Forfeiture of Life Estate.— By the Revised Statutes a conveyance made by a tenant for life or years of a greater estate than he possessed or could lawfully convey, shall not work a forfeiture of his estate, but shall pass to the grantee all the title, estate, or interest which such tenant could lawfully convey. This avoided the effect of the old common law rule of forfeiture by a wrongful alienation, which was abrogated, in fact, before the Revised Statutes.

1 R. S. 739, § 145.

Real Property Law, L. Chap. 547, § 212. Grant v. Townsend, 2 Hill, 554, affd., 2 Den. 336. Thompson v. Simpson, 128 N. Y. 270; Myers v. Bell Tel. Co. of Buffalo, 83 App. Div. 623.

The deed, by the Revised Statutes, operates as an estoppel, however, against the grantor or his heirs.

1 R. S. 739, §§ 143, 144.

Real Property Law, L. 1896, Chap. 547, § 210.

As to successive estates for life, and the limitations thereof, and of the power of alienation, see titles "Remainder" and "Executory Devise," Chap. IX., infra.

Conveyances in fee simple by tenant for life may be enjoined. Collins v.

Collins, 32 Hun, 156.

Effect of such conveyance, if made. Newcomb v. Lush, 84 Hun, 254.

TITLE II. INCIDENTS OF THE ESTATE.

Estovers.—Tenants for life are entitled to take reasonable estovers or botes, i. e., wood for fuel, fences, and agricultural erections and purposes, but not so as to commit waste; nor for purposes of sale nor exchange; timber also may be cut for necessary repairs, and to clear portions of the land for cultivation.

Co. Litt. 73, a. b.; 4 Kent, 73; Miles v. Miles, 32 New Hamp. 147; White v. Cutter, 7 Pick. 248; Poddleford v. Same, 7 id. 150; Dalton v. Dalton, 7 Ired. Eq. 197; Sarles v. Sarles, 3 Sand. Ch. 601; Harder v. Harder, 26 Barb. 409, and see *infra*, "Waste."

They cannot dig for gravel, lime, etc., except for repairing. Co. Litt. 53b.

Nor open a new mine, but they may dig and take the profits of mines that are opened. Coates v. Cheeves, 1 Cow. 460, 474.

They cannot take wood or soil for manufacturing purposes. Livingston v.

Reynolds, 2 Hill, 157.

Emblements.— The representatives of tenants for life are also entitled to the profits of crops, in case the estate determines by the tenant's decease before the produce can be gathered. This applies to crops sown, and not to the natural products of the soil. such as grass or fruit, not resulting from special cultivation. Under-tenants are also entitled to their emblements, when the lifetenant dies as above.

Evans v. Roberts, 5 Barn. & Cress. 829; Evans v. Inglehart, 6 Gill & Johns. 171; 4 Kent, 73; Beavens v. Briscoe, 4 Harr. & Johns. 139; Bank of Lausingburgh v. Crary, 1 Barb. 542; Willard Real Prop. 77; 2 Crabb's Law of Real Est. 52, § 1057.

The right of the tenant is based on the clearest equity, as the end of life

is uncertain. This finds statutory expression in the case of widows, from antiquity to our own day. They may bequeath the crop in the dower land. St. of Merton, 20 Hen. III, Chap. 2; Real Prop. Law, § 185. See Chap. VIII,

Tit. XI.

Rent due on termination of Life Estate.—Formerly, as between tenant for life and remaindermen, rent accruing upon leases executed by the testator of the parties, and becoming due after the termination of the life estate, could not be apportioned, and the devisees in remainder of the land from which the rent issued could maintain a joint action against the executor of the life-tenant for rent collected by him, which became due after the termination of the life estate.

This was changed, L. 1875, Chap. 542, and the subject is now regulated by L. 1893, Chap. 686. This law of 1893 is now embodied in the Code of Civil Procedure, § 2720, and an apportionment is to be made up to date of death.

Vide, Chap. XIV, Tit, II. Marshall v. Moseley, 21 N. Y. 280; Matter of Kane, 64 App. Div. 566.

Charges.— Tenants for life are bound to keep down charges, and preserve the estate from loss and forfeiture by paying taxes, interest on incumbrances, etc.

And this the life-tenant is obliged to do, even though it should exhaust rents and profits of the estate, unless the intention of the testator or other

party creating the estate be otherwise manifested.

4 Kent, 75; Stillwell v. Doughty, 2 Brad. 311; Moseley v. Marshall, 22 N. Y. 200; Matter of Detmold, 3 N. Y. Supp. 555. See 2 R. S. 87, § 27; Code Civ. Proc., § 2719; Sage v. City of Gloversville, 43 App. Div. 245. So in case of lease for life at a nominal rent. Carter v. Youngs, 42 Super.

418.

As to what charges should be apportioned, see Peck v. Sherwood, 56 N. Y.

Incumbrance imposed by a life tenant on land held by her subject to a testamentary power of sale given to her as executrix — removed by a sale under the power. Haas v. Kuhn, 67 Hun, 435.

It is a well-established principle, also, that where there is an estate for life and a remainder in fee, and there exists an incumbrance binding the whole estate in the land, and no special equities between the remainderman and the tenant for life can be shown. the latter is bound to pay the interest accruing during the continuance of his estate, and the owner of the future estate is to pay off the principal of the lien.

House v. House, 10 Paige 158; 4 Kent, 74; Moseley v. Marshall, 2 N. Y. 200. See also as to when the personalty and when the realty is bound under a will, etc., Chap. XV.

Act allowing remainderman to pay interest where life tenant fails to do so,

Act allowing remainderman to pay interest where life tenant fails to do so, and recover the amount from the life tenant. L. 1894. Chap. 315; now Real Property Law, § 233. — 249. Chap. 315; now Real Where a will gives the net income of the residue of the testator's estate to a party for life, the estate of the life tenant must bear the burden of the taxes and ordinary repairs and the payment of interest upon liens, if any exist. Wilcox v. Quimby, 73 Hun, 524.

If the tenant for life makes improvements upon the premises, he cannot claim compensation therefor from the reversioner or remainderman. Matter of Lamb 10 Miss. 638

of Lamb, 10 Misc, 638.

Waste.—Tenants for life are bound not to commit waste or destruction of the estate, voluntary or permissive; and are bound to take proper care, so as to prevent deterioration from neglect or decay. Otherwise they may have to respond in damages, even for waste committed by a stranger, and may be stopped by injunction.

By the English rule they could not destroy timber growing on the lands. In this country, it is held that a reasonable amount of timber land may be cleared for cultivation, and may be cut for use, if the estate be not injured and enough is left for permanent use. Timber may be cut, also, for use in mining; and for staves and shingles if the lands were used for those purposes.

mining; and for staves and shingles if the lands were used for those purposes.

Jackson v. Brownson, 7 Johns. 227; Parkins v. Coxe, 2 Hayw. 339; Hickman v. Irvine, 3 Dana, 123; Owen v. Hyde, 6 Yerger, 334; Veel v. Neel, 19 Penn. St. 323; Ballentyne v. Poyner, 2 Hayw. 110; Loomis v. Wolbur, 5 Mason, 13; Harder v. Harder, 26 Barb. 409; Rutherford v. Aiken, 2 T. & C. 281. But see McGregor v. Brown, 10 N. Y. 114.

If timber is improperly cut, it becomes the personal property of the owner of the inheritance, who may maintain trover for it against any one in possession. See as to Waste, 1 R. S. 780, § 8; Code Civ. Proc., § 1665; Mooers v. Wait, 3 Wend. 104; Rodgers v. Rodgers, 11 Barb. 595.

An injunction may be granted against any one who colludes with the tenant to commit waste. Rodgers v. Rodgers, 11 Barb. 595.

Damages for Waste.—Damages are to be based not merely on the value of what may be removed, but the solid and permanent injury to the inheritance caused by the removal. Harder v. Harder, 26 Barb. 408; and see *infra*.

Actions for Waste.— The Revised Statutes made provision for such actions and their procedure. Provisions were also made for actions of this nature by the Code of Procedure, §§ 450-452; Code Civ. Proc., §§ 1651-1659; vide Harder v. Harder, 26 Barb. 409; Robinson v. Wheeler, 25 N. Y. 252.

Application for Production of Life Tenants.—By the Code of Civil Procedure, a person entitled to claim real property after the death of another who has a prior estate therein may, not oftener than once a year, apply by petition to the Supreme Court at special term in a district where at least a part of the property is situated. for an order directing the production of the tenant for life by a person named in the petition against whom an action of ejectment to recover the real property can be maintained if the tenant for life is dead; or, where there is no such person, by the guardian, husband, trustee, or other person who was or is entitled to the custody of the person of the tenant for life or the care of his estate. § 2302.

Full details of the proceedings are given. §§ 2302-2319.

If possession be awarded the remainderman under this proceeding, and it appears afterward that the life-tenant was not, in fact, dead, a similar proceeding may be taken on his behalf for the restoration of possession to him, and mesne profits may be recovered (§§ 2317, 2318).

This supersedes R. S., Part III, Chap. 5, Tit. 8; 1 R. L. 104. The Code of Procedure, § 471, continued proceedings under the Revised Statutes in force. All these former laws are now repealed. L. 1880, Chap. 245.

These proceedings are not applicable where the occupant has a base fee. Matter of Hyde, 41 Hun, 72.

Security on Receipt of the Estate.—The owner of a life estate in property bequeathed is entitled to receive the same from the executor upon giving adequate and satisfactory security, to be approved by a justice of the Supreme Court, to those entitled to the remainder. Scott v. Scott, 6 Misc. 174.

Liability of Guardians, etc., holding over after their Estates have ceased.— By the Code of Civil Procedure a person in possession of real property as guardian or trustee for an infant, or having an estate determinable upon one or more lives, who holds over and continues in possession after the determination of his trust or particular estate, without the express consent of the person then immediately entitled, is a trespasser. An action may be maintained against him or his executor or administrator by the person so entitled, or his executor or administrator, to recover the full value of the profits received during the wrongful possession.

1 R. L. 167, § 71; 1 R. S. 749, § 7. See Livingston v. Tanner, 14 N. Y. 64; Torrey v. Torrey, id. 430.

Dower and Curtesy.—These two species of estates for life are reviewed in the ensuing chapter.

Power of Sale .- When life tenant may enforce. Wilcox v. Quinby, 20 N. Y. Supp. 5.

CHAPTER VII.

DOWER AND CURTESY.

I .- THE ESTATE OF DOWER. TITLE

II .- Dower, how Barred or Defeated.

III .- ASSIGNMENT AND ADMEASUREMENT OF DOWER.

IV.—MISCELLANEOUS PROVISIONS AS TO DOWER. V.—ESTATES BY THE CURTESY.

THE ESTATE OF DOWER.

Dower is a life estate created by operation of law, in favor of the wife, on the decease of her husband, by which she is endowed. for life, with a third of the lands of which he was seized of an estate of inheritance, at any time during coverture. The title of dower is inchoate on marriage and seizin; and then attaches to the land, but is not consummate until decease of the husband.

Denton v. Nanny, 8 Barb. 618; Sutliff v. Forgey, I Cow. 89, 5 id. 713. See Statute of Magna Charta of Henry III; Glanville, Book VI, Of Dower; Bracton, fol. 92 et seq.

Dower is highly favored in the law. Konvalinka v. Schlegel, 104 N. Y. 125, 129; Lasher v. Lasher, 13 Barb. 106; Gray v. Gray, 5 App. Div. 132; Hindley

v. Hindley, 29 Hun, 318; Fern v. Osterhout, 11 App. Div. 319.

By our Revised Statutes, this common law right is confirmed as follows:

"A widow shall be endowed of the third part of all the lands, whereof her husband was seized of an estate of inheritance, at any time during the marriage."

1 R. S. 740 (substantially the same provision as in 1 R. L. 56, § 1). also Laws 1889, Chap. 406.

This section of the Revised Statutes was re-enacted in the same words in the

Real Property Law, L. 1896, Chap. 547, § 170.

The freehold and the inheritance must be in the husband during the marriage, simul et semel. Beardslee v. Beardslee, 5 Barb. 324; 4 Kent, 39.

If the marriage is void by reason of a former wife living, and marriage of the husband when the divorce was obtained against him a vinculo, the widow is not entitled to dower. Cropsey v. Ogden, 11 N. Y. 228. See Palmer v. Palmer, 162 N. Y. 130.

In general, however, it attaches in favor of the wife de facto where the

marriage is voidable merely.

Where a man contemplating marriage fraudulently conveyed away land to avoid wife's right of dower, held that her dower attached. Youngs v. Carter, 1 Abb. N. C. 136, note, affd., 10 Hun, 194; Pomeroy v. Pomeroy, 54 How. Pr. 228; Babcock v. Babcock, 53 How. Pr. 97.

As to marriage, see Hynes v. McDermott, 9 Daly, 4, affd., 91 N. Y. 451. Dowress has such interest as will entitle her to subrogation on paying mortgage. Bayles v. Husted, 40 Hun, 376.

The sufficiency of land remaining of the husband's estate to satisfy all

claim of dower is no answer to an action for dower out of the land of the Richardson v. Harris, 11 Misc. 254. husband's alienee.

Joint Seizin.— No title to dower attaches on a joint seizin by the husband and others; the possibility of the estate being defeated by survivorship defeats dower.

But it attaches in case of tenancy in common. Smith v. Smith, 6 Lans.

Partnership Lands.—As to dower in such lands, vide infra, Chap. XI. as to joint interests in land.

See also Winter v. Elkert, N. Y. Daily Register, April 7, 1883; Hauptmann v. Hauptmann, 91 App. Div. 197.

Nature of the Seizin requisite.—A seizin in law of the husband is sufficient without actual seizin: but the seizin must be in fact or in law. If the husband died before entry, the wife is entitled to dower; unless in case of non-entry for forfeiture, or where a tenant retains his seizin after the determination of a particular eehold estate. 6(misc/186, Therefore there can be no dower in a reversion in fee, or a vested remainder freehold estate.

expectant, on an estate for life, or the like estate. Durando v. Durando, 23 N. Y. 331; Green v. Putnam, 1 Barb. 500; House v. Jackson, 50 N. Y. 161; Dunham v. Osborn, 1 Paige, 634; Beekman v. Hudson, 20 Wend. 53; Clark v.

Dunham v. Osborn, 1 Paige, 634; Beekman v. Hudson, 20 Wend. 53; Clark v. Clark, 84 Hun, 362; Stewart v. Crysler, 52 App. Div. 597; 4 Kent Comm. 38; Jackson v. Walters, 86 App. Div. 470.

Dower is defeated by entry under a prior title and disseizin of the husband. Beardslee v. Beardslee, 5 Barb. 324. Nor can there be dower in a life estate pur autre vie. Nor in any estate held adversely, after release to the legal owner. Poor v. Horton, 15 Barb. 485.

Where a devisee, subject to executor's power of sale, died before exercise of the power of sale, his widow was held to be entitled to dower. Timpson's Est., 15 Abb. Pr. N. S. 230. Dower in a defeasible estate is defeated with it. Moriarta v. McRea, 45 Hun, 564, affd., 120 N. Y. 659.

Dower cannot be had on a dower estate, or as it is said "dos de dote peti non debet." 4 Rep. 122; Co. Lit. 31a; Park, Dower, 54; Dunham v. Osborn, 1 Paige, 634; Safford v. Safford, 7 id. 259; Durando v. Durando, 23 N. Y. 331, 334; Aikman v. Harsell, 31 Hun, 634, affd., 98 N. Y. 186; Price v. Price, 33 id. 76; Jones v. Fleming, 37 id. 227, rev'd 104 N. Y. 418.

Otherwise where dower is actually assigned. Bisset, Estates for Life, 94; Elwood v. Klock, 13 Barb. 50.

Elwood v. Klock, 13 Barb. 50.

Where the husband has a life estate, and was vested of the remainder, where the husband has a fire estate, and was vested or his remainder, subject to be divested on a contingency, dower attaches, but will be defeated by the divesting of his estate. House v. Jackson, 50 N. Y. 161.

Dower allowed in one-half of land held by the entirety by husband and a former wife, who had been divorced. Stetz v. Schreck, 128 N. Y. 263.

Possession is not necessary. Title is enough, if no adverse possession be

shown. McIntyre v. Costello, 47 Hun, 289.

Seizin in transitu.—A transitory seizin of the husband for an instant, as a conduit, is insufficient to give dower, although, if it vest beneficially in him for a moment, the right of dower attaches.

Cunningham v. Knight, 1 Barb. 399.

As to dower as against purchase money mortgage, see infra.

61 Miser 186.

Wife of a Mortgagee.— Nor is the wife of a mortgagee dowable of a mortgaged estate, unless he acquired an absolute estate during coverture.

1 R. S. 740, § 7; Real Property Law, § 175; Cooper v. Whitney, 3 Hill, 95; Gomez v. Tradesmen's Bank, 4 Sandf. 102; Jackson v. Williams, 4 Johns. 41.

Wife of a Mortgagor.—The wife of the mortgagor, even if she join in the mortgage, is always entitled to dower out of the equity of redemption, in lands mortgaged. The dower right is subordinate to the mortgage, where the mortgage was made prior to her marriage, or where it was for a part of the consideration on the purchase of the land by her husband (and that whether accepted by the vendor as part of the consideration or advanced by a stranger); or, where she has joined with her husband in the mortgage. But she is entitled to dower in all the land, where the mortgage was made during marriage and she did not join, except as above.

Where lands granted by the husband were, after his death, swallowed up by incumbrances on them, the widow recovered of the husband's grantee for dower in rents received after the husband's death, but before sale to pay incumbrances. Witthaus v. Schack, 38 Hun, 560.

Where wife joined in mortgage, but not in subsequent deed, the grantee

where wife joined in mortgage, but not in subsequent deed, the grantee may have subrogation on paying mortgage. Dowress cannot insist on satisfaction so as to extend her dower. Platt v. Brick, 34 Hun, 121.

A widow is not entitled to dower in lands, as against the purchase money mortgagee, or those claiming under him. 1 R. S. 740, § 5; Real Property Law, § 173; De Lisle v. Herbs, 25 Hun, 485.'

Dower is also subject to a vendor's lien. Warner v. Van Alstyne, 3 Paige, 513; cited Chase v. Peck, 21 N. Y. 581, 584.

See as to when the dower must yield to the superior title of a mortgage in passession under forcelegue. Smith v. Cordner 42 Borb, 256

gagee, in possession under foreclosure. Smith v. Gardner, 42 Barb. 356.
Foreclosure of a first mortgage in which wife did not join cuts off her dower, when purchaser under a second mortgage foreclosure in which wife was cut off, is made a party. Calder v. Jenkins, 16 N. Y. Supp. 797.
Foreclosure cannot affect her if her right is superior. Nelson v. Brown, 20 N. Y. Supp. 978; Merchants' Bk. v. Thompson, 55 N. Y. 7. See also Chap. XXVIII, Tit. II.

The wife's dower is affected when she joins with her husband in a

The wife's dower is affected, when she joins with her husband in a mortgage, only to the extent of the mortgage. If the mortgage fail as to the husband, her dower right is also freed. Hinchcliffe v. Shea, 103 N. Y. 153; reversing 34 Hun, 365; Everson v. McMullen, 113 N. Y. 293;

reversing 42 Hun, 369.

If there has been an entry by the mortgagee after forfeiture, under a mortgage made before coverture, or the equity of redemption has been released to the mortgagee or those claiming under him by the husband, the widow of the mortgagor is no entitled to recover dower at law, but might have relief in equity on paying due proportion of the debt. Van Duyne v. Thayre, 19 Wend. 162; Swaine v. Perrine, 5 Johns. Ch. 482; Campbell v. Ellwanger, 81 Hun, 259.

If the mortgagee, under a mortgage made before coverture, enters, under a foreclosure, or after forfeiture of the estate, and by virtue of his rights as mortgagee, the right of dower of the mortgagor's wife must yield to the mortgagee's superior title; for, as against the title under the mortgage, the widow has no right of dower, and the equity of redemption is entirely subordinate to that title. Smith v. Gardner, 42 Barb. 356.

The mortgage in the above case was given for purchase-money; and the wife not made a party to the foreclosure. It was held that the remedy if any, was by action to redeem, and not ejectment for dower. See also Jackson v.

Bruyn, 6 Cow. 316.

If the wife redeem, she is bound to contribute ratably with the heir towards the redemption. If the heir redeem, she contributes by paying during life to the heir one-third of the interest on the amount of the mortduring life to the heir one-third of the interest on the amount of the mortgage debt, paid by him, or else a gross sum, amounting to the value of such annuity. Swaine v. Perrine, 5 Johns. Ch. 482; Bell v. Mayor, 10 Paige, 49; House v. House, id. 159; Mills v. Van Voorhis, 20 N. Y. 412; Wheeler v. Morris, 2 Bosw. 524.

If her husband's grantee, not being bound to do so, pays mortgage which binds her, she must allow a due proportion of it on redemption, even though she did not join in the deed. Everson v. McMullen, 113 N. Y. 293, revg. 45

Hun, 578.

As in this State the mortgagor, until re-entry or foreclosure, is regarded to be legally, as well as equitably seized of mortgaged lands, the wife is dowable, as above stated, of an equity of redemption therein, existing at the decease of her husband. Where she has duly executed a mortgage jointly with him, she is only dowable of such equity.

She is endowed of the lands mortgaged as well when a mortgage was executed before marriage by her husband sole, as after, when executed jointly, as against every person except the mortgagee and those claiming under him. The equity of redemption may be defeated by foreclosure suit, to which she must be a party. This applies in this State as well to mortgages given as part consideration-money, in which she does not join, as to others.

1 R. S. 740, §§ 4, 5; Real Property Law, L. 1896, Chap. 547, §§ 172, 173. Brackett v. Baum, 50 N. V. 8; Russell v. Austin, 1 Paige, 192; Van Duyne v. Thayre, 14 Wend. 233; Bell v. The Mayor, 10 Paige, 49; Mills v. Van Voorhis, 20 N. Y. 412; Denton v. Nanny, 8 Barb. 618; Wheeler v. Morris, 2 Bos. 524; compare Cunningham v. Knight, 1 Barb. 399; Runyan v. Stewart,

Where, under the former chancery practice, she did not appear and was not personally served, held she was cut off. Feitner v. Lewis, 119 N. Y. 131,

rev'g 55 Super. 519.

Vide infra, "Foreclosure," Chap. XVIII.

The wife's right, both inchoate and vested, in the husband's land follows the surplus money; and will be protected against creditors and her one-third will be directed to be invested for her.

1 R. S. 741, § 6; Real Property Law, § 174; Vartie v. Underwood, 18

Barb. 561, 564; Hawley v. Bradford, 9 Paige, 200.

Where the wife unites with her husband in conveying an estate in which she is entitled to dower, the conveyance is held to be an extinguishment of her right, not only with respect to the grantee and his successors in interest, but also as to third parties.

Accordingly, where the husband gave a purchase-money mortgage, and

he and his wife conveyed, subsequently, the land to another person, and afterwards the mortgage was foreclosed, it was determined that as between

afterwards the mortgage was foreclosed, it was determined that as between herself and the strangers to the conveyance, the wife was not, after her husband's decease, entitled to dower in the surplus moneys. Elmendorf v. Lockwood, 4 Lans. 393; affd., 57 N. Y. 322.

A mortgage given by husband and wife to secure the purchase-money of mortgaged premises, cannot, after having been satisfied and discharged of record, be set up by the assignee of the husband as a bar to his widow's right of dower. Runyan v. Stewart, 12 Barb. 537; Bartlett v. Musliner, 28 Hun,

In an application for dower out of surplus money, sums due to the estate from the widow cannot be recouped, though, perhaps, they might be, if she elected a gross sum in lieu of dower. The amount due on the mortgage, and the costs and expenses of foreclosure, must be deducted, but not taxes or assessments, before computing dower. Taylor v. Bently, 3 Redf. 34.

If wife be not made party in foreclosure, her remedy is not ejectment. Campbell v. Ellwanger, 81 Hun, 259; but an action to redeem, Smith v.

Gardner, 42 Barb. 356.

In Lands conveyed to Husband, on Condition, infra, p. 162.

Dower of Widows of Aliens, vide supra, Chap. III.

Dower in Hereditaments, etc.—A woman is dowable in all hereditaments appertaining to the realty, as well as to lands of which her husband was seized; this would include rents, commons, mines, if opened, and other incorporeals, partaking of the realty.

Real Property Law, § 1, defining "lands." Stoughton v. Leigh, 1 Taunt. 402; Coates v. Cheever, 1 Cow. 460; 4 Kent, 41.

Dower would not apply to such a right as the using of water for hydraulic purposes. Kingman v. Sparrow, 12 Barb. 201.

Nor to share in a land company, of which the husband had disposed in his lifetime. McDougal v. Hepburn, 5 Fla. 568.

Grass and Fruits.—A widow has no dower in grass and fruits, and other spontaneous productions of the soil growing on her husband's lands at the time of his decease. Kain v. Fisher, 6 N. Y. 597; vide infra, Title IV. Title IV.

Trust Estates.— Strictly, the wife of a cestui que trust was not dowable in an estate in which her husband had only the equitable and not the legal estate during coverture, as of a use or trust; and this is still the English rule, except where modified by statute.

By various provisions of statutes, in this State, the wife has her dower in certain inheritable interests of the husband, in lands whereof he died seized, of the equitable, but not of the legal, estate, as will be seen under appropriate heads.

A wife is not endowable of lands held by a party in trust to sell and dispose of the same, and then to pay debts and legacies, the residue to belong to the trustees.

This is on the principle that the husband is seized of no estate in the land; but has a mere power in trust, inasmuch as he is not entitled to the rents and profits as well as to the possession. Germond v. Jones, 2 Hill, 560. Nor in lands held as equitable mortgagee, subject to the right of redemp-

tion in the cestui que trust. Terrett v. Crombie, 6 Lansing 82, affd., 55 N. Y. 683.

The widow of a trustee of lands has no dower in them. Cooper v. Whitney, 3 Hill, 95; Terrett v. Crombie, 6 Lans. 82, affd., 55 N. Y. 683; Germond v. Jones, 2 Hill, 569, 573; Hawley v. James, 5 Paige, 318, 452; Manhattan Co. v. Everston, 6 Paige, 457, 460, 465; 4 Kent, 43.

As the equitable estates of cestuis que trustent were abolished by the Revised Statutes (1 R. S. 729, § 60; Real Prop. Law, § 80), there could be no further ground for claiming dower in the husband's trust interests. Revisers' Notes to 1 R. S. 740, Tit. 3; Phelps v. Phelps, 143 N. Y. 197; Poillon v. Poillon, 90 App. Div. 71.

Dower in Lands Purchased under Execution .- By the Code of Civil Procedure (§ 1473), the wife also is to have dower in lands purchased by the husband at sale on execution, when the husband dies previous to the delivery of such conveyance, and the lands are subsequently conveyed to the executors or administrators of the deceased husband, in trust for the heirs or devisees.

So formerly by 2 R. S. 374, §§ 63, 64; repealed by L. 1880, Chap. 245. And see infra, "Sales under Execution," Chap. XXXVIII.

Dower in Lands Contracted to be Sold .- By the Revised Statutes, a wife also had dower in lands held by the husband at the time of his death by contract of purchase. This was also the general rule in equity.

2 R. S. 112; also, 111, § 84. Repealed L. 1880, Chap. 245. See Code Civ. Proc., §§ 2782-3. Knolls v. Barnhart, 9 Hun, 443; affd., 71 N. Y. 474.

The Chancellor, in Hawley v. James, 5 Paige, 318, 453 and 16 Wend. 61, holds that a widow is dowable only of lands held by the husband by contract at the time of his death; and if aliened in his lifetime, he holds her not entitled to dower. In Hicks v. Stebbins, the right is held to apply to lands which the deceased held by contract as purchaser, without regard to the time of the death of the husband, or whether he had or had not parted with the contract before his decease. The court, however, reluctantly refuses to disturb the Chancellor's decision. 3 Lans. 39.

A right to dower cannot be asserted with respect to lands nurchased with

A right to dower cannot be asserted with respect to lands purchased with the husband's money, but not conveyed or agreed to be conveyed to him. Phelps v. Phelps, 143 N. Y. 197; vide, "Contracts of sale," Chap. XIX.

Equitable Conversion, and Lands Taken Subject to a Power. -In equity, lands agreed to be turned into money, or money into lands, are considered as that species of property into which they were agreed to be converted; and the right of dower is regulated in equity by the nature of the property in the equity view of it.

Green v. Green, 1 Ham. Ohio, 249; Coster v. Clarke, 3 Edw. Ch. 437; Kent, 50; Church v. Church, 3 Sandf. Ch. 434.

When specific performance was decreed against the vendor's widow, who was also sole devisee and legatee, she was held not entitled to dower. Meyer v. De Mier, 52 N. Y. 647.

If lands descend subject to a power of sale subsequently exercised, the widows of heirs and devisees take dower in the proceeds respectively. Timpson's Estate, 15 Abb. N. S. 130.

Lands Exchanged.—Our statutes prescribe that if a husband. seized of an estate of inheritance in lands, exchange them for other lands, his widow shall not have dower of both, but shall make her election; and if such election be not evinced by the commencement of proceedings to recover her dower of the lands given in exchange within one year after the death of her husband, she shall be deemed to have elected to take her dower of the lands received in exchange.

1 R. S. 740, § 3; Real Prop. Law, § 171.
This means a mutual grant of equal interests. If the husband take back merely an equitable interest, and gives a fee, the wife's dower is not removed. Wilcox v. Randall, 7 Barb. 633.

As to enforcing specific performance where lands exchanged are subject to a dower right. See Sternberger v. McGovern, 15 Abb. N. S. 257.

Statutes of Descent.—By the Revised Statutes it was provided that the estate of a widow as tenant in dower should not be affected by any of the provisions of the Revised Statutes, Part II, Chap. II, relative to the descent of real property.

1 R. S. 754, § 20. Same provision, Real Prop. Law, § 280, end.

Lands taken by the Public.- Where the land is taken for public purposes during the coverture, as by a municipal corporation, according to law, it is taken divested of the dower.

Moore v. The Mayor, 8 N. Y. 110, affg. 4 Sandf. 456; Melizst's Appeal, 17 Penn. St. 449; Weaver v. Gregg, 6 Ohio St. 547. But as between a wife and any other than the State an inchoate right of dower in lands taken under unu uny other than the State an inchoate right of dower in lands taken under eminent domain is a subsisting interest which will be protected. Simar v. Canaday, 53 N. Y. 298; limiting Moore v. Mayor, supra.

And dower is now held protected in condemnation proceedings out of the proceeds. Matter of Trustees, etc., N. Y. and Brooklyn Bridge, 75 Hun, 558; affd., 60 St. Rep. 874.

See also Chap II

See also Chap. II.

TITLE II. DOWER, HOW DEFEATED OR BARRED.

As a general rule, no act, deed, or conveyance of the husband, or judgment or decree confessed by or recovered against him or his heirs, can prejudice the wife's right to her dower; nor can deeds fraudulently made by him to defeat dower, have that effect. Neither can courts, unless under express statutory provision, compel a widow to accept a gross sum in lieu of dower.

Crain v. Cavana, 36 Barb. 410, overruling Jackson v. Edwards, 22 Wend. 498.

Jointure.— The wife may be barred, with her assent, by a pecuniary provision or by having a jointure settled upon her in lieu and satisfaction of dower. If the jointure be made before marriage, with her assent, it bars the dower even if she be an infant.

McCartee v. Teller, 2 Paige, 511, affd., 8 Wend. 267; Matter of Estate of Young v. Hicks, 92 N. Y. 235.

But if made after marriage or before marriage, without her consent, the wife, on the death of her husband, has her election to accept of the jointure, etc., or her dower. Her assent as aforesaid is evidenced by her being a party to the conveyance, if of full age, and if an infant, by her joining with her father or guardian therein.

1 R. S. 741, §§ 9-12; Real Property Law, §§ 177, 178, 179.

The legal of equitable provisions to bar the dower estate must be a fair equivalent therefor, and be a reasonable and competent livelihood, to make them absolutely binding in the first instance. McCartee v. Teller, 8 Wend. 267 affg. 2 Paige, 511; Curry v. Curry, 10 Hun, 366. Unless they are carried out; dower will not be barred. Ellicott v. Mosier, 11 Barb. 31, 7 N. Y. 201; Sheldon v. Bliss, 8 N. Y. 31. Nor unless they are to take effect immediately on decease of the husband. Crain v. Cavana, 36 Barb. 410.

An ante-nuptial agreement to accept a certain sum in lieu of dower may

But where, by the agreement to accept a certain sum in her of dower may be enforced by specific performance. Carpenter v. Carpenter, 40 Hun, 263.

But where, by the agreement, the provision in lieu of dower was to be a lien, and it was held that the agreement did not effect this, and the provision failed, dower was not barred. Mundy v. Munson, 40 Hun, 304.

Ante-nuptial agreement gives no estate per se in lands subsequently acquired though so intended and expressed. Johnston v. Spicer, 41 Hun, 475.

But it can be enforced by specific performance.

But it can be enforced by specific performance. Id.

As to being too indefinite to be a lien, see Mundy v. Munson, 40 Hun, 304.

Lack of consideration and indefiniteness will defeat such agreement. Graham v. Graham, 143 N. Y. 573.

Jointure, etc., when Forfeited .- Every jointure, devise, and every pecuniary provision in lieu of dower shall be forfeited by the woman for whose benefit it shall be made, in the same cases in which she would forfeit her dower; and, upon such forfeiture, any estate so conveyed for jointure, and every pecuniary provision so made, shall immediately vest in the person or his legal representatives, in whom they would have vested on the determination of her interest therein, by the death of such woman. I R. S. 742, § 15; Real Prop. Law, § 182.

Forrest v. Forrest, 3 Bosw. 661, 695.

Provisions by will and deed.—If provision be made to a woman by will, in lieu of dower, she shall also make her election. She shall be considered to have chosen the jointure or provision, unless within one year from her husband's death she commences proceedings for dower, or enters on the lands to be assigned to her for dower. See 1 R. S. 742, §§ 13, 14.

Palmer v. Voorhis, 35 Barb. 479.

By Law of 1895, Chap. 1022 (repealing Law of 1895, Chap. 171), the above section 13 was substantially re-enacted.

See now Real Property Law, §§ 180, 181, the latter embodying some amendments made since the Revised Statutes, and containing some slight

original changes.

Where a legacy is not expressed in lieu of dower, it will not be so intended. unless the intention is otherwise manifest from the will. Adsit v. Adsit, 2 Johns. Ch. 448; Jackson v. Churchill, 7 Cow. 287; 4 Barb. 20; Lewis v. Smith, 9 N. Y. 502, 13 Barb. 106; Savage v. Jackson, 10 Paige, 266; Savage v. Burnham, 17 N. Y. 562; Dodge v. Dodge, 31 Barb. 413; Palmer v. Voorhis, 35 id. 479; Bull v. Church, 5 Hill, 206, affd., 2 Denio, 430; Wetmore v. Peck, 66 How. Pr. 54; Bond v. McNiff, 38 super. 83, affd., 41 id. 453; White v. Kane, 51 id. 295; Konvalinka v. Schlegel, 104 N. Y. 125.

A charge on real estate of an annuity not being expressed to be in lieu of dower, there being no other provision for widow, will not prevent the admeasurement of dower, nor will election by widow be required. Horstmann

v. Flege, 172 N. Y. 381.

Where the will operates an equitable conversion of all the property, the

widow must elect. Asche v. Asche, 47 Hun, 285, affd., 113 N. Y. 232.

A provision by will in lieu of dower, if accepted, bars the wife's dower in lands which the testator had conveyed before the date of the will. Palmer v. Voorhis, 35 Barb. 479, supra; Steele v. Fisher, 1 Edw. 435. She is barred after the year, whether she knew of the provisions of the will or not. Palmer v. Voorhis, supra.

If the provision in the will fail, her right to dower is restored. Lee v.

Power, 12 N. Y. Supp. 240.

Where widow dies pending time for election as to dower, she will be presumed to have taken provision in will, when it is the more favorable. Doty v. Hendrix, 16 N. Y. Supp. 284.

Election may be extended by court order, when a contest of the will is

pending. L. 1890, Chap. 61, amending 1 R. S. 742, § 14.

Presumption of election, and as to enlargement of time therefor. Id. and Laws of 1895, Chap. 1022.

See these provisions re-enacted. Real Property Law, § 181.

Provision by deed .- Where a deed of husband and wife is set aside for fraud on creditors her dower is revived, and she need not take a gross sum in lieu thereof. Lowry v. Smith, 9 Hun, 514.

Lapse of time presumption of acceptance. Doremus v. Doremus, 66 Hun,

111.

When election Binds.— Election induced by fraud, when held binding. The statute requiring election within one year has the force of a statute of limitation. Akin v. Kellogg, 119 N. Y. 441.

Widow must have full knowledge of the nature and extent of the estate,

or her election will not bind her. Hindley v. Hindley, 29 Hun, 318.

Election of provision in will is in ease of the estate, and bars the widow

from sharing in lapsed legacies. Matter of Benson, 96 N. Y. 499.

Where widow accepts devise of whole estate in trust for her benefit, dower is abrogated. Asche v. Asche, 18 Abb. N. C. 82, affd., 47 Hun, 285, affd., 113 N. Y. 232; Savage v. Burnham, 17 N. Y. 561.

When Dower Defeated.—As a general principle, the wife's dower is liable to be defeated by every subsisting claim or incumbrance in law or in equity existing before the inception of the title, and which would have defeated the husband's seizin.

An agreement by the husband to convey, before dower attaches, will, if enforced in equity, extinguish the claim to dower; also a judgment recovered against the husband before marriage, and a sale under it, overrides the wife's right of dower. Sanford v. McLean, 3 Paige, 117.

So where the husband elects to rescind a sale to him for fraud, dower is lost. Hammond v. Pennock, 61 N. Y. 145.

But not by a conveyance made before marriage with the intent of depriving the wife of dower. Youngs v. Youngs, 10 Hun, 194.

But dower cannot be asserted in lands purchased with husband's money, when they are not conveyed or agreed to be conveyed to him. Phelps v. Phelps, 143 N. Y. 197, supra.

Defeasance.— Dower is also defeated by the disseizin of the husband, by paramount title or re-entry, on condition broken, and by the operation of collateral limitations determining the estate. Green v. Reynolds, 72 Hun, 565.

Acts of the Husband. By I R. S., p. 742, § 16, "No act, deed, or conveyance, executed or performed by the husband, without the assent of his wife, evidenced by her acknowledgment thereof, in the manner required by law to pass the estates of married women, and no judgment or decree confessed by or recovered against him, and no laches, default, covin, or crime of the husband, shall prejudice the right of his wife to her dower or jointure, or preclude her from the recovery thereof, if otherwise entitled thereto."

See now, Real Property Law, § 183. The words "the estates of married women" in the Revised Statutes have been changed to "the contingent right of dower of a married woman," and the words "if otherwise entitled thereto" have been omitted.

Denton v. Nanny, 8 Barb. 618. Her deed concludes her as an estoppel, not as a grant; Malloney v. Horan, 53 Barb. 29; reversed, on other grounds in 49 N. Y. 111. The legal effect of a wife's uniting with her husband in a conveyance of his lands is to release her dower. Before admeasurement, she has no interest or estate in the lands, and her deed operates not as a

has no interest or estate in the lands, and her deed operates not as a grant but as an estoppel. Id.

Dower is not removed if the wife is an infant at the time of the acknowledgment. Cunningham v. Knight, 1 Barb. 399; Sandford v. McLean, 3 Paige, 117; Wells v. Seixas, 23 Blatchf. 242. Nor is her dower barred by a deed of separation. Carson v. Murray, 3 Paige, 483. As to how far it is barred if she join in a deed, subsequently set aside as fraudulent or void, see infra, Chap. 21; Manhattan Co. v. Evertson, 6 Paige, 459, 467; Malloney v. Horan, 49 N. Y. 111. Vide infra, "Release." See also supra, 85, 86.

As to what duress on the part of the husband will avoid her deed or release, see Rexford v. Rexford, 7 Lans. 6.

Where husband and wife joined in a deed absolute on its face but really

Where husband and wife joined in a deed, absolute on its face but really a mortgage, and the grantee afterward reconveyed to the husband taking back a mortgage from him alone, dower attached. Taylor v. Post, 30 Hun,

Annulment of Marriage. - Where marriage had been annulled on ground of pre-existing marriage, dower was not granted. Price v. Price, 124 N. Y. 589.

Incestuous and Void Marriages.- Vide 2 R. S. 139, § 3, as to incestuous and void marriages, amended, L. 1893, Chap. 601. Now Domestic Relations Law, L. 1896, Chap. 272, § 2.

Foreign Divorce.—A woman divorced in another State, not for adultery but for another cause, will have dower here even if she has appeared in the action. Van Cleaf v. Burns, 133 N. Y. 540, revg. 62 Hun, 250. See also Williams v. Williams, 130 N. Y. 193.

If, in an action brought in the courts of a sister State by a husband to procure an absolute divorce, the husband being at that time an actual and bona fide resident of that State, the wife voluntarily appears in the action, the judgment is as binding upon her in the State of New York as in the State wherein the judgment was rendered. Rich v. Rich, 88 Hun, 566.

So if a woman has obtained a divorce in Massachusetts, she is estopped from claiming dower here, though the grounds of the divorce would not constitute sufficient grounds for divorce in this State. Starbuck v. Starbuck, 173 N. Y. 503.

173 N. Y. 503.

Adultery of Wife.—By the Revised Statutes of 1830, in case of divorce a vinculo for the misconduct of the wife, she shall not be endowed.

2 R. S. 146, § 61; 1 id. 741, § 8. See also Code Civ. Proc., § 1760, forbidding dower where the marriage is dissolved by a judgment.

See now Real Property Law, § 176.

As to a case arising under adultery committed before 1830, vide Reynolds v. Reynolds, 24 Wend. 193.

If condoned her inchoate right is not affected. Pitts v. Pitts, 13 Abb.

N. S. 272, affd., 52 N. Y. 593.

A decree of limited separation can make no provision affecting dower.

Crain v. Cavana, 62 Barb. 109.

Adultery will not, per se, bar dower. Only a decree of divorce for adultery will suffice. A decree in another action establishing the fact has no effect. Pitts v. Pitts, 52 N. Y. 593; Schiffer v. Pruden, 64 id. 47.

Even a decree in action for divorce finding adultery of wife, but refusing divorce because of husband's adultery, will not bar dower. Schiffer v. Pruden,

39 Super. 167, affd., 64 N. Y. 47.

Adultery of the Husband.— It had been questioned whether a woman who has obtained a decree for a divorce a vinculo matrimonii, for the adultery of her husband, was entitled after his death to dower in his estate. In Wait v. Wait, 4 Barb. 192, it was held that she was not. This case, however, was reversed, and the contrary rule established by the Court of Appeals.

Wait v. Wait, 4 N. Y. 95. See also Forrest v. Forrest, 3 Abb. 144; 25 N. Y. 501; Price v. Price, 124 id. 589.

By Code Civ. Proc., § 1759, it is provided that where final judgment is rendered dissolving the marriage on the wife's application, the plaintiff's right of dower in any real property of which the defendant is or was theretofore seized, is not affected by the judgment.

But she is not entitled in lands of which he became seized after the vorce. Kade v. Lauber, 16 Abb. Pr. N. S. 288; Nichols v. Park, 78 App. divorce.

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She is entitled to dower in lands of the husband of which he was seized before divorce, even where she remarries. Van Voorhis v. Brintnall, 23 Hun, 260, revd., 86 N. Y. 18, on other grounds.

Provisions under Law of 1860.— Under Law of March 20. 1860, Chap, 90, §§ 10, 11, on the decease of husband or wife, leaving no minor child, the survivor took a life estate of one-third of the estate of which the other died seized. If he or she died intestate, leaving minor child or children, the survivor took the income of the whole real estate during the minority of the youngest child. and of one-third for life. These provisions were repealed by Law 1862, Chap. 172, but affected rights vested under them.

Release.— The wife could release dower during life of husband in no other way than by joining in a conveyance to a third person.

Carson v. Murray, 3 Paige, 483; Elmendorf v. Lockwood, 57 N. Y. 322, 330; People v. Knickerboeker Life Ins. Co., 66 How. Pr. 115; Ford v. Knapp, 31 Hun, 522, reversed on another point, 102 N. Y. 135.

See, however, under "After Divorce," infra, 165; Savage v. Crill, 19 Hun, 4, affd., 80 N. Y. 630. L. 1890, Chap. 502, repealed by L. 1892, Chap. 616, Real Property Law, § 186.

Quitclaim or release of dower by a married woman to a stranger to the title will not divest her of the inchoate right of dower. Merchants Bk. v. Thompson, 55 N. Y. 7.

But she may, it seems, release to a grantee of the husband. Marvin v. Smith, 46 N. Y. 571.

As to wife's inchoate right of dower, and how she might release same. Witthaus v. Schack, 105 N. Y. 332.

An agreement during coverture or between husband or his trustee and the wife to relinquish her dower is invalid. 2 Sandf. 811. Or a release by her to him. Crain v. Cavana, 36 Barb. 410, affd., 62 id. 109; 3 Paige, 483, supra; Wightman v. Snieder, 18 N. Y. Supp. 551. See also cases, supra, p. 160. Neither do the Laws of 1848 and 1849, for the protection of married women,

enable a wife to release her dower directly to her husband. Graham v. Van Wyck, 14 Barb. 531. Nor agree with him to do so. Crain v. Cavana, 36 Barb. 410, affd., 62 id. 109. If she release to a purchaser for value she shall be deemed to release in every character which enabled her to give effect to her deed. Dundas v. Hitchcock, 12 How. 256.

The release of dower to lessees of the husband is not an abandonment of dower as between the widow and the husband's heirs. Williams v. Cox, 3

Edw. 605.

The court cannot compel a husband who has married a woman having a dower right, nor the woman either, to join in a deed releasing it. In re Lane, 1 Ed. Ch. 349. It has been held, as a principle regulating the estate, that a release of dower is held to operate only as a release, and that it does not operate as the transfer of an independent estate; that therefore if the principal instrument (a deed or mortgage, as the case may be) accompanying it is canceled, or never takes effect, or ceases to operate, the release of dower falls with it, and the right of dower revives. Halstead v. Eldridge, dower falls with it, and the right of dower revives. Halstead v. Eldridge, 2 Halst. 392; Douglas v. McCoy, 5 Ohio 527; Powell v. Morrison, etc., 3 Mason, 347; Hall v. Savage, 4 id. 273; Barker v. Parker, 17 Mass, 56; Summers v. Babb, 13 Ill. 483; Stinson v. Summers, 9 Mass. 143; Kitzmiller v. Rensselaer, 10 Ohio St. 63; Taylor v. Fowler, 18 Ohio, 567; Robinson v. Bates, 3 Metc. 40; Woodworth v. Paige, 5 Ohio St. 70; Miller v. Wilson, 15 id. 108; Witthaus v. Schack, 105 N. Y. 332. The case of Malloney v. Horan, 53 Barb. 29, does not appear to be in accord with the cases holding that an estoppel arises against the wife; but that decision was reversed on appeal on other grounds. See Malloney v. Horan, 49 N. Y. 112. As to a release during coverture of part of an estate held in trust. vide Marvin v. Smith, lease during coverture of part of an estate held in trust, vide Marvin v. Smith, 46 N. Y. 571.

An agreement by a wife in articles of separation to release her dower is not binding after the husband's death. Guidet v. Brown, 3 Abb. N. C. 295.

Even though she long accepted a pecuniary provision thereunder. Id.

Where a widow set aside as to herself a deed of her husband's in which she had joined, it was held that her dower attached as to the original grantee, but not as to bona fide purchasers from him, before the revocation of the deed. Witthaus v. Schack, 38 Hun, 590, revd., 105 N. Y. 332, on other grounds, however.

Where an infant wife joins in a deed she may disavow it at any time before the statute has run. Mere inaction will not confirm it, and, when disaffirmed, dower attaches. Wells v. Seixas, 23 Blatchf. 242.

A used in which the wife joins need not expressly release dower so nomine to operate as a release. Other words may do. Gillilan v. Swift, 14 Hun, 574. L. 1893, Chap. 599, allowing her, if of full age, to make power of attorney to release. See also L. 1835, Chap. 275, as to nonresident married women. Real Property Law, L. 1896, Chap. 547, § 187, provides:

"A married woman of full age may release her inchoate right of dower in real property by attorney in fact in any case where she can personally release the same." A deed in which the wife joins need not expressly release dower eo nomine

She may release by attorney in fact, though he be her husband. In re Wolff, 19 N. Y. Supp. 51, affd., Wronkow v. Oakley, 133 N. Y. 505. See also infra, Chap. XIII, Tit. IV.

As to release of dower in actions pending, and consent to accept a sum. Laws of 1870, Chap. 717 (repealed Laws of 1880, Chap. 245); amended Laws of 1880, Chap. 487. See present provisions, Code Civ. Proc., §§ 1569, 1570, 1571, 1617, 1618.

Dower may be released to husband by a married woman under § 1571 of the Code of Civil Procedure.

See also "Partition" and "Foreclosure" with reference to protection of

dower interests, in Code of Civil Procedure.

See infra, p. 166; also Chaps. XXVIII and XXX, infra as to "Fore-closure" and "Partition."

After Divorce.—A woman theretofore divorced was enabled by L. 1890, Chap. 502 (repealed L. 1892, Chap. 616), and, also, by said latter act to convey and release to her former husband her inchoate right of dower in land to which her husband had or might acquire title. Real Property Law, § 186.

Estoppel.—A widow may be estopped by her own acts from setting up dower. As, when an innocent grantee has taken a deed under a statement from a widow that her dower had been extinguished, and relying upon it.

Maloney v. Horan, 49 N. Y. 111; Lawrence v. Brown, 5 id. 394; Wood v. Seely, 32 id. 105; Jewett v. Miller, 10 id. 402. See also Witthaus v. Schaack, 38 Hun, 590, revd. on other grounds, 105 N. Y. 332.

Limitation.—It is also provided that "An action for dower must be commenced by a widow, within twenty years after the death of her husband; but if she is, at the time of his death, either—I. Within the age of twenty-one years; or, 2. Insane; or, 3. Imprisoned on a criminal charge, or in execution upon conviction of a criminal offense, for a term less than for life; the time of such disability is not a part of the time limited by this section.

Code Civ. Proc., § 1596; Wetyen v. Fick, 178 N. Y. 223.

The provisions formerly in force, which are substantially the same, are found in 1 R. S. 742, § 18, which was repealed by L. 1880, Chap. 245. This section would apply to cases where the husband died before the Revised Statutes of 1830. Brewster v. Brewster, 32 Barb. 428; contra, Stewart v. Smith, 14 Abb. 75; Ward v. Kilts, 12 Wend. 137; Williamson v. Field, 2 Sandf. Ch. 533, 569, criticised, 57 Super. 99.

By L. 1882, Chap. 277, the above section of the Code was amended by adding a provision that if, before dower is barred, the owners of the land subject to it shall execute an acknowledgment of it under seal, and acknowledged like a deed, or it shall be recognized by a judgment to which such owners are parties, the statute shall run only from such acknowledgment or judgment.

ment or judgment.

Assignment in Bar.—"The acceptance, by a widow, of an assignment of dower, in satisfaction of her claim upon the property in question, bars an action for dower, and may be pleaded by any defendant."

Code Civ. Proc., § 1604, following 1 R. S. 743, § 23, which was repealed by L. 1880, Chap. 245.

But the intent to so assign and admeasure must be clear. Aikman v. Harsell, 98 N. Y. 186.

See Ellicott v. Mosier, 7 N. Y. 201; Rutherford v. Graham, 4 Hun, 796.

Foreclosure. See supra, p. 155, and Chap. XXVIII.

Partition.—Where there has been actual voluntary partition among tenants in common, the dower rights of each wife attach to the share in severalty of her husband.

Wilkinson v. Parish, 3 Edw. 653; Jackson v. Edwards, 7 Paige, 386, 22 Wend. 498.

As to provisions relative to dower, in partition suits. See "Partition."

Chap. XXX, infra.

And a sale in partition will extinguish the wife's right of dower, if she is made a party. Jackson v. Edwards, 7 Paige, 386, 22 Wend. 498, supra. Jordan v. Van Epps, 85 N. Y. 427, holding that her only remedy is by appeal; she cannot attack the sale collaterally.

See Code Civ. Proc., § 1567.

TITLE III. ASSIGNMENT AND ADMEASUREMENT OF DOWER.

The Code of Civil Procedure prescribes that after assignment in satisfaction of the widow's claim of dower upon the property in question, and her acceptance, it may be pleaded in bar of any further claim of dower, by any defendant.

Code Civ. Proc., § 1604. So formerly by 1 R. S. 743, § 23; repealed by L. 1880, Chap. 245.

Dower may be assigned by parol followed by occupation. Gibbs v. Estey, 22 Hun, 267.

Proceedings to Admeasure Dower.— The statutes of this State abolished the old writ of dower, and substituted the action of ejectment, and the statutory proceedings.

2 R. S. 303, 343.

The assignment also could be made in pais, by parol, by the party who has the freehold. Gibbs v. Estey, supra.

The action of ejectment for dower was abolished by L. 1898, Chap. 517.

Proceedings for the recovery of dower are provided in the Code of Civil Procedure, §§ 1596 to 1625, inclusive. The Supreme Court has a general jurisdiction of these proceedings, and also the "County Courts," for land situated within their respective counties. § 340.

Formerly the "Superior City Courts" had a like jurisdiction for land situated within their respective cities. § 263. Repealed to take effect Jan. 1, 1896, by L. 1895, Chap. 946, § 2.

These proceedings take the form of an action and supersede the old procedure for admeasurement of dower. They are, however, based on similar principles.

Formerly the surrogate also had jurisdiction by 2 R. S. 220, § 1, but this was repealed by L. 1880, Chap. 245. The surrogate was not ousted by the pendency of a partition suit in which the widow claimed dower. Matter of

Hughes, 3 Redf. 18.

Hughes, 3 Redf. 18.

For former procedure, see 2 R. S. 488 et seq. These proceedings for the admeasurement of dower were substantially enacted by Law of Feb. 20, 1806, 1 R. L. 60, giving the Supreme Court, and the Surrogate's and Common Pleas Courts of the county jurisdiction. The details of them are not appropriate to this treatise. They were amended by Laws of 1869, Chap. 433. See as to the proceedings, Stewart v. Smith, 4 Abb. App. Cas. 306.

The dower, it was then provided, should be admeasured, on notice and assigned by commissioners. As amended by Laws of 1869, Chap. 433.

The adverse parties must have had reasonable notice, in writing, of the proceedings, or they would be set aside. In the Matter of Elizabeth Cooper, 15 Johns. 533. Tenants for years were not entitled to notice. Ward v. Kilts, 12 Wend. 137. See also In re Sipperly, 44 Barb. 371.

A substantially similar proceeding is now provided (Code Civ. Proc., §§ 1607-1613) as to parties. See Code Civ. Proc., §§ 1597, 1598, 1599.

The widow cannot insist on having dower assigned out of each parcel where others would be injured. Price v. Price, 41 Hun, 486. The question of practicability is for the referee. O'Dougherty v. Remington Paper Co., 42 Hun, 192.

of practicability is for the referee. 42 Hun, 192.

Parties defendant and allegations necessary to complaint in action for dower. Connolly v. Newton, 85 Hun, 552. See Code Civ. Proc., §§ 1597, 1598,

Effect of Admeasurement.—The admeasurement of dower, being made and confirmed, was to be at the expiration of thirty days from the date of such confirmation, unless appealed from, binding and conclusive as to the location and extent of the widow's right of dower, on the parties who applied for the same, and on parties appearing or who had notice. Under the Code of Civil Procedure, a formal judgment is entered which does not differ in its incidents from other final judgments. Code Civ. Proc., § 1613. Vide 2 R. S. 513, 634, as to further details of the procedure. Siglar v. Van Riper, 10 Wend. 414.

By Laws of 1869, Chap. 433, the appeal did not stop her recovery of pos-

The right to dower can be aliened. Formerly it was held inalienable. Vide Jackson v. Aspell, 20 Johns. 412; Ritchie v. Putnam, 13 Wend. 524; overruled by Payne v. Becker, 87 N. Y. 153. Pope v. Mead, 99 N. Y. 201, holding the right to unassigned dower assignable.

The proceedings under the Revised Statutes were expressly continued in

force by the Code of Procedure, § 471.

Dower might be also admeasured under the statute of "Arbitrations."

Vide 2 R. S. 541, § 2.

It is to be remarked that the admeasurement was binding and conclusive only as to the location and extent of the dower right, and did not preclude the controverting the title to dower at law. After admeasurement, to get possession, the widow had to bring ejectment, when the validity of her claim to any dower, the title of her husband, his seizin, and her marriage, might be controverted and tried. Vide 2 R. S. 303; Hyde v. Hyde, 4 Wend. 630; Parks v. Hardey, 4 Bradf. 15; Wood v. Seely, 32 N. Y. 105. Ejectment for dower has now been abolished (Code Civ. Proc., § 1499), and all the questions may be tried in the action for dower.

It was not until the dower had been fully assigned that the widow acquired a vested estate for life, which would enable her to sustain her ejectment or to subject it to sale under execution, although it might be released or assigned. Moore v. Mayor, 8 N. Y. 110; Greene v. Putnam, 1 Barb. S. C. R. 500; 3 id. 319; Kain v. Fisher, 6 N. Y. 597; Siglar v. Van Riper, 10 Wend. 414, 421; Payne v. Becker, 22 Hun, 28, holding right of dower before assignment. ment to be inalienable, was reversed, 87 N. Y. 153, and the opposite rule established. See also Pope v. Mead, 99 N. Y. 201.

But she could have had ejectment before assignment against tenants having Ellicott v. Mosier, 11 Barb. 574, affd., 7 interests less than a freehold.

N. Y. 201.

Until assignment the widow's interest is a chose in action or claim, which is extinguished by a sale under a surrogate's order. But where it has been actually assigned by the decree of a competent court, it cannot be sold under said proceedings. Lawrence v. Miller, 2 N. Y. 245; Stewart v. McMartin, 5 Barb, S. C. R. 438.

After assignment, a widow's seizin relates back to the time of her marriage, or when the husband became seized, and any order for the sale of the lands by the surrogate, for debts due, is void as to her life estate. Lawrence v. Brown, 5 N. Y. 394; 4 Kent, 69. And no livery or writing was necessary to an assignment in pais. Fowler v. Griffin, 3 Sandf. 385.

Amount fixed by final judgment in dower cannot be altered by order.

McIntyre v. Clark, 43 Hun, 352.

As to appeal from admeasurement before the Code, see Smith v. Smith,

Taxes and Assessments should be paid by the heirs or devisees before the dower in the lands is admeasured. Harrison v. Peet, 56 Barb. 251.

An assessment must be borne by the heirs, the widow being required to bear a third of the interest of the capital of the assessment on the lots assigned to her, at seven per cent., to commence from the confirmation of the assessment; or, if not confirmed until after the husband's death, then from such death. Williams v. Cox, 3 Edw. 178; and see infra, p. 171.

Estimation of Lands and Improvements.- In case of alienation by the husband, the widow was to have her dower assigned according to the value of the lands at the time of alienation. Dorchester v. Coventry, 11 Johns. 510; Shaw v. White, 13 id. 179; Walker v. Schuyler, 10 Wend. 480; Marble v. Lewis, 53 Barb, 432.

By the Code of Civil Procedure, no damages are to be estimated for any permanent improvements made after decease of the husband, as against the heirs or other owners. §§ 1600, 1601. This principle was found also §§ 1600, 1601. This principle was found also

in the Revised Statutes. 1 R. S. 743.

But the improvements may be assigned as a part of the dower. Brown v.

Brown, 4 Robt. 688; Parks v. Hardey, 4 Bradf. 15.

In making admeasurement under the Code of Civil Procedure (§ 1609. subd. 2), as formerly under the Revised Statutes, permanent improvements, made by any heir, guardian of minors, or other owners, since the death of the husband, or since the alienation by him are to be considered; and if practicable, those improvements must be awarded within that part of the lands not allotted to such widow; and if not practicable so to award the same, they are to make a deduction from the lands allotted to such widow, proportionate to the benefit she will derive from such part of such improve-

ments as is included in the portion assigned to her.

Chancellor Kent, from a review of the American cases claimed the rule to that the improved value of the land from which the widow was to be excluded in the assignment of her dower, as against a purchaser from her husband, was that which had arisen from the actual labor and money of the owner, and not that which had arisen from extrinsic and general causes. The courts in this State made, however, no such distinction, but followed the rule given above, 4 Kent, 68. The whole question is now settled by Code Civ. Proc., § 1609, subd. 2, supra.

By Code Civ. Proc., § 1613, as formerly by Laws of 1869, Chap. 433, § 3, the court may order the rental value of one-third of the land to be paid to

the widow.

Assignment in certain Cases under the Former Procedure.- If the property were not divisable, or arose from rent, common, rights of return of yield, mines, etc., then the assignment might be made in a special manner, as of a third of the profits or the use for every third month.

So also rooms, and the use of halls and passages might be assigned. Parks v. Hardey, 4 Bradf. 15.

If the widow is evicted by paramount title of her land, she may recover a third part in value of the two remaining third parts of the lands whereof she was dowable. Her remedy on eviction is by a new assignment of dower. If the assignment was by the alience of the hall and she has no down. recourse as against him. 4 Kent, 69; Perkins, § 419; St. Clair v. Williams, 7 Ohio, 110.

Ejectment; and Admeasurement thereon.—Provision was made by the Revised Statutes for the admeasurement of the lands after judgment for the wife in ejectment, and the obtaining possession of the lands by a writ of possession. But now ejectment for dower is abolished. Code Civ. Proc., § 1499.

See 2 R. S. 304; and Ellicott v. Mosier, 7 N. Y. 201, as to the parties

against whom the action was to be brought.

By Law of 1869, Chap. 433, regulating appeals from judgments awarding the land admeasured to the widow, no appeal was to stay the issuing of

a writ of possession on her giving the security as provided.

In an action of ejectment for dower, it was held that a purchaser or heir, holding under or through the husband, was estopped from showing that the husband was not seized of such an estate as would entitle the wife to dower. This was so held in Browne v. Potter, 17 Wend. 164, and the various cases therein cited. These cases have been overruled, however, so far as the grantee's right exists to controvert the right to dower. Sparrow v. Kingman, 1 N. Y. 242; Finn v. Sleight, 8 Barb. 401.

Damages for Withholding Dower.—The Code makes provision for the recovery of damages for withholding dower. They cannot be recovered for a period over six years. (Code Civ. Proc., § 1600.) The details of these proceedings are not appropriate to this treatise.

See 1 R. S. 742, § 20.

TITLE IV. MISCELLANEOUS PROVISIONS AS TO DOWER.

Consent to Accept a Sum in Discharge of Dower .- By Code Civil Procedure a widow may file a consent, in an action to admeasure or recover dower, to receive a gross sum in satisfaction. The court may decree a sale of any of the lands free of incumbrances, pay all liens, the sum to the widow, and the surplus to those entitled thereto, or may sell subject to liens. The court, if a consent is filed, may also allot portions of land in fee simple to the widow. Full details of the proceedings are given in the Code, §§ 1617–25.

So formerly by L. 1870, Chap. 717; amended by L. 1874, Chap. 258 and L. 1880, Chap. 487, and repealed by L. 1880, Chap. 245.

Remedy of Infant Heir.—If dower is wrongfully recovered where there is no right thereto, by default or collusion with the guardian of an infant heir, the heir, when of age, may recover the lands wrongfully awarded for dower, with damages from entry by the widow, though more than six years before the action.

Code Civ. Proc., § 1605. So formerly, 1 R. L. 57; 1 R. S. 743, § 24; repealed by L. 1880, Chap. 245.

Crops.—A widow may bequeath the crop in the ground of the land holden by her in dower.

1 R. L. 368, § 17; 1 R. S. 743, § 25; Real Prop. Law, § 185. She is entitled to growing crops in the land set off to her. Clark v. Battorf, 1 T. & C. 58.

Quarantine.—A widow is entitled to tarry in the chief house of her husband forty days after his death, without being liable for rent, and to have reasonable sustenance out of his estate.

I R. S. 742, § 17; Real Prop. Law, § 184.

Legislative Acts affecting Dower Rights.—It has been held in the court of another State, that it is competent for the Legislature to modify the laws relative to dower, so as to affect cases where the marriage and seizin have taken place before the passage of the law, when the title to dower has not been consummated by the death of the husband.

Magee v. Young, 40 Miss. 164. And see various cases cited above in this chapter.

Legacy in Lieu of Dower.—Where the personal estate remaining for distribution is insufficient to pay legacies in full, legacies to a widow in lieu of dower are entitled to priority and carry interest from the death of testator, although their value exceeds that of the dower interest. Matter of McKay, 5 Misc. 123.

Waste Committed by a Doweress.—A tenant in dower is liable for waste. For proceedings therefor, vide supra, Chap. IV.

Alien Women and Widows of Aliens, Dower of.— As to these, vide supra, Chap. III, Tit. IV.

Sales by Order of Surrogates.—As to the reservation of proceeds for dower claims under such sales, vide infra, Chap. XVIII.

These proceedings do not authorize the sale of the widow's estate in dower. where it has been assigned to her. Lawrence v. Miller, 2 N. Y. 245.

Action to Protect Inchoate Dower.—See Clifford v. Kampfe, 84 Hun, 393, as to inchoate right of dower and action by a married woman for its protection. Simar v. Canaday, 53 N. Y. 298; Moore v. The Mayor, 8 N. Y. 110.

Sale of Infant's Estate.—As to reservation of certain proceeds for claims in dower, vide infra, Chap. XXV.

Partition Sales .- As to payment of claims for dower out of proceeds of such sales, vide infra, Chap. XXX. See also Code Civ. Proc. § 1569.

Taxes.—All lands admeasured to the widow are to be held by her, subject to the payment of all taxes and charges accruing thereon subsequent to her taking possession. Code Civ. Proc., § 1613. So formerly, Borst v. Griffin, 9 Wend. 307.

Rights in a Lease of Lands.—A widow entitled to dower who joins with the heirs in a lease of the real estate for a term of years becomes vested, as against the tenant with all the rights of a lessor, and her title to the premises and to the rents cannot be disputed by him.

The fact that the other lessors have conveyed their respective interests to the tenant does not affect her rights, and, in case of her death, her administrator has a good cause of action for the proportionate part of the rent to which she was entitled.

Sommer v. Bavarian Star Brewing Co., 6 Del. 413, affd., 8 Misc. 268.

Power of Attorney.—Releases through, vide, Chap, XIII, also supra, p. 165.

TITLE V. ESTATES BY THE CURTESY.

Tenancy by the curtesy is an estate for life, created by operation of law. It arises to the husband on the decease of a wife who has been seized at any time during the coverture, of an estate of inheritance, either in severalty or in common, and has had issue by him, born alive, which might by possibility inherit the same estate as heir to the wife, and the wife dies in the lifetime of the husband. He then holds the land during his life, by the curtesy of England, so called. It is deemed a legal estate and not a mere charge.

Mack v. Roche, 13 Daly, 103. It is immaterial whether the issue be living

at the time of the seizin, or at the death of the wife, or whether it was born before or after the seizin. 4 Kent, 26; Jackson v. Johnson, 5 Cow. 74.

If the issue take as purchaser, the husband is not entitled to take by curtesy, as where there was a devise to the wife and her heirs; but if she died leaving issue, then to such issue and their heirs. Barker v. Barker, 2 Simm. 249. But see Kirk v. Richards, 32 Hun, 434.

Like dower it was an incident of socage tenure. Fowler's Real Property

Law (2d ed.), 837.

Four things are requisite to an estate by the curtesy, viz.: marriage, seizin of the wife during coverture, issue born alive during the life of the mother (Marsellis v. Thalhimer, 2 Paige, 35), and

death of the wife. The law vests the estate in the husband immediately on the death of the wife without entry. His estate is initiate on issue had, and consummate on the death of the wife. although technically the estate or right is supposed to vest during coverture.

Furguson v. Tweedy, 56 Barb. 168; 43 N. Y. 543; Ellsworth v. Cook, 8 Paige, 643; In re Winne, 2 Lans. 21; Knapp v. Smith, 27 N. Y. 277.

A child delivered by the Cæsarian operation and dying immediately is not "issue born alive," so as to entitle the father to curtesy. Thalhimer, 2 Paige, 35.

As to burden of proof that child was born alive. Bender v. Terwilliger, 48

App. Div. 371.

Seizin of the Wife.—The seizin of the wife by the English law had to be in fact and in deed, and where her title is incomplete before entry, a seizin in fact would seem essential even in this country.

Pond v. Bergh, 10 Paige, 140, 154; Jackson v. Johnson, 5 Cow. 74; Graham v. Ludington, 19 Hun, 246; Gibbs v. Estey, 22 Hun, 266. It would not be necessary, however, if the outstanding life estate is a mere equitable interest; nor where her title is acquired by virtue of a conveyance, which, under the statute of uses, passes the legal title and seizin, without the necessity of an entry or other act to perfect the estate in the grantee. Adair v. Lott, 3 Hill, 182.

The general rule is much relaxed, in this State, and a constructive seizin of the wife is sufficient, where it is not rebutted by an actual disseizin.

Jackson v. Sellick, 8 Johns. 262; Davis v. Mason, 1 Pet. (U. S.) 503; Ellsworth v. Cooke, 8 Paige, 643; Adair v. Lott, 3 Hill, 182; Vrooman v. Shepherd, 14 Barb. 441; Furguson v. Tweedy, 56 id. 168; 43 N. Y. 543. So held, particularly in the case of wild lands not held adversely. Jackson v. Sellick, 8 Johns. 262. So a judgment in partition or ejectment would give a constructive seizin. Ellsworth v. Cook, 8 Paige, 643. So where a wife was devisee of a partner. Buckley v. Buckley, 11 Barb. 43.

Where there is an outstanding life estate, however, it must be ended before the death of the wife, otherwise there is no seizin in fact. Re Cregier, 1 Barb. Ch. 598; Taylor v. Gould, 10 Barb. 388; and there must be either possession or a title to possession in the wife. Burke v. Valentine,

52 Barb. 412; Furguson v. Tweedy, 43 N. Y. 543.

To entitle the husband to curtesy also, by the common law, the husband had to be a citzen, not a alien. This necessity is in a manner obviated by the alien laws of the State. See "Aliens," Chap. III, Tit. IV.

Curtesy exists if the wife has an equitable estate of inheritance, not-

withstanding the rents and profits are to be paid to her separate use during the coverture. The receipt of the rents and profits is considered a sufficient seizin of the wife. Payne v. Payne, 11 B. Mon. 138; Powell v. Gossom, 18 id. 179; Pitt v. Jackson, 2 Bro. C. C. 51; Morgan v. Morgan, 5 Madd. 408.

Where adverse possession exists during the whole period of the marriage, the husband has no curtesy. Baker v. Oakwood, 49 Hun, 416, affd.

123 N. Y. 16.

The husband of a mortgagee in fee is not entitled to curtesy, though the estate become absolute at law, unless there has been a forclosure, or unless the mortgage has subsisted so long a time, as to create a bar to the redemption. Vide supra, p. 155, the same principle as to dower.

The wife is seized through the possession of a covenant in common.

Buckley v. Buckley, 11 Barb. 43.

Curtesy would also exist in what was intended to be land, as where money had been agreed to be laid out in the purchase of land, the money being treated as land by a court of equity.

Watts v. Ball, 1 P. Wms. 108; Chaplin v. Chaplin, 3 id. 299; Casborne v. Scarfe, 1 Atk. 603; Cunningham v. Moody, 1 Vesey, 174; Dodson v. Hay, 3 Bro. 405; Coster v. Clarke, 3 Edw. Ch. 428; 4 Kent, 50; Vrooman v. Shepherd, 14 Barb. 441.

Curtesy in Beneficial Interests.—At common law, the husband could not be tenant by the curtesy of a use; but he may be of an equity of redemption and of land of which the wife has only a beneficial interest, through a trustee; unless, perhaps by the deed or trust, curtesy is expressly excluded. Watts v. Ball, 1 P. Wms. 108, 1 Sumner, 128; Alexander v. Warrance, 17 Mo. 228; Pierce v. Hakes, 23 Pa. 231; 4 Kent. 31.

In Conditional Estates.—Curtesy applies to conditional and qualified, as well as to absolute, estates in fee; but, as a general rule, curtesy can only be commensurate with the original estate, and if that is determined curtesy falls with it, unless curtesy is tacitly annexed as an incident to the estate, through the terms of the grant to the wife; as also where the seizin was wrongful and there is eviction under a title paramount, curtesy will not attach. Hatfield v. Sneden, 54 N. Y. 280, revg. 42 Barb. 615; Stanhouse v. Gaskell, 17 Eng. L. & Eq. 140; Matter of Kirk v. Richardson, 32 Hun, 434.

Statute of Descents.—Curtesy is not affected by any of the provisions of the statute of descents. 1 R. S. 754, § 20; Real Property Law, § 280.

Curtesy since the Acts of 1848-9.— The Act of 1848, "for the more effectual protection of the property of married women," so far as it affects the husband's existing rights under a marriage contracted before the act, has been declared unconstitutional, as taking away the husband's property, in violation of Art. 1, §§ 1, 6, of the Constitution. This would apply to lands acquired before the act. Under that act, and the Act of 1849, supra, p. 88, the husband continues to take as tenant by the curtesy even of lands acquired subsequent to them, where the wife dies seized of the estate, without having transferred it. The object of those statutes was simply to protect the wife during coverture, and to empower her to convey by deed or devise.

Vide decisions, supra, and White v. White, 5 Barb. 474.

The right of curtesy is upheld as to lands acquired since those acts in all cases, subject to its being defeated by a disposition of the lands by deed or will. Unlike dower it could be defeated by the wife's deed or will.

Hurd v. Cass, 9 Barb. 366; Clarke v. Clarke, 24 id. 581; Jaycox v. Collins,

26 How. Pr. 496; Rider v. Hulse, 33 Barb. 264; Thurber v. Townsend, 22 N. Y. 517; 24 *id.* 372; Burke v. Valentine, 52 Barb. 412, overruling Billings v. Baker, 28 *id.* 243; Scott v. Guernsey, 60 *id.* 163, affd., 48 N. Y. 106; th Case of Winne, 2 Lans. 21, overruling 1 *id.* 508.

Act of March 20, 1860.—It is questionable whether, by the Statute of March 20, 1860, Chap. 90, in this State, curtesy was not abolished or modified in certain cases, for a short time. That act provided that at the decease of a husband or wife leaving no minor child or children, the survivor shall have a life estate of one-third of all the real estate whereof the husband or wife died seized, and at the decease of the husband or wife intestate, leaving minor child or children; the survivor shall have the income of all the real estate whereof the intestate died seized, during the minority of the youngest child, and one-third during his or her life.

These provisions were repealed by Law of 1862, Chap. 172; but they are given here, as they may affect interests vesting when they were in force.

Partition Suits.—As to the disposition of rights of curtesy in partition suits, vide, Chap. XXX.

Effect of Divorce upon.—In case of a judgment of divorce a vinculo, at the instigation of the wife, the husband loses all right in the income of the wife's separate real estate.

2 R. S. 146; Code of Civ. Proc., § 1759.

Curtesy Liable to Creditors.—When the estate by curtesy is once vested in the husband it becomes liable for his debts, and may be sold on execution.

Watson v. Watson, 13 Conn. 83; Curtesy initiate may be sold, Van Duzer v. Van Duzer, 6 Paige, 366; Wickes v. Clarke, 8 id. 161.

Waste.—Tenants by the curtesy committing waste without license in writing, are subject to an action of waste.

Code Civ. Proc., § 1651, superseding 2 R. S. 334, which was repealed by L. 1880, Chap. 245. As to proceedings for waste, vide supra, p. 151,

CHAPTER VIII.

ESTATES LESS THAN FREEHOLD.

I .- ESTATES FOR YEARS.

II .- LEASES.

III.— Assignment and Subletting.

IV .- EVICTION.

V.— FORFEITURE.

VI .- EJECTMENT AND RE-ENTRY.

VII.— ESTATES AT WILL.

VIH .- ESTATES AT SUFFERANCE.

IX .- MERGER.

X .- SURRENDER.

XI .- MISCELLANEOUS PROVISIONS.

TITLE I. ESTATES FOR YEARS.

An estate for years is one giving the possession of lands, for some determinate period; generally at a certain rent. The period being certain or fixed, caused the appellation terminus, or term, to be applied to the estate.

An estate for any number of fixed years, although they should exceed the ordinary limit of human life, is only a chattel, and is considered part of the personal estate. It is termed a chattel real.

1 R. S. 743.

Real Property Law, L. 1896, Chap. 547, Art. II, "Creation and Division of

Estates."

The English law on the subject of long terms, upheld in equity through trusts and attendant upon inheritances, is involved in great intricacy and is superseded in this country by statutory enactments abolishing trusts, except for certain purposes, and providing for the record of conveyances as notice for the protection of bona fide purchasers and mortgagees, which prevent outstanding terms from operating when coming in collision with a registered conveyance.

By the common law, leases for years might be made to commence in future; for being chattel interests, they were never required to be created by feoffment and livery of seizin. The tenant was never technically seized; he was the mere representative of the reversioner, and could not even defend

a real action.

At common law actual entry was requisite to give the lessee the rights of a tenant in possession, and make him capable of receiving a release of the reversion by way of enlargement of the estate. Before entry, the lessee had only an executory interest or interesse termini, and not an estate capable of surrender, though it might be released or assigned. When the words and the Statute of Uses operated upon the lease, and annexed the possession to the use without actual entry. Bacon's Abrid., Title Leases; 4 Kent. 98; Hannen v. Ewalt, 18 Pa. St. 9; Doe v. Brown, 20 Eng. L. & Eq. 88; Fowler's Real Property Law, 131 et seq. See infra, Chap. X, "Uses and Trusts."

There are many complicated principles of law applicable to estates for years, growing out of the relation of landlord and tenant. that do not properly come within the province of this general review of the subject. They will be found in special treatises bearing directly on that relation; and the subjects of estates for years and leases can be treated here only with reference to their more general features: such as the nature of the estate created, and the general relations and obligations of parties interested in them.

TITLE II. LEASES.

Terms for years are generally created under conveyances technically termed "leases."

Whether an instrument is a lease or not often depends upon the intent of parties to be ascertained and gathered from the whole instrument.

As to requirements common to all instruments in general, reference is made to Chap. XX.

It is sometimes doubtful whether the instrument amounts to a lease or is merely a contract to lease. Where the agreement amounts to a lease or interest but to rest in contract, it is construed the latter. Jackson v. Delacroix, 2 Wend. 433; Pearce v. Colden, 8 Barb. 522; Averill v. Taylor, 8 N. Y. 44; Foster v. Clifford, 42 Misc. 496. A lease to begin in futuro is not an executory contract, but a lease. Alline v. Whitney, 1 Hill, 484.

Letting lands upon shares for a crop is not a lease. Putnam v. Wise, 1 Hill, 234; Austin v. Sawyer, 9 Cow. 39; Bradish v. Schenck, 8 Johns. 116; Barrower v. Heath. 19 Barb. 331. Dinebart v. Wilson. 15 id. 595. Unglish

Harrower v. Heath, 19 Barb. 331; Dinehart v. Wilson, 15 id. 595; Unglish

v. Marvin, 128 N. Y. 380.

Agreement to Work a Farm. - When not a lease. Matter of Strickland, 10 Misc. 486.

A receipt by the landlord setting forth the terms and conditions of the tenancy, held a good lease. Gibbons v. Dayton, 4 Hun, 451.

One entering under agreement to lease, and refusing to take lease or surrender possession, is a trespasser from the time of the demand for possession. Welch v. Winterburn, 25 Hun, 437.

It is well settled that a lessor is not required to give actual, physical possession of demised premises to the lessee; that he gives the lessee the legal right to take possession is sufficient. Gardner v. Keteltas, 3 Hill, 330.

T.H. Electric Co. v. The Durant Land Imp. Co., 4 Misc. 207 (revd., 144 N. Y. 34, on other grounds)

N. Y. 34, on other grounds).

Leases in Fee for Life .- By the Revised Statutes leases in fee or for life, like grants of freehold estates must be subscribed, sealed and witnessed

or acknowledged. 1 R. S. 738, § 137.

The Real Property Law, L. 1896, Chap. 547, however, provides only that they be subscribed and witnessed or acknowledged. Real Property Law, § 208.

A conveyance of real estate in fee does not require a seal since the passage of the Real Property Law. Leask v. Horton, 39 Misc. 144; Fitzpatrick v. Graham, 122 Fed. Rep. 401.

See more fully as to such leases, supra, Chap. V, Tit. IV.

Leases for Special Purpose.—Where property is leased for a special purpose and possession is refused because of a prior lease, see as to damages. Friedland v. Myers, 139 N. Y. 432.

The Term .- The day of date of lease is included in the term unless excluded by its terms or by custom. Buchanan v. Whitman, 76 Hun, 67.

LEASES.

In drafting leases of farming or agricultural lands, the lawyer should have regard to the Constitutional provision which prohibits leases of such lands where rent or service is reserved. if the term exceeds twelve years.

Constitutions of 1894, Art. 1, § 13, of 1846, Art. 1, § 14.

Leases of lands not agricultural may be made for terms of years beyond twelve or indeed for a thousand or more years if desired. See Fowler's Real Property, 145. But the lessor's interests and the lessee's as well are both liable to taxation if a lease is "a lease in fee" or for a term of one or more lives or for twenty-one or more years.

Laws of 1846, Chap. 327; Laws of 1896, Chap. 908, § 8. See Woodruff v. Oswego Starch Factory, 177 N. Y. 23. A covenant to pay taxes does not include such taxes. Id.

If the unexpired term of the lease exceeds five years a tenant has for one year a right to redeem if dispossessed for nonpayment of rent.

Code Civ. Proc., § 2256. And see Koppel v. Tilyou, 70 N. Y. Supp. 910; 31 C. P. R., § 185.

Various subterfuges have been essayed by conveyancers to cut off this right of redemption, but none of them have thus far been confirmed by the highest court. If a tenant of a long term is dispossessed it is often embarrassing for the landlord to have his property lie vacant for a year while the dispossessed tenant is uncertain whether to redeem or not. But such is a tenant's right if the unexpired term exceeds five years.

For rights and remedies on perpetual leases or leases in fee, called fee farm leases at common law, see Fowler's Real Property Law (2d ed.) 173 seq.

Leases to be in Writing.—By the Revised Laws of 1813, and the Revised Statutes of 1830, no estate or interest in lands, etc., other than leases for a term not exceeding one year, shall be created, granted, assigned, surrendered, or declared, unless by operation of law or a deed or conveyance in writing subscribed by the party (or his agent authorized in writing) creating, granting, etc.; and every contract for the leasing for a longer period than one year, or for the sale of lands, or any interest therein, is declared void, unless the contract or some note or memorandum be in writ-

ing expressing the consideration and subscribed by the party by whom the lease or sale is made, or by his agent lawfully authorized.

1 R. L. 77; 2 R. S. 134, 135, §§ 6, 8, 9; Real Property Law, §§ 207, 224. Durand v. Curtis, 57 N. Y. 7.

See infra, Chap. XIX, "Contracts," and infra, Chap. XX, as to decisions on the above sections.

The statute applies to the person creating or granting, not to the grantee.

Thistle v. Jones, 45 Misc. 215.

A written lease, signed by the lessee, may be valid as between the lessor and the lessee who has occupied under it, although not signed by the lessor.

Evans v. Conklin, 71 Hun, 536.

A parol lease for one year, to commence in futuro, was held void under this statute, and also as being a contract not to be performed within one year from the making thereof. Croswell v. Crane, 7 Barb. S. C. R. 191. The Court of Appeals, however, overruled this decision and declared such a parol lease valid. Young v. Dake, 5 N. Y. 463; Becar v. Flues, 64 id. 518.

Parol leases for a year or under make a legal title. McGune v. Palme 5 Robt. 607; Supp v. Kensing, id. 309; Hurlburt v. Ryerson, 1 Bosw. 28. McGune v. Palmer,

The agent's authority to contract may be by parol to make his act a contract, but not a deed under seal. Worrell v. Prall, 5 N. Y. 229.

A lease for years, to end on the 1st May, expires at noon on that day, but a lease from another day to the 1st May, expires at midnight on April 30. The People v. Robertson, 39 Barb. 9.

Assignments of interests in leases must be in writing, even between suc-

ceeding firms. Agate v. Gignoux, 1 Robt. 278.

A contract to lease void under the Statute of Frauds is null for all purposes. Dung v. Parker, 52 N. Y. 494.

As to recovery for use and occupation, in case of lease which is void under the Statute of Frauds. Van Arsdale v. Buck, 82 App. Div. 383.

the Statute of Frauds. Van Arsdale v. Buck, 82 App. Div. 383.

Parol lease for a year with privilege of four years, held valid for one year; and, in case of holding over, to constitute a tenancy from year to year. Dorr v. Barney, 12 Hun, 259. See Thomas v. Nelson, 69 N. Y. 118, 121; Loughran v. Smith, 75 N. Y. 206. But see Rosen v. Rose, 13 Misc. 565; Talamo v. Spitzmiller, 120 N. Y. 37.

Nor will it be made valid by a payment on account or an entry upon and taking possession, by the lessee. Wilder v. Stall, 15 N. Y. Supp. 870.

A verbal agreement to lease premises which is understood to be executory merely, and to require the execution of a written lease, does not constitute a lease of the premises. Fleming v. Ryan, 10 Misc. 420.

Where co-owners did not sign the lease, but inclosed same in a letter signed

Where co-owners did not sign the lease, but inclosed same in a letter signed by one of them, held it was not a signing within the statute, and a guarantor of a five years lease was held not liable, as the holding was from year to year. Jewett v. Griesheimer, 100 App. Div. 210.

The lease may merge all previous negotiations and preclude an action to reform or cancel; the remedy then is damages. Genet v. Del. & Hudson Can. Co., 86 N. Y. 625, affg. 10 Wkly. Dig. 386.

"With appurtenances" carries a right to have windows remain unob-

structed. Doyle v. Lord, 64 N. Y. 432.

Where a lessor falsely told a lessee that oral agreements would remain in force though there was a written lease, the lease was reformed. Monne v. Ayer, 52 Super. 139.

As to what is delivery, see Witthaus v. Starin, 12 Daly, 226.

Patent ambiguity in lease cannot be corrected by parol. Vandevoort v. Dewey, 42 Hun, 68.

A lease of an estate less than freehold did not require a seal even before the Real Property Law. Stoddard v. Whitney, 46 N. Y. 627, 633.

All prior negotiations and engagements are merged in a written lease.

Ely v. Fahy, 79 Hun, 65, 29 N. Y. Supp. 667.

Power of attorney to an agent under a general authority to lease. Kane v. Dahlbender, 9 Misc. 473; Fleming v. Ryan, 9 Misc. 496, 10 Misc. 420.

The note or memorandum must contain in itself all the necessary terms

of the contract. 169 N. Y. 407.

Description, however, may be shown by proof aliunde. Miller v. Tuck, 95

App. Div. 134.

An oral agreement for lease of twenty years, where there had been part performance, enforced, equity compelling specific performance. Veeder v. Horstmann, 85 App. Div. 154.
See also Real Property Law, § 234; 2 R. S. 138, § 10.

This doctrine is confined to equity, however, and cannot be availed of in a

suit at law. Spota v. Hayes, 36 Misc. 532.

Nor where the plaintiff suffers no damage or loss, though he may have gone to expense, equity will not decree specific performance of an oral agreement for lease. Czermak v. Wetzel, 114 App. Div. 816.

Leases by Estoppel.—A lease may be created or made effective by way of estoppel, as when made by a person who has no vested interest at the time but afterwards acquires it. It then takes effect, by way of estoppel, from the time the grantor acquires the interest. But not so if the grantor had any interest at the time.

Helps v. Hereford, 2 B. & Ald. 242; Brown v. McCormack, 6 Watts, 60; Bank of Utica v. Mersereau, 3 Barb. Ch. 528; Bush v. Cooper, 18 How. U. S. 82; Jackson v. Bradford, 4 Wend. 619.

A lessor who has allowed a tenant to make expenditures required by a lease, and has received rent, is estopped to contest its validity. Clark v. Hyatt, 55 Super. 98, affd., 118 N. Y. 563.

See Veeder v. Horstmann, 85 App. Div. 154; Spota v. Hayes, 36 Misc. 532.

If the conveyance be with general warranty, a subsequent purchaser from the grantor of his after-acquired title would be equally estopped; and the estoppel runs with the land. See the notes to Trivivian v. Laurence, Smith's Leading Cases, vol. ii; White v. Patten, 24 Pick. 124; McWilliams v. Nisley, 2 Serg. & Rawle, 507; Laury v. Williams, 13 Me. 281; Cheeney v. Arnold, 18 Barb. 434, affd., 15 N. Y. 345; Van Rensselaer v. Kearney, 11 How. U. S. 297; 4 Kent, 99.

By Ratification .-- A lease executed by an unauthorized agent may be likewise made effective by subsequent acts of ratification. Clark v. Hyatt, 118 N. Y. 563.

For ratification on the part of the lessee, a corporation not in existence at the time of the execution of the lease, see Thistle v. Jones, 45 Misc. 215.

Who may Lease.—A lease may be granted by the party or parties having a sufficient interest, coupled with the right of possession.

A trustee of the income only of a testamentary trust estate has, as such, no interest in the estate which renders it necessary for him to join in a lease of realty belonging to the corpus of the estate, made by the trustees of

the corpus. Corse v. Corse, 72 Hun, 39.

Thus, trustees may make leases, as if seized of the beneficial as well as the legal interest (infra), but not for longer than the trust term. Matter of McCaffrey, 50 Hun, 371; Gomez v. Gomez, 81 Hun, 569, 570, and life tenants may lease for a period terminable with their estate. A lease made by a life tenant terminates with the death of the lessor. McIntyre v. Clark, 6 Misc. 377. As to leases by guardians, etc., vide infra.

One of two tenants in common, or joint tenants, cannot singly make a lease to bind both. Kingsland v. Ryckman, 5 Daly, 13; 4 Kent, 368. See Valentine v. Healey, 158 N. Y. 369.

Where a general assignee leased a farm included in the assignment and

received rent, the lease was sustained as to the lessee. Smith v. Newell, 32 Hun, 501.

Powers to Lease.—Although a lease cannot be granted for a period beyond that at which the lessor's estate determined, it may be upheld if made under a power to make leases, and if made for a reasonable time; and sometimes the power is implied, and equity may upheld or annul the lease; and a trustee may, if so empowered. lawfully make a lease which may extend beyond the term of his trust.

See Greason v. Keteltas, 17 N. Y. 491, as to prior to the Revised Statutes. Labatret v. Delatour, 54 How. Pr. 435; Gomez v. Gomez, 81 Hun, 566; Matter

of McCaffrey, 50 Hun, 371.

By the Revised Statutes a power was given to tenant for life to make leases for not over twenty-one years, to commence during his life. 1 R. S. 733, §§ 87, 88, 89. The power is annexed to the estate, and passes by any conveyance thereof; and if specially excepted therein, becomes extinguished. It may also be extinguished by release to the remainderman or reversioner. The power is bound by any mortgage made by the life-tenant, and the mortgagee may enforce the power.

The power is not separately assignable.
See infra, Chap. XII, "Powers;" Havens v. Sackett, 15 N. Y. 365; Root v. Stuyvesant, 18 Wend. 257.

This subject is now regulated by the Real Property Law, §§ 123, 135.
Courts may authorize a receiver in partition to make a lease for a fixed period, possibly extending beyond the pendency of the action and then shorten the term afterward, regardless of the rights of the lessee. Weeks v. Weeks, 106 N. Y. 626.

Indemnity is allowed the lessee, however. Id.

Restrictions, Conditions and Covenants, Including Rent.— - These are various in character, and as agreed on by the parties to the lease. Sometimes covenants will be implied.

Restrictions as to use of Premises .- Restrictions as to sale of intoxicaing liquors on the premises leased, are binding. People v. Bennett, 14

Imrovements, Alterations, etc.—A stipulation that tenant may tear down and rebuild and that new building shall be purchased at end of term by landlord, gives no right to tenant to alter existing building at expense of landlord. Smith v. Cooley, 5 Daly, 401.

In the absence of express agreement the landlord is not liable for additions and improvements made by tenant. Chemung R. R. Co. v. Erie Ry. Co., 13

Week. Dig. 166.

An agreement by lessor to pay the value of them gives lessee no lien on them. N. Y. Dyeing, etc., Est. v. De Westenberg, 46 Hun, 281.

Rent.— See also "Eviction." A tenant holding over after notice to quit or the rent would be raised is deemed to have assented to such increased rent. Mack v. Burt, 5 Hun, 28.

Where the rent is payable monthly, in advance, the tenant who abandoned the premises on the first day of the month is liable for the month's rent.

MacKellar v. Sigler, 47 How. Pr. 20.

Eviction of a tenant by summary proceedings for nonpayment of rent does not discharge him from payment of rent, taxes and assessments already due; the lease is annulled only as to the future. Johnson v. Oppenheim, 55 N. Y. 280; (Compare Code Civ. Proc., § 2253;) Rice v. Bliss, 66 How. Pr. 186.

Action for rent, question of title, and discontinuance. Van Etten v. Van Etten, 69 Hun, 499.

Where lessor reserved the right to enter for purposes of repair and preservation, and afterwards promised to remit one month's rent if allowed to enter and shore up building against excavations on the next lot, the agreement was upheld as upon a good consideration. White v. Mealio, 42 Super.

A verbal reduction of rent specified in an unsealed lease is binding after payment of the reduced rent and acceptance of it in full. Nicoll v. Burke, 78 N. Y. 580. See, however, McMaster v. Kohner, 44 Super. 253.

Succeeding partner of lessee held liable for rent as presumed assignee. Kernochan v. Whiting, 42 Super. 490.

An assignee is only liable for rent while he occupies. Stern v. Florence,

S. M. Co., 53 How. Pr. 478.

Where a lessee, without the express consent of the landlord, sublets and the undertenants hold over after the expiration of the lessee's term, the latter is liable for the rent the same as if he had remained personally in possession. Hall, etc., Co. v. Campbell, etc., Co., 5 Misc. 265, affd., 8 Misc. 430. See also as to holding over as constituting a renewal, *infra*, p. 185.

A receiver is liable for rent in full on a lease. People v. Nat. Trust Co.,

Landlord may assign the rent of lands leased and still retain the land, or may convey the land and reserve the rents. Bennett v. Austin, 81 N. Y.

Sureties are responsible without notice of default, or demand by landlord upon the lessee. Ducker v. Rapp, 41 Super. Ct. 235, reversed, on other

grounds, 67 N. Y. 464; Turnure v. Hohenthal, 36 Super. 79.

A deposit by tenant to secure rent, is recoverable back, on dispossession, Scott v. Montells, 50 Super. 448; contra. Rice v. less the rent accrued.

Bliss, 66 How. Pr. 186.

Where a lessor of premises knows or intends that they will or may be used for unlawful purposes the lease is void. Ernst v. Črosby, 140 N. Y.

Parol evidence, when admissible in defense that repairs were a condition

precedent. Cartledge v. Crespo, 5 Misc. 349.

Where rent is payable in advance on first day of month, which is Sunday, tenant has till midnight of the second to pay his rent. Boehm v. Rich, 21 Week. Dig. 510. Rent cannot be increased by verbal understanding. Smith v. Kerr, 33 Hun, 567, affd., 108 N. Y. 31.

As to reduction of rent, see supra.

Defect in lessor's title or authority is no defense to an action for rent. Tilyou v. Reynolds, 108 N. Y. 558; Bath G. Co. v. Claffy, 74 Hun, 638. Rent falling due on a legal holiday, other than Sunday, is payable on that

day. Walton v. Stafford, 162 N. Y. 558.

Covenant to Build.-As to construction and operation of, see McIntosh v. Rector, etc., 120 N. Y. 7.

Covenant to Repair.— If there be no agreement or statute to the contrary, a landlord is not bound to repair the demised premises or to allow the tenant for repairs made without his authority; and the tenant (if occupant of the whole demised premises) is bound to repair at his own expense to avoid the charge of permissive waste. Any obligation of a lessor to repair rests solely on express contract, and even when there is such an express contract, specific performance cannot be enforced. The tenant who is bound or not to repair, is liable for damage to third persons from the ruinous state of the premises; and, if they were in good condition when leased, the landlord is not liable.

Kabus v. Frost, 50 Super. Ct. 72; Moffat v. Smith, 4 N. Y. 126; Bears v. Ambler, 9 Barr. 193; Witty v. Matthews, 52 N. Y. 512; City of Lowell v. Spaulding, 4 Cush. 277; City of N. Y. v. Corlies, 2 Sandf. 301; Eakin v. Brown, 1 E. D. Smith 36; Suydam v. Jackson, 54 N. Y. 450; Beck v. Allison, 56 id. 366.

Nor is there any implied warranty that the buildings are safe, well built Nor is there any implied warranty that the buildings are safe, well built or fit for any particular use. Cleves v. Willoughby, 7 Hill, 83; Jaffe v. Harteau, 56 N. Y. 398; Edwards v. N. Y. & Harlem R. R. Co., 98 id. 245; Dutton v. Gerrish, 9 Cush. (Mass.) 89; nor that the landlord shall keep them in tenantable condition; Post v. Vetter, 2 E. D. Smith 248. Nor that the land shall remain in the same condition, 1 Sneed (Tenn.), 613. Where the landlord is to make repairs before possession by the tenant, it is a condition precedent and the tenant's entry before the stipulated day is no waiver. Strohecher v. Barnes, 21 Geo. 430. See also Mumford v. Brown, 6 Cow. 475; Howard v. Doolittle, 3 Duer, 464; Bloomer v. Warren, 29 How. Pr. 259. A parol promise to repair is void. 2 Swee. 184; Mayor, etc., v. Cooper, 49 Super. 409. Super. 409.

A covenant by landlord to put and keep the roof in good repair implies no knowledge that it is not in good repair, and notice must be shown to charge

him. Thomas v. Kingsland, 108 N. Y. 616.

Where landlord covenanted to repair the roof on written notice of its defective condition, held no written notice was required where the acts of the landlord himself cause the defective condition. Pratt, etc., Co., Ltd., v. Tailer, 114 App. Div. 574.

If the premises be made untenantable by act of the landlord, before the tenancy begins, covenant for rent will not be sustained. Cleves v. Willoughby, 7 Hill, 83; aliter, if they become so after the term begins. 2

Swee. 184. See also Rotter v. Goerlitz, 12 N. Y. Supp. 210.

Where the lease is in writing, parol evidence cannot be given to show that the landlord, at the time of executing it, promised to repair, nor to modify or alter any agreement as to repairs. Cleves v. Willoughby, 7 Hill, 83; Hartford & N. Y. Steamb't Co. v. Mayor, etc., of N. Y., 78 N. Y. 1.

A lessee is liable in damages for breach of his covenant to repair. Green

v. Eden, 2 T. & C. 582; Matter of Brockway, 12 Misc. 240.

Upon the breach of a covenant by lessor to repair, the lessee has the option to make the repairs and to recover the expense from the landlord, or to sue for damages. Hexter v. Knox, 63 N. Y. 561; Thomas v. Kingsland, 13 Week. Dig. 421, affd., 108 N. Y. 616; Myers v. Burns, 35 N. Y. 269.

But the breach is no defense to an action for rent. Newman v. French, 45

Hun, 65; Pfapp v. Reddick, 9 Misc. 472.

As to the lessee's covenant to keep the whole house and premises in good repairs, see Green v. Eden, 2 Supm. 582. Covenant for "necessary repairs" means only such as the lessee may consider necessary. White v. Albany Railway, 17 Hun, 98.

Under a covenant to make necessary repairs, the tenant is liable for the expense of replacing a portion of the glass front of the premises which was, at the time of his removal, cracked almost its entire height, although the injury did not occur through the fault of himself or his servants. Cohn v. Hill, 9 Misc. 326.

Where there is no covenant on the part of the landlord to repair, and the tenant has control of the premises, he is bound to repair and cannot vacate under Chap. 345, L. 1860 (now § 197 of the Real Property Law), because the premises become dilapidated. Oakley v. Loeming, 8 Misc. 302.

Where entire building is rented, as to duty of tenant to make repairs, see Oakley v. Loeming, 7 Misc. 742, affd., 8 Misc. 302.

No action lies for personal injuries sustained in consequence of the breach of an agreement to keep leased premises in repair. Daucy v. Walz, 112

App. Div. 355.

Frank v. Mandell, 76 App. Div. 413; Eschbach v. Hughes, 7 Misc. 172 (a case of pneumonia resulting from failure to repair roof contrary to covenant); Stelz v. Van Dusen, 93 App. Div. 358; Sherlock v. Rushmore, 99 App. Div. 598; Boden v. Scholz, 101 App. Div. 1; Hagin v. Cayuga Lake Cement Co., 105 App. Div. 269.

Third Person Injured.—An action against the landlord does not arise in favor of a third person for injuries caused by neglect on the part of the lessee of premises to observe a covenant to keep in repair. Clancy v. Byrne, 56 N. Y. 129. As to injuries to tenant. Cesar v. Karntz, 60 N. Y. 229.

Where the landlord makes repairs he is liable for their negligent execution. Walker v. Shoemaker, 4 Hun, 479; McVie v. McNaughton, 21 Week. Dig. 89; Worthington v. Parker, 11 Daly, 545. But see Butler v. Cushing, 46 Hun,

521, holding him liable without proof of negligence.

The owner of premises, on which is a nuisance at the time of leasing, is liable for injuries caused thereby, although the negligence of the tenant contributed thereto. Walsh v. Mead, 8 Hun, 387; Schmidt v. Cook, 12 Misc. 449. But in case of a nuisance not so per se, but becoming such by negligent use of lessee, landlord is not liable. Swords v. Edgar, 59 N. Y. 28.

Where a coal hole has been excavated in a city sidewalk and was used by subsequent lessee, the lessee was held liable separately or conjointly with the landlord, for injuries resulting to a third person therefrom, an imperfect cover having been placed thereon. Irvine v. Wood, 51 N. Y. 224.

A general covenant to repair does not take the case out of the statute of 1860, Chap. 345 (Real Property Law, § 197), infra, where the premises become untenantable. Butler v. Kidder, 87 N. Y. 98; May v. Gillis, 169 id. 330.

Under the lessee's covenant to repair, if to keep in repair, it be necessary that the premises should first be put in repair, the covenantor is bound to perform that duty. Heintze v. Erlacher, 1 City Ct. 465; citing Myers v. Burns, 35 N. Y. 269; also Ward v. Kelsey, 38 id. 80.

No agreement of a lessor to repair can be implied in a written lease, and there must be a new consideration to support a subsequent promise to repair.

Fox v. Abbott, 16 Week. Dig. 159.

One tenant of many in a building not bound impliedly to repair. Bold v. O'Brien, 12 Daly, 160; Dowd v. Fitzpatrick, 18 Weekly Dig. 343; Donohue v. Kendall, 50 Super. 386, affd., 98 N. Y. 635. But notice to landlord must be shown. Henkel v. Murr, 31 Hun, 28, affd., 98 N. Y. 635.

Owner of an apartment house bound to keep the building in ordinary repair. Worthington v. Parker, 11 Daly, 545; Bold v. O'Brien, 12 Daly, 160. Liability to stranger for injury from lack of repair where landlord controls the part out of repair. Brady v. Valentine, 3 Misc. 19; Spencer v. McManus, 5 Misc. 287 5 Misc. 267.

The owner of a tenement is not liable to a tenant for injuries sustained by slipping upon ice on the walk or stoop. The remedy, if any, is against the municipality for neglect. Little v. Wirth, 6 Misc. 301.

Covenant to repair on part of landlord is not a ground for recovery by tenant for personal injuries where landlord had no notice. Spellman v. Bannigan, 36 Hun, 174. See also Sanders v. Smith, 5 Misc. 1.

A sevenent by tenant to repair does not enurs to beget of a streamen who

A covenant by tenant to repair does not enure to benefit of a stranger who

sustains an injury by its breach. Odell v. Solomon, 99 N. Y. 635.

Lessee is liable for culpable negligence in making repairs.

Rent is not suspended by landlord's occupancy for purpose of making repairs. McClenahon v. The Mayor, etc., 102 N. Y. 75.

Tenant of part of a building has no redress if injured because landlord

lets the rest go to ruin. Simons v. Seward, 54 Super. 406.

A landlord is only liable for injuries caused by the dangerous condition of the premises where it is shown that he had actual notice of such condition or that such condition had existed for a reasonable length of time. McCabe v. Kastens, 10 Misc. 42.

Covenant to Build.-As to construction and operation of. McIntosh v. Rector, etc., 120 N. Y. 7.

Destruction by Fire or Otherwise.— Formerly under a covenant to repair, a lessee was bound to rebuild in case of fire, and to pay rent for the premises even if the buildings were entirely destroyed: but, by Statute of April 13, 1860, Chap. 345, "The lessees or occupants of any building which shall, without fault or neglect on their part, be destroyed, or be so injured by the elements, or any other cause, as to be untenantable and unfit for occupancy, shall not be liable or bound to pay rent to the lessors or owners thereof, after such destruction or injury, unless otherwise expressly provided by written agreement or covenant, and the lessees or occupants may thereupon quit and surrender possession of the leasehold premises, and of the land so leased or occupied."

See Real Property Law, § 197, re-enacting this Statute of 1860 in substance. In the later statute rent ceases after the surrender. Real Property Law, § 197.

See also Graves v. Berdan, 26 N. Y. 498, 29 How. Pr. 262. But the tenant must actually leave. Danziger v. Falkenberg, 18 N. Y.

Where the building has been injured by fire, the landlord cannot be compelled to rebuild or repair it for the benefit of his tenant, even though he has expressly covenanted to do so. The only remedy of the tenant is by an action for damages. Doupe v. Genin, 45 N. Y. 119; Beck v. Allison, 56 N. Y. 366.

A covenant to deliver up the premises in the same condition, natural wear and tear excepted, does not bind the tenant to rebuild after a fire. Warner v. Hitchins, 5 Barb. 666; or to repair other similar accidental damages. U. S. v. Bostwick, 4 Otto, 53.

A covenant to rebuild in case of fire is binding on executor. Chamberlain

v. Dunlop, 126 N. Y. 45.

A covenant to repair by tenant held to bind him to rebuild in case of destruction by fire. Allen v. Culver, 3 Den. 285, but see contra, Butler v. Kidder, 87 N. Y. 98.

The law is now clearly established that the covenant to repair does not deprive the tenant of the protection of the statute. May v. Gillis, 169 N. Y.

See Lehmeyer v. Moses, 67 App. Div. 531. Otherwise, however, where the condition existed at the time of making the lease, and there was no fraud on the part of the landlord. Sherman v. Ludin, 79 App. Div. 37; Prahar v. Tousey, 93 App. Div. 507.

Or the lease may be removed from the operation of the statute by a clause inserted in it. Roman v. Taylor, 93 App. Div. 449.

inserted in it. Roman v. Taylor, 93 App. Div. 449.

Act of 1860.— The Act of 1860, Chap. 345 (Real Property Law, § 197), does not affect the common law rule as to repairs. Sheary v. Adams, 18 Hun, 181. It does not apply where the lessee knew the premises to be untenantable. Alsheimer v. Krohn, 45 How. Pr. 127. Nor to ordinary deterioration from the weather. Suydam v. Jackson, 54 N. Y. 450. A surrender to be effectual must be complete. Johnson v. Oppenheimer, 55 N. Y. 280.

A landlord or sub-letting tenant is not liable to strangers for injuries caused by deterioration during the letting or sub-letting, nor upon their covenants with each other. Clancy v. Byrne, 56 N. Y. 129.

Tenant cannot be estopped from claiming that the premises were untenantable by reason of continued occupation by sub-lessee. Kip v. Merwin, 34 Super. 531, affd., 52 N. Y. 542. But see Smith v. Sonnekalb, 67 Barb. 66.

Where a clause in a lease provided that in case the demised premises become damaged by fire, so as to render them untenantable the rent should be paid up to such time and cease until they were put in repair, it was held to be optional with the landlord to determine the lease by not electing to repair. Witty v. Mathews, 52 N. Y. 512. See also N. Y., etc., Improvement Co. v. Motley, 20 N. Y. Supp. 947.

A covenant that the tenant shall not be required to pay rent, if the premises become untenantable by fire, takes the case out of the Statute of 1860, Chap. 345, in case of damage by other elements. Butler v. Kidder, 87 N. Y. 98.

A tenant refusing to allow shoring up of walls, etc., on excavations being made in an adjoining lot, is not released from rent on the premises becoming untenantable (Laws 1855, Chap. 6). Johnson v. Appenheim, 55 N. Y. 280.

untenantable (Laws 1855, Chap. 6). Johnson v. Appenheim, 55 N. Y. 280. Tenant has a reasonable time, by the Statute, in which to move out after a fire. Bassett v. Dean, 34 Hun, 250.

He will be presumed to elect to cancel unless he gives notice to the contrary. Fleischmann v. Toplitz, 134 N. Y. 349.

Dampness injurious to health arising during tenancy is within the act. Franke v. Youmans, 17 Week. Dig. 252. Offensive odors are not. Sutphen v. Seebass, 14 Abb. N. C. 67, n.; Coulson v. Whiting, Id. 60. Nor is defective plumbing. Chadwick v. Woodward, 13 Abb. N. C. 442. Except in apartment houses. Bradley v. De Goicouria, 14 Abb. N. C. 53.

See Fowler's Real Property Law (2d ed.), 626-630.

See Fowler's Real Property Law (2d ed.), 626-630.

A general covenant by lessee to repair will not take the case out of the act. Butler v. Kidder, 87 N. Y. 98; May v. Gillis, 169 id. 330. But no particular words are needed if it is clear that the act is not meant to apply. Butler v. Kidder, 87 N. Y. 98; Aehlers v. Rehlinger, 1 City Ct. 79.

As to destruction of premises by fire not relieving from rent then due, though in advance. Craig v. Butler, 83 Hun, 286. Compare Hecht v. Heerwagen, 13 Misc. 316; Kelly v. Partridge, 4 id. 205.

As to special provisions as to fire. N. Y. R. Estate, etc., Co. v. Motley,

143 N. Y. 456.

The act does not apply to lawful destruction by the public authorities, Id.; Connor v. Bernheimer, 6 Daly, 295.

See Meserole v. Hoyt, 34 App. Div. 33, affd., 161 N. Y. 59.

Covenant to Pay Taxes, Water Rates, etc.—Upon default of the lessee upon such a covenant the lessor may pay the taxes and recover the amount. Gallup v. Albany R. R. Co., 7 Lans. 471; affd., 65 N. Y. 1.

An action will lie for the breach of such a covenant without a payment being made by the lessor. Muller v. Earle, 35 Super. 461.

A covenant by a lessee to pay taxes "when due and payable," has been held not to require him to pay them until after notice by the receiver of taxes that they are due and payable. Whitman v. Nicol, 58 Super. 528.

Ejectment brought for breach of this covenant may be defeated by payment at any time before judgment. Giles v. Austin, 38 Super. 215, affd.,

62 N. Y. 486.

In absence of express covenant a lessee is not bound to pay water rates, and where he covenants to pay the "usual rates" he need not pay extra rates imposed. Moffat v. Henderson, 50 Super. 211.

Covenants by lessee held to cover antecedent requirements of Board of Health. See Hull v. Burns, 17 Abb. N. C. 317.

This covenant does not include taxes on rents, under Tax Law, L. 1896, Chap. 908, § 8. Woodruff v. Oswego Starch Factory, 177 N. Y. 23.

For a covenant to pay water rates, see Myers v. Reade, 112 App. Div. 363.

Covenant for Renewal, etc. See also infra, Chap. VIII, Tit. 6.

In the absence of specific authority in the trust deed, trustees have no authority to make renewals. Gomez v. Gomez, 81 Hun, 566.

Holding over after notice of increase of rent as constituting a trespass

or a renewal at option of landlord. Frost v. Akron Iron Co., 12 Misc. 348;

Johnson v. Doll, 11 id. 345; Clendenning v. Lindner, 9 id. 682.

Holding over where presumption of acceptance of option. Voege v. Ronalds, 83 Hun, 114; Bailie v. Plant, 11 Misc. 30; Crouch v. T. & B. Stove Co., 83 Hun, 276.

Presumption of renewal from tenant holding over and landlord accepting rent. Cole v. Sandford, 77 Hun, 198.

Covenants for continual or perpetual renewals are not upheld, as tending to create perpetuities, nor a covenant generally to renew on such terms as might be agreed on it being too uncertain. 1 Hoff. Ch. 110, affd., 26 Wend. 57; Banker v. Braker, 9 Abb. N. C. 411; Muhlenbrinck v. Pooler, 40 Hun, 526; Syms v. The Mayor, 105 N. Y. 153. These covenants run with the land, and bind the grantee of the reversion. Livingston v. Sage, 95 N. Y. 160 N. Y. 289.

Covenant that at the expiration of the term lessee might continue to occupy the premises for such further time as he should choose, paying same rent, held to create, at most, a tenancy from year to year; and when the landlord died before the expiration of the original term, that the lessee was not entitled to any renewal. West'n Transp'n Co. of Buffalo v. Lansing, 49 N. Y. 499. See also Baurman v. Binzer, 16 N. Y. Supp. 342, affd., 65 Hun, 39, as to what is too indefinite a covenant.

Such a covenant for renewal construed as an option. See Bruce v. Fulton Nat. Bk., 79 N. Y. 154.

A lessee's right to be paid for buildings is not affected by taking a renewal. Livingston v. Sulzer, 19 Hun, 375.

A clause in a lease giving "privilege of six years more at the same rent," is equivalent to a covenant of renewal. Crawford v. Kastner, 27 rent," is equivalent to a covenant of renewal.

A renewal of a lease operates as a renewal of all the provisions contained in or made a part of the lease. Wadsworth v. Wadsworth, 21 Week.

Dig. 520.

For where the covenants contained in an original lease of real estate entitle the lessee to three renewals thereof, the omission of such covenants in the renewal of a lease so given is an immaterial circumstance, as the lessee, under the original lease, has the right to the renewals therein specified. Gomez v. Gomez, 81 Hun, 566.

As to facts showing election by lessor between renewing lease or buying fixtures, see Crosby v. Moses, 48 Super. 146, modified in 92 N. Y. 634.

Facts showing election by assignee of lessee to exercise privilege to extend. Probst v. Rochester Steam Laundry Co., 171 N. Y. 584.

Lease with general covenants for renewal held to run out on expiration of second renewal which contained no covenant for further renewal, and the last lease could not be reformed. Syms v. The Mayor, etc., 105 N. Y. 153. It has also been held that only one renewal can be claimed. Leary v. Hutton, 40 Hun, 526, affd., 129 N. Y. 649.

Covenant to pay for buildings abrogated by default in rent and re-entry of lessor. Bates v. Johnson, 12 N. Y. Supp. 403, affd., 126 N. Y. 681.

Covenant to renew or sell the demised premises to lessee held to be an option for the lessor, not the lessee. Baurman v. Binzen, 65 Hun, 39.

As to what constitutes sufficient demand for renewal, see Chamberlain v. Dunlop, 126 N. Y. 45. Where lease is to two tenants and contains covenant for renewal, both tenants must join in application for the renewal. Buchanan v. Whitman, 76 Hun, 67.

Enurement of covenant to sub-lessee. Robinson v. Beard, 140 N. Y. 107. When a lease contains a covenant to the effect that on giving a specified notice the lease shall continue in force for an additional term, the giving of the notice by the lessee creates the new term without the execution of a new lease. Hausauer v. Dahlman, 72 Hun, 607.

Covenant of renewal by lessor does not imply a covenant to accept the renewal by lessee. Zorkowski v. Astor, 156 N. Y. 393.

As to the lessee's right to have a renewal clause in his new lease. Martin

v. Babcock & Wilcox Co., 186 N. Y. 451.

As to how far these covenants run with the land, see Title III., infra.

Covenant for Quiet Enjoyment.—A covenant for quiet enjoyment in a lease means only that the tenant shall not be evicted by paramount title. It relates only to the title, and not to the actual occupation.

Howard v. Doolittle, 3 Duer, 464, 466; Coddington v. Dunham, 35 Super.

Howard v. Doontone, 3 Duer, 404, 400; Condington v. Dunnam, 35 Super. 412; Connor v. Bernheimer, 6 Daly, 295.

A covenant for quiet enjoyment is ordinarily implied in a lease, in spite of the provisions of the Revised Statutes against implied covenants in deeds. See infra, Chap. XX. Boreel v. Lawton, 90 N. Y. 293; Mock v. Patchin, 42 id. 167; People v. Gedney, 10 Hun, 151. But if one is expressed, none will be implied. Burr v. Stenton, 43 N. Y. 462.

Eviction is necessary to constitute a breach of this covenant. Boreel v. Lawton, 90 N. Y. 293. If a constructive eviction, there must be a surrender

of possession. Id.

It seems that a lessor who omits to keep in order water pipes under his control, may be held liable for breach of this covenant. Vann v. Rouse, 94 N. Y. 401.

Trespass as to which landlord is not a party is not a breach of this covenant. Walter v. Fowler, 17 Weekly Dig. 225, modified and affd., 85 N. Y. 621; Blauvelt v. Powell, 13 Supp. 439; s. c., 59 Hun, 179.

Tearing down an unsafe building by the city is not a breach.

v. Bernheimer, 6 Daly, 295.

Implied Covenants.—As to implied covenants in a lease, vide supra also infra Chap. XX, "Conveyances"; also as to covenants generally.

Condition of the Premises and Representations by Landlord.

- Between landlord and tenant no contract or warranty on the part of the landlord that the premises demised shall be or continue fit for the tenant's business or occupation is ever implied from the mere fact of letting.

Jaffe v. Harteau, 56 N. Y. 398; 59 Barb. 497; Edwards v. N. Y. & Harlem R. R. Co., 98 N. Y. 245; Daly v. Wise, 132 id. 306. Steefel v. Rothschild. 179 id. 273.

And none can be inferred against the landlord's grantee. Outerbridge

v. Phelps, 45 Super. 555.

A landlord who lets premises knowing that they are infected by a contagious disease, without notifying the tenant thereof, is liable to the latter in case the disease is communicated. Cæsar v. Karutz, 60 N. Y. 229; Snyder v. Gordon, 46 Hun, 538.

Fraudulent suppression by landlord, or agent of landlord, of a latent defect rendering premises untenantable, is held to rescind the contract. Sequard v. Corse, 9 Week. Dig. 51; Jackson v. Odell, 14 Abb. N. C. 42;

s. c., 12 Daly, 345.

As to representations by landlord in ignorance, constituting fraud, and continuance of lease by tenant not being a waiver. Myers v. Rosenback, 13 Misc. 145.

Suppression of material fact which should in good faith be disclosed; held equivalent to a false representation. Tyler v. Savage, 143 U. S. 79.

Where a written lease contains no covenant by which damage from

water is assumed by landlord, he is not, in the absence of negligence, under obligation to recompense the lessee for injury from leaks from pipes. Opdyke v. Prouty, 6 Hun, 242.

The concealment of defects which a lessee could not have discovered by the exercise of reasonable diligence constitutes a fraud and renders lessor liable for rent paid in advance and a loss to fixtures and stock which lessee is compelled to remove by reason of a judgment obtained by the municipal authorities declaring the premises unsafe and directing demolition. Steefel v. Rothschild, 179 N. Y. 273.

Where tenant occupied part of plaintiff's building and plaintiff turned

off water in pipes that leaked and prohibited the lessee from turning it on, it was held that it was the landlord's duty to keep the pipes in repair; and the tenant having left, that no rent could be recovered beyond the actual occupation of the premises. West Side Svgs. Bk. v. Newton, 76 N. Y. 616.

The owner of a tenement is not obliged to keep a fire escape in sufficienc

condition of repair to be used as a balcony, when not presumably intended for such use. McAlpin v. Powell 70 N. Y. 126.

In general a landlord is not bound to disclose defects in the structure

or condition of the premises, such as a defect in the plumbing, that make them unfit for habitation. Coulson v. Whiting, 14 Abb. N. C. 60.

Landlord's fraudulent concealment that premises had been formerly occupied as a house of prostitution, is a defense to action for rent when tenant has been deceived to his damage. Rhinelander v. Seaman, 13 Abb. N. C. 455, note.

Statement by landlord as to habitability of premises not a continuing warranty that they shall continue so. Fowler v. Stevens, 49 Super. (J. & S.)

A statement by landlord, regarded merely as a statement of opinion, as regarding good order of plumbing. Coulson v. Whiting, supra; Lady v. Wise, 132 N. Y. 306.

There is no implied covenant on the part of the lessor as to plumbing. Chadwick v. Woodward, 13 Abb. N. C. 442, affd., 1 City Ct. Supp. 94.

Chadwick v. Woodward, 13 Abb. N. C. 442, affd., 1 City Ct. Supp. 94.

In an action for rent, tenant cannot counterclaim for damages by reason of defective plumbing if there was no wrongful concealment. Chadwick v. Woodward, 1 City Ct. Supp. 94, affg. 13 Abb. N. C. 441.

Payment of rent does not prevent right to sue for damages by reason of landlord's false representations. Pryor v. Foster, 130 N. V. 171.

Owner of a tenement house held liable for dangerous stairway. Peil v. Reinhart, 127 N. Y. 381; Hilsonbeck v. Guhring, 131 id. 674.

An oral agreement of landlord to put premises in good condition may be proven. Clenighan v. McFarland, 11 N. Y. Supp. 719.

See also infra, "Eviction," Title IV.

Conditional Limitations.—When a breach of condition will determine a lease, and when not, without entry, vide supra, "Conditional Estates," Chap. V, Tit. IV.

The principle is that the lessee's estate will ipso facto cease, on breach of a condition determining it, in case there is no qualification or right of entry given to the lessor which implies an election to be exercised on his part.

See Title V, "Forfeiture."

Denying Title of Lessor.—In general a lessee is estopped from denying the lessor's title existing at the time of demise.

Prevot v. Lawrence, 51 N. Y. 219; Goode v. Gaines, 145 U. S. 141; Tilon v. Reynolds, 108 N. Y. 558; Smith v. Barber, No. 1, 112 App. Div. 187. Under the common law, a denial of the landlord's title worked a forfeiture; but a parol denial did not forfeit a writen lease. Delancy v. Ganong, 9 N. Y. 9.

A tenant or purchaser cannot controvert the title of one under whom he holds or whose title he has recognized. Jackson v. Spear, 7 Wend. 401; Delancey v. Ganong, 9 N. Y. 9; Jackson v. Whedon, 1 E. D. Smith, 141; Jones v. Reilly, 174 N. Y. 97, unless the landlord's title has expired or been extinguished. Lawrence v. Miller, 2 N. Y. 245; Jackson v. Rowland, 6 Wend. 666; Lane v. Young 66 Hun, 563. But he can controvert any

assignment of the lease. Despard v. Walbridge, 15 N. Y. 374. Or he may set up a subsequent title acquired by himself. Nellis v. Lathrop, 22 Wend. 121; Hetzel v. Barber, 69 N. Y. 1; Van Etten v. Van Etten, 69 Hun, 499. A tenant can show that the title has passed from the landlord to another

person subsequent to the time of his entry as tenant. Ryers v. Farwell, 9 Barb. 615.

Neither the tenant nor his assignee can set up adverse possession against the landlord. Bradt v. Church, 39 Hun, 262, affd., 110 N. Y. 537; and see "Title by Possession," Chap. XXXIV.

Tenant cannot set up ultra vires against a corporation. Mayor v. Wylie, 43 Hun, 547, affd., 122 N. Y. 663.

Recording Leases.— See Chap. XXVI.

By the Revised Statutes, 1 R. S. 763, the provisions relative to the proof and recording of deeds should not extend to leases for life or lives or years, in the counties of Albany, Ulster, Sullivan, Herkimer, Dutchess, Columbia, Delaware and Schenectady. Laws of 1823, p. 413, § 5.
Real Prop. Law, § 240 (limited however to leases heretofore made).

Otherwise the laws relative to the records and proofs of deeds applied to leases, except to those not exceeding three years. 1 R. S. 762; Real Prop. Law, § 240.

Vide infra as to acknowledgment and record, Chap. XXVI.

Leases of Agricultural Lands.—By the Constitutions of 1846 and 1894, it is provided that leases of agricultural land, wherein rent or service is reserved for a longer term than twelve years. shall be invalid.

Const. 1846, Art. I, § 14; Const. 1894, Art. I, § 13.

This has been held to apply only where rent is payable at stated periods, and not to a grant or lease for a long term for a specified consideration. Parcell v. Stryker, 41 N. Y. 480. Covenants for renewal beyond the twelve years, in the leases of agricultural lands, would be void, but the lease would be good for the twelve years. Hart v. Hart, 22 Barb. 606.

The above provision is held to apply merely to rents and services that are certain and periodical, and issue out of the land in return for its use. It would not apply to covenants binding the person only and not the land.

It would not apply to covenants binding the person only, and not the land, for the performance of duties not certain or periodical; e. g., as to support

a person. Stephens v. Reyonlds, 6 N. Y. 454.

A lease for more than twelve years is void in toto. Two leases, one for eight years and the other for twelve, to begin at the expiration of the former, are to be considered as one lease for twenty years, and void. Clark v. Barnes, 76 N. Y. 301.

The nature of the lands and not the intended use is the test. Addell v.

Durant, 62 N. Y. 524.

Leases by Guardians in Socage.— Such guardians may lease the lands of infant heirs until they become of age; but the lease is subject to be avoided either by such coming of age or the appointment of a general guardian.

Emerson v. Spicer, 55 Barb. 408, affd., 46 N. Y. 594. Vide infra, Chap. XXV, "Guardians in Socage." See People v. Ingersoll, 20 Hun, 316.

Leases in Fee. - For leases in fee, reserving rents or services. See Chap. IV, Tit. V, supra.

Rights of Heirs, Mortgagees, etc., in Leases for Five Years and Over.- If a lessee who has an unexpired term of over five years is removed for nonpayment of rent, he, his representatives. mortgagees, assignees, or judgment creditors may, within a year. redeem the term.

Code Civ. Proc., §§ 2256 to 2259, inclusive. Formerly regulated by Laws of 1842, Chap. 240. Repealed, L. 1880, Chap. 245.

Otherwise however, when tenant is evicted for nonpayment of taxes. Wilty v. Acton, 9 N. Y. Supp. 247, affd., 58 Hun, 552.

Leases by Trustees. See supra, p. 163.

Judgments a Lien on .- By the Code of Civil Procedure, judgments are a lien on chattels real, and they may be sold under execution.

Code Civ. Proc., §§ 1251, 1252. So formerly by 2 R. S. 359; vide "Judgments," and "Sales on Execution," infra, Chaps. XXVII and XXXVIII.

Assets.- Leases for years are excluded from the statute of descents, and are assets for administration.

1 R. S. 754, § 27; Real Prop. Law, § 280.

Attornment.—An attornment is a continuation of the existing lease in all respects, except that another person is substituted, by acknowledgment of the tenant, for the original landlord. An attornment to one having no color of title, or a stranger, is void, unless on consent of the landlord or under a judgment or decree, or to a mortgagee after forfeiture of the mortgage.

 R. S. 744, § 3. Real Prop. Law, § 194.
 Austin v. Ahearne, 61 N. Y. 6; Jackson v. Harper, 5 Wend. 246; Jackson v. DeLancey, 13 Johns. 537; or after surrender; Jackson v. Sears, 10 id. 435; Lawrence v. Brown, 5 N. Y. 394; O'Donnell v. McIntyre, No. 2, 37 Hun, 623, affd., 118 N. Y. 156.

A conveyance by the landlord is valid without attornment, but the tenant is not bound unto the grantee until he has had notice. 1 R. S. 739, § 146;

Real Prop. Law, § 213.

The People v. The Mayor, 19 How. 289. See also, infra, Title XI. Attornment under judgment afterward reversed is avoided by the reversal. Ross v. Kernan, 31 Hun, 164.

Leases by Aliens.—By the Revised Statutes, no alien shall have power to lease or demise lands which he may take or hold by virtue of the deposition made that he intends to become a citizen until he becomes naturalized.

1 R. S. 720, § 16. See Laws 1845, Chap. 115; L. 1893, Chap. 207.

Law of 1845, Leases by Aliens .- The Law of 1845, Chap. 115, § 9, provides that all leases duly executed heretofore by aliens to citizens, or to resident aliens capable of holding real estate, or which may hereafter be executed by such aliens to any such alien or to a citizen, are confirmed and made valid.

Law of 1893, Chap. 207.— This law enabled aliens to convey, transmit, etc., generally. It was not re-enacted however. Both these statutes of 1845 and 1893 were repealed by the Real Property Law, L. 1896, Chap. 547, without the substitution of a similar enactment. It is probable however that the original restriction was not intended to be revived thereby.

L. 1897, Chap. 593.—This law extended the rights of citizens as far as real property is concerned to the citizens of a state or nation which by its

laws, confers similar privileges on citizens of the United States.

See Chap. III, title "Aliens," p. 95, supra.

TITLE III. ASSIGNMENT AND SUBLETTING.

A lessee for years may assign or grant over his whole interest. unless restrained by covenant not to assign without leave of the lessor. Unless so restrained, also, he may underlet for any less number of years than he himself holds.

If the deed passes all the estate or term of the termor, it is an assignment. But if it be for a less portion of time than for the whole term, it is an under-lease, and leaves a reversion in the termor, and he alone is entitled to renewal.

Underletting in violation of covenant may be enjoined under proper cir-

cumstances. Sloan v. Martin, 54 Super. 87.

Lynde v. Newcombe, 27 Barb. 415; Jackson v. Silvernail, 15 Johns. 278;

Jackson v. Harrison, 17 id. 60; Bedford v. Terhune, 30 N. Y. 453; Woodhull v. Rosenthal, 61 id. 382, distgd., Ganson v. Tifft, 71 id. 48, 54.

An under-lease made for the whole unexpired term, but at a difference rent, or reserving the right to re-enter for breach of covenants, is not an assignment, but is a sub-lease. The People v. Robertson, 39 Barb. 9; Post v. Kearney, 2 N. Y. 394; Collins v. Hasbrouck, 56 N. Y. 157, approved, Ganson v. Tifft, 71 N. Y. 48, 54.

A covenant not to underlet is not broken by underletting a portion of the premises. Jackson v. Silvernail, 15 Johns. 278; Post v. Kearney, 2 N. Y. 394; Jackson v. Harrison, 17 Johns. 66; People v. Elston, 39 Barb. 9; Roosevelt v. Hopkins, 33 N. Y. 81. Nor by occupation of premises by servant or licensee of tenant. Presby v. Benjamin, 169 N. Y. 377.

Nor will a covenant not to let or underlet prevent the lessee from making

an assignment. Lynde v. Hough, 27 Barb. 415.

A landlord's consent would discharge the covenant against assignment wholly, and the assignee would take the lease free therefrom. Siefke v. Koch, 31 How. Pr. 383.

But an agent to rent premises and collect rent, especially where the lease made is for a term of years and under seal, has no implied power to con-

sent to the substitution of a new tenant. Wallace v. Dininy, 11 Misc. 317.

A mere acquiesence in an assignment by the lesse, and acceptance of rent from the assignee, does not operate as a release of the lessee's obligation under his covenants. Id; Ranger v. Bacon, 3 Misc. 95.

A covenant that the assignor has a right to transfer, etc., does not war-

rant the landlord's title. Knickerbacker v. Killmore, 9 Johns. 106.

A subletting with knowledge of the landlord, who subsequently received the rent, is a waiver of any forfeiture under a covenant against subletting. Ireland v. Nicholls, 46 N. Y. 413; Smith v. Rector, etc., St. Philip's, 107 N. Y. 610.

Same as to assignments. Clark v. Greenfield, 13 Misc. 124.

A mere change in the business firm of the lessee incident to the admission

of a new partner, or the withdrawal of an old one, does not violate a provision against subletting. Roosevelt v. Hopkins, 33 N. Y. 81.

As to assignment between partners, vide 1 Robtn. 271.

A mortgage upon leasehold premises is not an assignment or transfer within the covenant; nor is a judicial sale in foreclosure. Riggs v. Pursell,

66 N. Y. 193.

As to lease taken by one partner with covenant against assignments, Mitchell v. Reed, 61 N. Y. 123. Acceptance of rent by lessor after a breach of the covenant is a waiver. The condition once dispensed with is also dispensed with forever. Murray v. Harway, 56 N. Y. 337; Heiter v. Eckstein, 50 How. Pr. 445.

Under a contract to transfer a lease, "free from incumbrance," rent not accrued is not apportionable. Hull v. Stevenson, 58 How. Pr. 135, n. But see Matter of Eddy, 10 Abb. N. C. 396, disapproved, 26 Abb. N. C. 378.

Possession of part of premises under a sub-lease is notice to a purchaser of the lease from lessee. Burke v. Martin, 3 Alb. L. J. 150. Also Foster

v. Oldham, 8 Misc. 331.

Landlord who has taken an assignment back from tenant after subletting may recover against sureties of sub-tenant, and lease does not merge. Townsend v. Read, 15 Abb. N. C. 285.

An assignee of lease cannot get more than the equity if there be a mort-

gage. Alford v. Cobb, 35 Hun, 651.

Presumption of assignment from possession of leased premises. Armstrong v. Wheeler, 9 Cow. 88; Foster v. Oldham, 8 Misc. 331.

Sub-tenant may pay Rent to the Original Lessor.—A sub-tenant may protect himself against ouster by paying rent to the lessor, although he is not liable to the former, and there is no privity between them. Peck v. Ingersoll, 7 N. Y. 528; McFarlan v. Watson, 3 id. 286; Bedford v. Terhune, 30 id. 453; Eten v. Luyster, 60 id. 252.

Creditors of insolvent lessee can only take surplus of rent paid by sub-lessees after original lessor's rent is fully paid. Otis v. Conway, 114

N. Y. 13.

Assignments may be Proved by Acts in Pais.—Armstrong v. Wheeler, 9 Cow. 88; Bedford v. Terhune, 30 N. Y. 453.

Continuing Liability of the Lessee and of the Assignee.— The lessee, after assignment, still remains liable upon all his covenants to the lessor, by reason of his privity of contract. And the assignee of the lessee will be liable to the lessor upon such covenants only while he remains tenant. For though there is no privity of contract between them, there is privity of estate. He may relieve himself of responsibility by assigning over to another.

Post v. Jackson, 17 Johns. 239; Carter v. Hammet, 18 Barb. 608; Van Schaick v. Third Avenue R. R. Co., 49 id. 409, affd., 38 N. Y. 346; and vide infra, pp. 193, 194, and 9 Cow. 88, and Durand v. Curtis, 57 N. Y. 7; Tate v. McCormick, 23 Hun, 218.

He is not liable for breaches of covenant before he got the estate. Astor

v. Hoyt, 5 Wend. 503.

A lessee with the written consent of his lessor assigned his lease. The lessor accepted rent of the assignee. *Held*, that the original lessee was still liable to his lessor. Ranger v. Bacon, 3 Misc. 95.

Rights of Assignees as to Lessor's Covenants.—As seen above, lessees and assignees of leases and their representatives, have the same rights against the lessor, his grantees, assignees, or his or

their representatives, as the lessee might have had against the lessor, except on covenants against incumbrances, or relating to the title or possession. Supra, p. 143.

Act of Feb. 6, 1788; 1 R. L. 363; 1 R. S. 747. Real Prop. Law, § 193.

Also, same option as to renewal; but if not availed of the original lessee

may avail himself of the covenant. Hume v. Hendrickson, 79 N. Y. 117.

By Law of April 9, 1805, Chap. 98, these provisions are extended to grants or leases in fee reserving rents. Dolph v. White, 12 N. Y. 296.

By Law of April 14, 1860, Chap. 396, the above provisions are not to apply to deeds of conveyance in fee made before the 9th of April, 1805; nor to such deeds to be made after the act.

As to the application of these statutes to leases in fee, vide supra, pp. 134-147, where the above statutes are fully set forth.

See also Van Rensselaer v. Bradley, 3 Den. 135, overruled, Van Rensselaer v. Chadwick, 24 Barb. 333, affd., 22 N. Y. 32; Van Rensselaer v. Jewett, 5 Den. 454, affd., 2 N. Y. 141; Van Rensselaer v. Smith, 27 Barb. 104; Van Rensselaer v. Ball, 19 N. Y. 100; Main v. Green, 32 Barb. 448, 33 id. 136; Main v. Davis, 32 id. 463; Van Rensselaer v. Secor, 32 id. 469; Tyler v. Heidorn, 46 id. 440.

Covenants to Repair. -- Covenants by a lessor to repair run with the land and bind the reversioner; and a covenant by lessor to repair implies a covenant to rebuild in case of total destruction by fire. Allen v. Culver, 3 Den. 285. Vide also, supra, Title II.

When a lease of land embraces also personal chattels, the lessee's covenant to return or replace them, or pay for them, does not pass to the grantee of the reversion. Nor does it bind the assignee of the lessee. Allen v. Culver, 3 Den. 285.

Covenant of Renewal.—These run with the land, and the assignee of the lessee may take advantage of them. Wilkinson v. Petit, 47 Barb. 230. Vide also, supra, Tit. II and infra, p. 195. Downing v. Jones, 11 Daly, 245. Robinson v. Beard, 140 N. Y. 107.

Obligations and Liabilities of Assignees.—The assignee of the lease becomes liable to the landlord on covenants only so long as he remains in the legal relation of assignee; and when he assigns to another who accepts the assignment, his liability ceases.

Stoppani v. Richards, 1 Hilt. 509; Siefke v. Koch, 31 How. Pr. 383; Johnston v. Richards, 1 Hill. 509; Steike v. Roch, 31 How. Pt. 383; Johnston v. Bates, 48 Super. 180; Carter v. Hammet, 18 Barb. 608; Stern v. Florence S. M. Co., 17 Week. Dig. 567; Stewart v. L. I. R. R. Co., 102 N. Y. 601. See also, supra, p. 192.

The mortgagee of a term is not personally liable, before entering, as an assignee of the interest of the lessee in the premises. Childs v. Clark, 3 Barb. 52; Calvert v. Bradley, 16 How. (U. S.) 580.

Kent, in his Commentaries, holds that the mortgagee of the whole term is liable on these covenants, even before entry, quoting Williams v. Basanquet (1 Brod. & Bing. 288), and therefore suggests that the mortgagee take by way of under-lease, leaving a few days of the original term. His view is probably based on the former doctrine of law, that the mortgagee took the legal estate, and not a mere security. The assignee is not liable unless the whole term has been assigned. Davis v. Morris, 36 N. Y. 569.

Trustees are bound on covenants in leases made by them; also their successors in office. Greason v. Ketletas, 17 N. Y. 491.

Sub-lessees are bound by the covenants in the lease. The Importers' Ins. Co. v. Christie, 5 Robtn. 169; Barrington Apart. Ass'n v. Watson, 38 Hun.

545.

After the original landlord has received rent directly from a sub-tenant. After the original landlord has received rent directly from a sub-tenant, and has thus recognized him as the person responsible to him, and accepted him as his tenant, he cannot resort to the original lessee for the rent Carter v. Hammet, 18 Barb. 608; and the landlord may bring an action for rents. Marshall v. Lippman, 16 Hun, 110.

See a special case in equity by which an assignee was held bound even after transfer. Van Schaick v. The Third Av. R. R., 49 Barb. 409; 38 N. Y. 346.

An equitable assignee of a losse is liable on the coverage for the coverage.

An equitable assignee of a lease is liable on the covenants for rent during the period of his occupancy. Astor v. Lent, 6 Bos. 612; Close v. Wilberforce. 1 Beav. 113.

The whole term must be assigned to make an assignee liable. Morris, 36 N. Y. 569.

An assignee for the benefit of creditors does not assume the lease by entering and remaining only long enough to remove his assignor's goods. Johnston v. Merritt, 10 Daly, 308.

A lease of premises held by an assignor passes to his assignee under a general assignment for the benefit of creditors. Foster v. Oldham, 4 Misc.

201, affd., 8 id. 331.

Although an assignee for the benefit of creditors is not bound to ratify a lease of his assignor, if he occupy the premises he is liable for the time he actually occupies them, not upon the lease, but on a quantum meruit.

Upon what Covenants the Assignee is Liable.—The assignee of the term is liable to the lessor or his grantee of the reversion upon all covenants that run with the land, although not expressly named in the lease; but he is not liable upon covenants which are merely personal or collateral, as to pay a note, build a house, etc. The general rule is, that no covenants run with the land, unless they touch or relate to the thing demised.

Gilbert v. Wiman, 1 N. Y. 550, 562; Norman v. Welles, 17 Wend. 136; vide Comyn. Landl. v. Tenant, 257; Jaques v. Barber, 20 Barb. 269; Dolph v. White, 12 N. Y. 295.

As to the above principles, more fully, and as to when an assignee of a lessee is not bound when named, or is bound although not named, see Spencer's Case and notes thereon in Smith's Leading Cases, and Allen v. Culver, 3 Den.

284; Dolph v. White, 12 N. Y. 296.

As a general rule, where a covenant relates to a thing not in esse, but to be done upon the land demised, assignees are bound if so specified, but to be done upon the land demised, assignees are bound if so specified, but not if it be not so stated. Tallman v. Coffin, 4 N. Y. 134. But a covenant or condition that attaches to the estate (e. g., not to cut wood) binds the assignee though not named. Verplanck v. Wright, 23 Wend. 506; Round Lake Ass'n v. Kellogg, 20 N. Y. Supp. 261, affd., 141 N. Y. 348.

Assignees of a lease, however, as well as grantees of real estate, are not liable for breaches of covenant, which were committed by those who have preceded them in the enjoyment of the estate. Tillotson v. Boyd, 4 Sandf. 546; Hull v. Stevenson, 13 Abb. N. S. 196; but see 58 How. Pr. 135,

n. See infra, p. 195.

Covenants of Leases in Fee.—As to these, vide supra, Chap. V., Tit. IV.

Covenant to Pay Assessment.—A lessee's covenant to pay assessment runs with the land, and binds the assignee of the term. Post v. Kearney, 2 N. Y. 394. Vide infra, Tit. XI, as to taxes and assessments.

Covenant of Renewal.—Where it was covenanted that sublessees might have renewals, in case of renewals to original lessee, equity will grant specific performance against the latter in favor of the sublessees, in case of such renewal. Robinson v. Beard, 140 N. Y. 107.

Rights of Grantees, Assignees, etc., of Lessor.—As above seen, the heirs and grantees of demised lands or rents, or the reversion thereof, or the assignees of the lessor, and their heirs, executors, etc.. are to have the same remedies for nonperformance of covenants for rent, or for waste or forfeiture, in grants or leases for life, years, or in fee, as their grantor or assignor had. Supra. p. 192.

This provision was taken from the Law of Feb. 6, 1788, re-enacted by the Revised Laws of 1813 (1 R. L. 363), and by the Revised Statutes (1 R. S. 747). By Law of April 9, 1805, Chap. 98, it was extended to leases in fee, and by Law of April 14, 1860, Chap. 396, declared not to apply to deeds of conveyance in fee made before the 9th of April, 1805, nor to deeds to be made after the act.

This provision was re-enacted in the Real Property Law, § 193.

These laws are given in full, supra, pp. 120-133, and also decisions bearing upon their relation to grants and leases in fee. These statutory provisions in favor of the assignees of lessors and their representatives changed the common law rule in this State, whereby conditions in a deed could only be reserved for a grantor and his heirs, and a stranger could not take ad-

vantage of a breach of them.

vantage of a breach of them.

See, also, with relation to the above laws, Dolph v. White, 12 N. Y. 296; Willard v. Tillman, 2 Hill, 274; Slocum v. Clark, Id. 475; Harbeck v. Sylvester, 13 Wend. 608; McKeon v. Whitney, 3 Den. 452; Van Rensselaer v. Jewett, 5 id. 121; 2 N. Y. 141; Nicoll v. The N. Y. & E. R. R., 12 Barb. 460, affd., 12 N. Y. 121; Van Rensselaer v. Hayes, 27 Barb. 104; 19 N. Y. 82, 100; Main v. Green, 32 Barb. 448; Tyler v. Heidorn, 46 id. 440; Huerstel v. Lorillard, 6 Robtn. 260; Towle v. Remsen, 70 N. Y. 303.

The assignee of a lease who has been recognized as such by the tenant, may sue in his own name for the rent although he has no interest in the

may sue in his own name for the rent, although he has no interest in the reversion. Moffat v. Smith, 4 N. Y. 126; Schaefer v. Henkel, 75 id. 378.

The liability of an assignee of a lease extends only to covenants broken while he remains possessed of the estate, and he is not chargeable for breaches happening previous to the assignment. Day v. Swockhamer, 2 Hilt. 4, and supra, pp. 193, 194.

Only the grantee of the reversion of the demised premises, or of the rent reserved, can maintain an action against the assignee of the lease. There must be a privity of contract or estate. Dolph v. White, 12 N. Y. 296.

Covenants to Renew.—See also supra. p. 193. Covenants to renew the lease run with the land, and bind the assignee of the reversion. Piggot v. Mason, 1 Paige, 412; Wilkinson v. Petit, 47 Barb. 230. See also, as to these covenants, Carr v. Ellison, 20 Wend. 178; Willis v. Astor, 4 Edw. 594; Abeel v. Radcliff, 13 Johns. 297; Rutgers v. Hunter, 6 Johns. Ch. 215; Whilock v. Duffield, 26 Wend. 57; 17 id. 137.

Aliter as to a covenant by lessor to pay at expiration of the term, half the value of a building to be erected by the lessee. Johnston v. Bates, 48

An agreement by the lessor to sell to the lessee can be enforced against a grantee of the lessor with notice; and is a good counterclaim in an action for rent. Lazarus v. Heilman, 11 Daly, 189.

Lessee cannot, by surrender, affect the rights of tenant under unexpired sub-lease. Eten v. Luyster, 37 Super. 486, affd., 60 N. Y. 252.

TITLE IV. EVICTION.

The rule is well settled that a wrongful eviction of the tenant by the landlord from the whole or any part of the demised premises, before the rent becomes due, precludes a recovery thereof, until possession is restored. To render an eviction of a tenant a valid defense, however, against the landlord's claim for rent, it must take place before the rent falls due; and the rule is the same although the rent is payable in advance and the eviction occurs before the expiration of the period in respect of which the rent claimed accrues. It is settled also, that such eviction need not be forcible, but may be made indirectly; as where the lessor is guilty of acts, by creating a nuisance, or otherwise, which preclude the tenant from a beneficial enjoyment of the premises, in consequence of which the tenant abandons the possession before the rent becomes due. In such case the lessor's right to recover the rent is barred, as his act is considered a virtual expulsion of the tenant.

See also supra, p. 187.

It is also a principle pertaining to the law of eviction that, in case of eviction from a portion of the premises only, the lessee's rights are the same as if wholly evicted. The law will not apportion the rents in favor of the wrongdoer and the landlord, therefore, cannot recover any compensation even for the part of the premises occupied by the tenant while the eviction continues, nor will any action for use and occupation lie therefor. The only exception to the rule is where the eviction is by some person having a title paramount to the lessor's title.

Christopher v. Austin, 11 N. Y. 216; infra, p. 198; "Eviction by Paramount Title."

It is also a principle restricting the above rules that, if the lessor's wrongful act stop short of depriving the tenant, actually or impliedly, of the occupation of any portion of the premises, although the injury inflicted may be great, and the holding of the land by the lessee become less beneficial than it otherwise would have been from the tortious acts of the lessor, the latter will not be barred from his rent.

Also if the tenant actually remains in possession of the demised premises his obligation to pay rent continues; and damages resulting from acts of mere trespass or negligence by the landlord, cannot be set off against the rent.

For cases establishing the above principles, see Cohen v. Dupont, 1 Sandf. 260; Dyett v. Pendleton, 5 Cow. 728, affd., 20 N. Y. 283; Ogilvie v. Hull, 5

Hill, 52; Christopher v. Austin, 11 N. Y. 217; Giles v. Comstock, 4 N. Y. 270; Edgerton v. Page, 20 N. Y. 281; Carter v. Byron, 49 Hun, 299; Smith v. Barker, No. 1, 112 App. Div. 187.

It has been also held that, where, by the lessor's permission. there has been a material interference with the beneficial use by the lessee, even though the act done does not amount to an actual eviction, the right to abandon the premises exists; and there can be no claim for rent after an abandonment made under such circumstances.

Rogers v. Ostrom, 35 Barb. 523; Bank v. Newton, 76 N. Y. 616; Dennison v. Ford, 7 Daly, 384; Duff v. Hart, 16 N. Y. Supp. 163; Lawrence v. Marble Co., 1 Miss. 105. The acts complained of, however, must have been by the landlord's direction or with his connivance. Gilhooley v. Washington, 4 N. Y. 217. See also Johnson v. Oppenheim, 55 id. 280, as to excavations on an adjoining lot.

It is also held that when the estate out of which rent issues is gone (e. g., when certain rooms are leased, and the building is destroyed), and the demised tenement has absolutely ceased to exist, the rent must terminate, and the obligation to pay it is at an end. The lessee's estate does not revive on rebuilding. Graves v. Berdan, 29 Barb. 100, affd., 26 N. Y. 498.

A re-entry by landlord and reletting dispenses with a formal surrender and operates as a rescission of the lease and an eviction of the tenant. Renn v. Diederick, 3 Alb. Law Journal, 30; MacKellar v. Sigler, 47 How.

Nonsupply of water from leakage in other parts of premises than that occupied by tenant is not an eviction, nor a counterclaim in an action for rent. Coddington v. Dunham, 35 Super. 412.

Alterations of approach to premises in pursuance of a public ordinance not

an eviction. Gallup v. Albany R. R. Co., 65 N. Y. 1.

Dampness of premises where tenant agreed to repair does not constitute an eviction. Truesdell v. Booth, 6 Supm. 379.

Negligence or trespass by landlord does not bar the rent. But otherwise where he does acts which preclude the tenant from the beneficial enjoyment. Id. Dexter v. King, 8 N. Y. Supp. 489.

Vermin or noxious smells arising after lease do not constitute an eviction. Truesdell v. Booth, supra; Franklin v. Brown, 118 N. Y. 110; also Sutphin v. Seebas, 12 Daly, 139. Nor insults by landlord. Edwards v. Candy, 14 Hun, 596.

To evict a tenant from a farm, carrying him to the highway is sufficient.

Lawrence v. Mead, 5 Hun, 179.

Interference with light, etc., constitutes an eviction. Denison v. Ford, 7 Daly, 384.

Constructive eviction bars summary proceedings. People v. Gedney, 10 Hun, 152.

See Law of 1860, Chap. 345 (Real Property Law, § 197), authorizing tenant to abandon premises made untenantable without default of tenant, supra, Tit II. Also Tallman v. Murphy, 120 N. Y. 345.

supra, Tit II. Also Tallman v. Murphy, 120 N. Y. 345.

There must be real destruction or injury, not merely fears of it. Tallman v. Gashweiler, 13 Daly, 555.

Rescission of lease by tenant on account of former bad character of premises, not allowed unless made at once on discovery. Gilhooley v. Washington, 4 N. Y. 217; Edgerton v. Page, 20 id. 281; Koehler v. Scheider, 4 N. Y. Supp. 611; Boreel v. Lawton, 90 N. Y. 293.

Tenant may elect to consider service of summons in summary proceedings an eviction. Baldwin v. Thibaudeau, 17 N. Y. Supp. 532.

Fastening up of vacant but not surrendered premises, by landlord, held an eviction. Morgan v. Short. 13 Misc. 279.

eviction. Morgan v. Short, 13 Misc. 279.

Permission given by landlord to adjacent lot owner to enter on premises to support walls, when not an eviction. McKenzie v. Hatton, 141 N. Y. 6.
Otherwise where landlord owned both lots. Snow v. Pulitzer, 21 N. Y.

Supp. 296, affd., 142 N. Y. 263.
Where tenant is bound to repair, a leak in roof does not constitute an eviction. Crawford v. Redding, 8 Misc. 306.

There cannot be a constructive eviction until tenant surrenders.

Bonnell, 9 Misc. 154.

Nor any constructive eviction without an actual abandonment. Olson v. Schevlovitz, 91 App. Div. 405.

The Rule where Landlord Controls other Portions of Building.

-Where the owner of a tenement fails properly to repair and care for portions of the building which are in his sole care and control. whereby the premises of a tenant are rendered so unhealthful that the latter is obliged to remove, there is a constructive eviction. Romaine v. Brewster, 6 Misc. 531.

Rooms let with steam heat, inadequacy of heat held an eviction. Laurence v. Burrell, 17 Abb. N. C. 312; Ryan v. Jones, 2 Misc. 65. But tenant cannot

wait until the warm season and then move. Id.

See also Adams v. Burr, 13 Misc. 247; Doolittle v. Selkirk, 7 Misc. 722.

Where plumbing in a flat was so bad that it occasioned sickness, and landlord did not repair though ordered by the Board of Health to do so, it was held a constructive eviction. Bradley v. De Goicouria, 12 Daly, 393.

But see Coulson v. Whiting, 12 Daly, 408, contra.

Where there was no agreement as to heat of an apartment, held it was within the implied covenant of quiet enjoyment, but where tenant remained

there was no partial eviction, and as there was no agreement, no damages could be recovered. Jackson v. Paterno, 58 Misc. 201.

Evidence of bad smell must go to the jury on constructive eviction. St. Michael's, etc., Ch. v. Behrens, 13 Daly, 548; Tallman v. Earle, 3 Misc. 76. See also Fowler's Real Property Law, 626, 627.

Eviction by Title Paramount.—Where a tenant is actually evicted from the demised premises by title paramount, or surrenders possession in consequence of a judgment for their recovery, he is discharged from the payment of rent; but if he is only ejected from a portion of the premises by such title, the landlord may recover for the portion still enjoyed by the tenant.

The Home Ins. Co. v. Sherman, 46 N. Y. 370; Christopher v. Austin, 11 id. 216; Hurlburt v. Post, 1 Bosw. 28. See supra, 196.

Under a covenant for quiet enjoyment a tenant, on a partial eviction by title paramount, is entitled to an abatement of the rent. Blair v. Caxton, 18 N. Y. 529.

The erection of a building by strangers on an adjoining lot, so as to shut off light from the demised premises, is not an eviction of the tenant by the landlord. Johnson v. Oppenheim, 55 N. Y. 280.

Attachment by sheriff, accompanied by unlawful acts at suit of landlord for rent, is not an eviction to bar a claim for future rent as it accrues, unless the landlord participates in such acts. Grey v. Sheridan, etc., Co., 19 Abb.

Tenancy under a Mortgagor after Foreclosure .- It has been determined that the interest of a tenant under a demise from a mortgagor, made after the execution of the mortgage, is extinguished by a foreclosure and sale; and if the tenant attorn to the purchaser under the sale, at his request, although he may not have been actually evicted, the right of the lessor to the future rents is extinguished, and it is an eviction in law.

It is also held, that although the lessor may assign the lease to the

purchaser, and consent that the rent for the residue of the term be paid to him, the tenant may, notwithstanding, go out of possession and refuse to pay the subsequent rents. The eviction in such a case comes under the class of evictions by title paramount. Lane v. King, 8 Wend. 584; Simers v. Saltus, 3 Den. 214.

Lane v. King, 8 wend. 564; Sinters v. Satus, 5 Den. 214.

If the lessee choose he can attorn to a mortgagee after the mortgage has become forfeited, or to the purchaser. Id., and 1 R. S. 744; Real Prop. Law, § 194; Jones v. Clark, 20 Johns. 51.

Foreclosure of both landlord and tenant cancels lease as of date of entry into possession, by purchaser. Cummings v. Rosenberg, 6 Misc. 538.

It is not necessary, in such a case, that the referee's report of sale should

be confirmed, or the referee's deed produced, before the tenant can surrender the premises. Id.

TITLE V. FORFEITURE.

Forfeiture.—A term may be determined by conditions stipulated or covenants broken, or other act creating a forfeiture.

Formerly an alienation in fee worked a forfeiture, but by the Revised Statutes, no conveyance of a greater estate than can be lawfully conveyed has that effect; but all the estate of the grantor passes.

1 R. S. 739; Real Prop. Law, § 212; Grant v. Townsend, 2 Hill, 554.

The premises may be forfeited by act of the lessee's assignee, as seen above, Title III.

Where the condition renders the estate voidable only, it requires the act of the lessor to determine it. If not so determined the estate continues under the lease and not as a tenancy by sufferance.

Clark v. Jones, 1 Den. 516; Garner v. Hannah, 6 Duer. 262; Stuyvesant v. Davis, 9 Paige, 427.

Before the provisions of the Revised Statutes adverted to in the succeeding title, to work a forfeiture and re-entry, on nonpayment of rent, the common law required a previous demand of the rent due on the exact day, and at the place where payable, with circumstances of great particularity. Ejectment now stands in place of such demand.

See Tit. VI, infra.
Jackson v. Kipp, 3 Wend. 230; Van Rensselaer v. Jewett, 5 Den. 121; 2
N. Y. 131; Tyler v. Heidorn, 46 Barb. 439.

A forfeiture operating as to a portion of demised premises worked a forfeiture of the whole. Clarke v. Cummings, 5 Barb. 339.

A forfeiture may be waived; and if so, the waiver cannot be retracted unless the forfeiting act is continuing. 26 Barb. 41; Bleecker v. Smith, 13 Wend. 530; Clark v. Jones, 1 Den. 516; Collins v. Hasbrouck, 56 N. Y. 157.

The courts may relieve when the case is one which admits of compensation, and where the breach is not willful, or is the result of accident or mistake. Garner v. Hannah, 6 Duer. 262; Baxter v. Lansing, 7 Paige, 350.

The acceptance of the rent is not a waiver of forfeiture unless the rent received accrued subsequent to the act which works a forfeiture. Bleecker v. Smith, 13 Wend. 530; Jackson v. Allen, 3 Cow. 220; Hunter v. Osterhoudt, 11 Barb. 33; Graham v. Baker, 9 Week. Dig. 82.

It is not a waiver if it be so stipulated and understood. Stuyvesant v.

Davis, 9 Paige, 427; Manice v. Millen, 26 Barb. 41.

If lessor is ignorant of the forfeiture it is not waived by acceptance of rent. Clarke v. Cummings, 5 Barb. 339; Keeler v. Davis, 5 Duer. 507.

Rent accrued previous to the forfeiture may be recovered after re-entry by the lessor, but not that accrued after forfeiture as landlord, although he may recover them as mesne profits. Mattice v. Lord, 30 Barb. 382; 5 Rob. 169.

Mere default in the payment of rent, where there is a covenant for its payment and no condition in the lease providing for re-entry does not work a forfeiture of the term, and no ejectment lies. Van Rensselaer v. Jewett, 2 N. Y. 141, affg. 5 Den. 121; Delancey v. Ganong, 12 Barb. 120, affd., 9 N. Y. 9.

This last case also holds that the words "yielding and rendering" in a lease import a covenant but not a condition, unless the landlord would other-

wise be without remedy in case the rent should not be paid.

If, by the lease, forfeiture is provided on nonperformance of covenants, if the lease also contains the clause that in case of nonperformance the landlord may re-enter, the lease is voidable only, at the election of the landlord, but not void. Stuyvesant v. Davis, 9 Paige, 427, and supra, 132.

As to forfeiture under leases in fee, vide supra, Chap. V. Tit. IV.

Acceptance of rent after an action commenced for forfeiture is not a waiver. Importers' Co. v. Christie, 5 Rob. 170.

Waiver by acceptance of rent. Michel v. O'Brien, 6 Misc. 408.

Upon breach of a condition the lessor may resort to an action of ejectment to recover possession of the demised premises, although no right of entry is expressly reserved in the lease. Horton v. N. Y. Cen. R. R. Co., 12 Abb. N. C. 30.

Provision in lease of an apartment house as to ceasing of lease at landlord's option, upon objectionable conduct of tenant, etc., construed a condition subsequent, and not a conditional limitation. Penoyer v. Brown, 13 Abb. N. C. 82.

Provision for re-entry need not be in particular words, if substantially effective. Post v. Moran, 10 Daly, 502.

A waiver of forfeiture for breach of certain conditions, e. g., against assignment, dispenses with them forever. Murray v. Harway, 56 N. Y. 337. By L. 1873, Chap. 583, if the tenant carry on an unlawful business the lease becomes void, and landlord may re-enter. If he does not do so he becomes jointly liable with the tenant.

This law is still in force, not having been repealed by the Real Property Law. It was partially re-enacted, however, as to the landlord's liability, by the Real Property Law, § 201.

TITLE VI. EJECTMENT AND RE-ENTRY.

The remedies which the grantor or lessor may pursue in the event of nonpayment of rent or other violation of conditions, are ---

- I. An action to recover the rent itself, either as between the original parties, or as between parties who have succeeded to their rights and obligations.
 - 2. Ejectment to recover the premises.

There are also certain "Summary Proceedings," provided by the statutes of this State, to obtain speedy possession where rent is unpaid, or where a tenant holds over, that will be adverted to in a subsequent chapter (Chap. XLI), in which the proceedings in an ejectment suit in order to make title under it are given.

To work a forfeiture for nonpayment of rent, as seen in the preceding title, and to authorize ejectment thereon, the common law required a previous demand of the rent due on the exact day, with circumstances of great particularity.

The Code of Civil Procedure, however, provides that "When six months' rent or more is in arrear, upon a grant reserving rent, or upon a lease of real property, and the grantor or lessor, or his heir, devisee or assignee, has a subsisting right by law to re-enter for the failure to pay the rent, he may maintain an action to recover the property granted or demised, without any demand of the rent in arrear, or re-entry on the property."

Code Civ. Proc., \S 1504, following the statutes formerly in force. 1 R. L. 440, \S 23; 2 R. S. 505, \S 30, repealed L. 1880, Chap. 245.

At any time before final judgment, it is further provided, the defendant may tender or pay into court the rent, with interest and costs to be taxed, and thereupon the complaint must be dismissed.

Code Civ. Proc., § 1506; 2 R. S. 505, § 32.

Within six months after possession taken under an execution of judgment as above, the lessee, his assigns or personal representatives, may pay or tender to the lessor, his personal representatives or attorney, or pay into court, the rent, interest, costs and charges, and the court, upon application within three months thereafter, on proof of the facts and payment of rent which has accrued since judgment, must make an order restoring possession to the applicant, who shall hold upon the old terms without any new grant or lease.

Code Civ. Proc., §§ 1508, 1509; 2 R. S. 506, §§ 33, 35, 36. Mortgagees out of possession may also redeem as above.

A remainderman who was not a party to the ejectment suit brought by landlord against life tenant is not within the six months' statute of limitations,

landlord against life tenant is not within the six months' statute of limitations, which limits tenant's right to redeem to six months after landlord has been placed in possession. Sand v. Church, 152 N. Y. 174.

Whatever sum the plaintiff might have made out of the premises in the interim must be set off against the rent.
Code Civ. Proc., § 1510; 2 R. S. 506, § 38.

As to the above proceedings under the Revised Statutes and the practice thereunder, reference may be made to the following cases, most of which are more particularly referred to in other parts of this chapter, under their appropriate heads: Frost v. Snow, 7 Wend. 521; Featherstonhaugh v. Bradshaw, 1 id. 134; Jackson v. Miller, 7 Cow. 747; Kirby v. Fitzpatrick, 18 N. Y. 484; Blair v. Claxton, id. 529; Van Rensselaer v. Snyder, 13 id. 299; 27 Barb. 104, 176; 18 id. 157; 2 id. 316; Van Rensselaer v. Gallup, 5 Den. 453, 480; Rogers v. Lynds, 14 Wend. 172; Trustees, etc. v. Williams, 9 id. 147; 2 Duer, 507; 12 Abb. 475; 26 How. Pr. 292; Van Rensselaer v. Ball, 19 N. Y. 100; Van Rensselaer v. Jewett, 5 Den. 121, affd., 2 N. Y. 141; 19 Barb. 484.
Formerly the remedy by ejectment to enforce a forfeiture on the non-payment of rent, was not allowed except where a right of re-entry was expressly stipulated for between the parties to the lease.

Van Rensselaer v. Jewett, 5 Den. 121, affd., 2 N. Y. 141; Tyler v. Heidorn, Barb. 439. See, however, Horton v. N. Y. Central R. R. Co., 12 Abb. N. C. 30.

As to the remedy by ejectment, where the land was apportioned, vide,

Tit. V, supra.

Ejectment will lie for breach of covenant to pay taxes. Giles v. Austin, 34 Super. 171; s. c. (on another appeal), 38 Super. 215, affd., 62 N. Y. 486, as to such action.

Re-entry by Landlord.— Upon the termination of a lease the landlord may enforce right of possession through a judicial proceeding, but he is entitled to re-enter upon the property without judicial process provided he can do so without violence or a breach of the peace.

The true owner may always regain possession of his property in a peaceable manner. When the entry of the landlord is peaceable he may lawfully resist any act of a former occupant to regain possession. Hoske v. Gentzlinger, 87 Hun, 3.

"Re-entry" in a case held to mean only a re-entry in its technical sense, as known to the common law by ejectment, and does not include the removal of the lessee by statutory summary proceedings. Michaels v. Fishel, 169 N. Y. 381.

Code of Civil Procedure as to Re-entry. — By the Code of Civil Procedure whenever the right of re-entry is reserved for rent due to a grantor or lessor in default of sufficient goods whereon to distrain, it may be made or an action to recover the property may be maintained, on fifteen days' written notice after rent due, given by the grantor or lessor, his heirs or assigns, to the grantee or lessee, his heirs, executors, administrators, or assigns. § 1505.

This provision follows L. 1846, Chap. 274, which was repealed by L. 1880,

The above provisions, requiring fifteen days' notice, etc., do not apply when the right of entry arose on the breach of any other covenant than that for the payment of rent. Garner v. Hannah, 6 Duer. 262.

It is immaterial, since the abolition of distress, whether there is sufficient property for distress or not. Van Rensselaer v. Snyder, 13 N. Y. 299.

The Statute of 1846, supra, rendered inoperative the words in the Revised Statute, "and no sufficient distress can be found, etc.," and authorized the landlord to re-enter at any time after default in payment, provided he gave notice in writing as required.

This Act of 1846 also abolished "Distress" for rent.

The provisions of the Revised Statutes on the subject of ejectment for nonpayment of rent were held not repealed by the above Act of 1846. A landlord also might still, it was supposed, re-enter at common law or he might proceed under said Law of 1846. The service upon the tenant of the notice required by said act is the only prerequisite to the right of re-entry under the statute. Such notice was not intended to be in addition to the formalities of the common law proceeding. Williams v. Potter, 2 Barb. 316; Van Rensselaer v. Snyder, 9 id. 302, affd., 13 N. Y. 299; The Mayor v. Campbell, 18 Barb. 156. See also Van Rensselaer v. Smith, 27 Barb. 104; 19 N. Y. 100.

The fifteen days' notice might be waived by the tenant. Williams v. Potter, 2 Barb. 316. As to the notice, see 27 id. 104.

Where ejectment was brought for nonpayment, and the proceedings were according to the course of the common law, a strict demand of the rent made with great nicety, was essential. This common law demand is now rendered unnecessary under our statutes, as above.

The service of the notice under the third section of the Act of 1846

rendered unnecessary the proof of the want of any sufficient distress.

Actual entry in order to bring ejectment is now unnecessary; but only a right to enter for condition broken and to immediate possession is requisite.

Tyler v. Heidorn, 46 Barb. 439.

The case of Hosford v. Ballard, 39 N. Y. 147, holds that the clause in the Statute of 1846, requiring fifteen days' notice of an intention to re-enter did not apply to a grant in which the right to re-enter arises on defaudt of payment by the tenant, but only where such right depends on the sufficiency of goods whereon to distrain. See also, Cruger v. McLaury, 41 N. Y. 219.

This Act of 1846, Chap. 274, was held to have a retrospective effect, and not to be unconstitutional in its retrospective application. Stocking v. Hunt, 3 Den. 274; Conley v. Palmer, 2 N. Y. 182; Guild v. Rogers, 8 Barb. 502; Conkey v. Hart, 14 N. Y. 22; Van Rensselaer v. Snyder, 13 id. 299.

Notice in City of New York.—By Chap. 303, Laws of 1882, amended Chap. 357, Laws of 1889, it was provided: "No monthly tenant shall hereafter be removed from any lands or tenements in the city of New York or in the city of Brooklyn on the grounds of holding over his term (except when the same expires on the first day of May) unless at least five days before the expiration of the term the landlord or his agent serves upon the tenant, in the same manner in which a summons in summary proceedings is now allowed to be served by law, a notice in writing to the effect that the landlord elects to terminate the tenancy, and that unless the tenant removes from said premises on the day on which his term expires the landlord will commence summary proceedings under the statute to remove such tenant therefrom."

See Peabody v. Long Acre Square Building Co., 112 App. Div. 114; Simpson v. Masson, 11 Misc. 351.

For the duration of certain agreements in New York City, see Real Prop. Law, § 202.

Tenancy from Month to Month—Notice to Quit.—Notice under tenancy from month to month is three days. § 2231, Code Civ. Proc. Assuming that a month's notice to quit is not necessary in case of a simple tenancy from month to month, it is necessary where the lease is from month to month, "so long as the rent is paid." Hoffman v. Van Allen, 3 Misc. 99.

See also, "Ejectment and Summary Proceedings," infra, Chap. XLI. As to forfeiture, re-entry and ejectment in cases of "Conditional Grants and Leases in Fee," vide supra, Chap. V, Tit. IV.

TITLE VII. ESTATES AT WILL.

Another species of estates, not of freehold, is an estate at will By the Revised Statutes, they and estates at sufferance are termed chattel interests, but shall not be, as such, liable to sale on executions.

1 R. S. 722, § 5; Real Property Law, § 23.

An estate at will, in general, is where lands and tenements are leased to be held at the will of the lessor. A reasonable notice had to be given of the election to determine the estate, so that the tenant might remove the emblements, and also his family and property.

Jackson v. Wheeler, 6 Johns. 272; Phillips v. Covert, 7 Johns. 1; Bradley v. Covel, 4 Cow. 349; Newman v. Marshall, 52 Super. 202.

Nor could the tenant determine the estate before the period of payment arrived, so as to cut off the landlord from his rent. Walker v. Furbush, 11 Cush. 366; 4 Kent, 111.

This was the old common law tenancy at will.

The old tenancy at will was succeeded in many cases by a tenancy from year to year, created under a contract for a year implied by the courts; such tenancy could not be determined by either party. except at the end of the year. A tenancy, for example, at an annual rent, which had been paid for several years, without lease or agreement, was considered a tenancy from year to year.

The reservation of an annual rent was the leading circumstance that turned leases for uncertain terms into leases from year to year.

But tenancies at will, properly so called, are still in existence, and have their distinctive characteristics.

Thus, a tenancy without any term prescribed or rent reserved, or one expressly during the will of the lessor, or a simple permission to occupy, creates a tenancy at will, unless there are circumstances to show an intention to create a tenancy from year to year.

What were formerly held estates at will, however, at an annual rent, where no certain term is agreed on, and especially where the occupation continues after a determination of an estate for years. are generally now construed to be tenancies from year to year. The continued occupation is held to be evidence of a tacit renovation of the contract, without any definite period, and is construed to be a tenancy from year to year, requiring notice of determination by either party. Such a tenancy continues until terminated by a legal notice, and the tenant cannot withdraw at his pleasure.

Pugsley v. Aiken, 11 N. Y. 494, revg. 14 Barb. 114; Witt v. The Mayor, 6 Robtn. 441; Nichols v. Williams, 8 Cow. 13; Jackson v. Salmon, 4 Wend. 327; Conway v. Starkweather, 1 Den. 113; Taggard v. Roosevelt, 8 How. Pr. 141; 2 E. D. Smith, 100; Jackson v. Wilsey, 9 Johns. 217; Jackson v. Miller, 7 Cow. 747; Dorr v. Barney, 12 Hun, 259.

A renting by the month, and then from month to month, is not such a

A renting by the month, and then from month to month, is not such a letting as to require a month's notice to terminate. Such a contract in the city of New York cannot be construed as a tenancy at will, and does not extend the tenancy to the first of the following May. People ex rel. Oldhouse v. Goelet, 14 Abb. Pr. N. S. 130; s. c., 64 Barb. 476. Compare 7 Daly, 417; 4 Hun, 451.

Imposing improper conditions invalidates the effect of notice. Lore v. Pierson, 10 Daly, 272.

The cases on the question of the time of notice, in the cases of a tenancy from year to year, are full of contradictions, and it is difficult to lay down any exact rule from them. See Wright v. Mosher, 16 How. Pr. 454; Witt v. The Mayor, 6 Robt. 441; Reeder v. Sayre, 70 N. Y. 180. See infra, as to notice in cases of tenancy at will and at sufferance.

Where a tenant leaves in middle of a year and is compelled by law to pay the rent his lease terminates at end of the current year. Adams v.

City of Cohoes, 127 N. Y. 175.

Tenancy from Year to Year .-- When and how terminated in certain cases.

Park v. Castle, 19 How. Pr. 29.

See also, on this point, in a special case of tenancy from year to year, Wright v. Mosher, 16 How. Pr. 454; People v. Darling, 47 N. Y. 666.

It is frequently difficult to draw the line between and determine what are tenancies at will, properly so called, and tenancies from year to year.

The following decisions show the different aspects in which tenancies of this uncertain character are viewed:

A tenant in possession at or after a sale on execution, is tenant at will to the purchaser, and cannot set up an outstanding title. Colvin v. Baker, 2 Barb. 206; Dickinson v. Smith, 25 id. 102. As would also be the former

owner holding over. Nichols v. Williams, 8 Cow. 13.

A tenancy "for one year and an indefinite period thereafter," is one from year to year; also, where one enters on land by permission, as an occupant. Pugsley v. Aikin, 11 N. Y. 494; Jackson v. Bryan, 1 Johns. 322; Western Transp. Co. v. Lansing, 49 N. Y. 499; Reeder v. Sayre, 70 id. 180.

A parol gift of lands creates a tenancy at will. Jackson v. Rogers, 2 Cai Cas. 314. A parol lease for more than one year constitutes a tenancy at will. Talamo v. Spitzmiller, 120 N. Y. 37; compare, Coudert v. Cohn, 118 N. Y. 309. See Real Prop. Law, § 207.

Tenancy at will is created by owner allowing occupancy of the premises without any agreement as to period or as to paying rent. The notice to quit need not terminate at the end of a month. Peer v. O'Leary, 8 Misc. 350.

A tenant without any term prescribed or rent reserved is a tenant at will. Sarsfield v. Healy, 50 Barb. 245; People v. Field, 1 Lans. 22; King v. Van Duzer, 12 Week. Dig. 562; Learned v. Hudson, 60 N. Y. 102.

Also, one "during the will and pleasure of the lessor;" and a month's notice is sufficient. Post v. Post, 14 Barb. 253; Doe v. Wood, 14 Mees & W.

682.

This would not apply to any employee. Kerrains v. People, 60 N. Y. 221. See as to a janitor, Jennings v. McCarthy, 16 N. Y. Supp. 161.

Holding over after the expiration of a lease for a year or more is a continuation of the former tenancy, which becomes one from year to year, under the terms of the original lease. Webber v. Shearman, 3 Hill, 547; 6 id. 32; Witt v. The Mayor, 6 Robtn. 441; Hall v. Wadsworth, 2 Wms. (28 Vt.), 410. Conway v. Starkweather, 1 Den. 113; Elwood v. Forkel, 35 Hun, 202: Austin v. Strong, 47 N. Y. 679; Lounsberry v. Snyder. 31 id. 514; Dorr v. Barney, 12 Hun, 259. Or the landlord may, at his option,

treat lessee as a trespasser. Schuyler v. Smith, 51 N. Y. 309; Smith v.

Allt, 7 Daly, 492.

This does not apply where the lease contemplates holding over. Pickett v. Bartlett, 107 N. Y. 277. But will apply in case of mere delay in moving out, and the election may be made after removal. Shanahan v.

Where possession is taken, under a parol lease void by the statute, it enures as a tenancy from year to year, and cannot be terminated by either party except at the end of the year. Taggard v. Roosevelt, 8 How. Pr. 141; 2 E. D. S. 100; Loughran v. Smith, 75 N. Y. 205; Fougera v. Cohn, 43 Hun, 454, afdd. Coudert v. Cohn, 118 N. Y. 309. Compare Talamo v. Spitzwiller 120 N. Y. 27 miller, 120 N. Y. 37.

Where the holding is at a stated rent, it will, after notice to quit terminating the tenancy at will, become a tenancy from year to year, requiring six months' notice to quit. Bradley v. Covel, 4 Cow. 349.

A person in peaceable possession, with the knowledge and acquiescence

of the owner, is a tenant at will, entitled to notice. Marquart v. La Farge, 5 Duer, 559.

A party entering under an agreement to accept a lease for a term of 20 months, and subsequently refusing to accept, becomes a tenant at will or by sufferance. Anderson v. Prindle, 19 Wend. 391; s. c., 23 id. 616.

By L. 1882, Chap. 303, tenants from month to month, in New York, are entitled to five days' notice in case of holding over. The notice must state that landlord will commence summary proceedings otherwise. Folz v. Shalow, 16 N. Y. Supp. 942. Not so except by statute. People v. Goelet, 14 Abb. N. S. 130. See *supra* as to this statute, Tit. VI. See *infra*, as to notice to terminate tenancy at will and by sufferance.

Also Luddington v. Garlocke, 9 N. Y. Supp. 24.

Determination of Tenancy at Will by Notice under Statute.-The Revised Statutes provide: "Wherever there is a tenancy at will, or by sufferance created, by the tenant's holding over his term. or otherwise, the same may be terminated by the landlord's giving one month's notice in writing to the tenant, requiring him to remove therefrom."

"At the expiration of one month from the service of such notice, the landlord may re-enter, or maintain ejectment, or proceed in the manner prescribed by law, or remove such tenant, without any further or other notice to quit."

1 R. S. 745, §§ 7, 9. L. 1820, 177; Morgan v. Powers, 83 Hun, 298. See supra, p. 205.

The Revised Statutes further provide as to how the above notice shall be served.

1 R. S. 745, § 8.

These sections of the Revised Statutes are now embodied in the Real Property Law, § 198.

Where the tenancy is expressly at will, the notice may be given at any

time. Vrooman v. Šhepperd 14 Barb. 453.

The notice required by the Revised Statutes need not specify the time within which the premises must be surrendered. It is sufficient if the tenant has thirty days' notice of the intention to terminate the tenancy. Burns v. Bryant, 31 N. Y. 453. See contra, Wright v. Mosher, 16 How. Pr. 455. No notice is necessary to a tenant where the terms on which a lease is to terminate are fixed by the agreement of the parties. Allen v. Jaquish, and word for the parties.

21 Wend. 628; Doyle v. Gibbs, 6 Lans. 180.

Nor in cases where the relation of landlord and tenant does not exist; as in case of a trespasser. Torrey v. Torrey, 14 N. Y. 430; Doolittle v. Eddy, 7 Barb. 74; see 1 R. S. 749. Or a mere license. Doyle v. Gibbs, 6 Lans. 180. As to dispossessing a janitor, see Jennings v. McCarthy, 16 N. Y. Supp.

161.

If the tenant merely holds over without assent, he is not a tenant at sufferance requiring notice. Rowan v. Lytle, 11 Wend. 616; Smith v. Littlefield, 51 N. Y. 539.

A disclaimer of the tenancy dispenses with the notice to quit, as taking a deed from a stranger. Jackson v. Wheeler, 6 Johns. 272; Woodward v. Brown, 13 Pet. 1; Sharpe v. Kelley, 5 Den. 430; Clarke v. Crego, 47 Barb. 600, affd., 51 N. Y. 646.

Or an act of waste. Phillips v. Covert, 7 Johns. 1.

An acceptance of rent after the expiration of notice to quit is a waiver of the notice. Prindle v. Anderson. 19 Wend. 391: 23 id. 616. See also

People v. Darling, 47 N. Y. 666; Austin v. Strong, id. 679.

A tenant at will or by sufferance has the right to remain in possession of the leased premises until the tenancy is determined by a notice to surrender possession thereof. It can be terminated by the landlord's giving a written notice of one month, as above stated, and at the expiration of the month's notice the landlord has the right to re-enter or maintain ejectment or proceed in the manner prescribed by law to remove the occupants from the possession of the premises. Morgan v. Powers, 83 Hun, 298.

Other Determination of the Estate.—An estate at will is also determined by a conveyance to a third person, or by the commission of voluntary waste; also by any written disclaimer, such as giving a deed in fee.

Philips v. Covert, 7 Johns. 1; Jackson v. Wheeler, 6 id. 272; Sharpe v. Kelly, 5 Den. 431; Jackson v. Vincent, 4 Wend. 633.

Liable for Waste.—A tenant at will is liable for willful but not for permissive waste; for which trespass quare clausum fregit lies

Starr v. Jackson, 11 Mass. 519; Gibbons on Dilapidations, 47. See supra, as to waste, p. 151.

Effect of Covenants in the Lease.—A tenant holding over holds subject to all covenants in the expired lease, which are consistent with yearly tenancy.

Hyatt v. Griffiths, 33 Eng. L. & Eq. 75; Vrooman v. McHaig, 4 Md. 450; Prockett v. Ritter, 16 Ill. 96; Conway v. Starkweather, 1 Den. 113.

Assignable Interest.—An actual tenant at will has not any assignable interest, though it is sufficient to admit of an enlargement by release; and if he assigns, the tenancy is determined. On the other hand, estates which are constructive tenancies from year to year may be assigned.

City of New York .- The Revised Statutes provide that "Agreements for the occupation of lands or tenements, in the city of New York, which

shall not particularly specify the duration of such occupation, shall be deemed valid until the first day of May next after the possession under such agreement shall commence, and the rent under such agreement, shall be payable at the usual quarter days for the payment of rent in said city, unless otherwise expressed in the agreement."

1 R. S. 744, § 1; L. 1820, 178, § 4. See now Real Prop. Law, § 202. See Wolfe v. Merrit, 21 Wend. 338; Marquart v. La Farge, 5 Duer, 569; Clarke v. Richardson, 4 E. D. Smith. 173; Taggard v. Roosevelt, 2 id. 100. This has no application to a case where the tenancy is by the month.

Olson v. Schevlovitz, 91 App. Div 40c.
But when tenant hires orally at a rent payable monthly, occupation to be dependent on how the premises suit him, and occupies for three months, the case is within the statute. Bernstein v. Lightstone, 36 Misc. 193.

The presumption created by the statute may be rebutted. Taylor, 8 Daly 253.

Contracts of Sale.—As to occupation under a contract of sale. vide infra, Chap. XIX.

See also, "Estates at Sufferance," infra.

TITLE VIII. ESTATES AT SUFFERANCE.

Another estate, not of freehold, is an estate at sufferance that is, where the tenant comes into possession of land by lawful title, but keeps it over after the determination of his interest. He has only a naked possession, without power to sell or to transact. and was not, by common law, entitled to notice to quit, and, independent of statute, was not liable to pay rent.

Jackson v. Parkhurst, 5 Johns. 128; Jackson v. McLeod, 12 Johns. 182. A tenant for life or lives who continues in possession without owner's consent after the termination of the life estate is not entitled to notice to quit, as no tenancy at sufferance arises thereby. Livingston v. Tanner, 14 N. Y. 64, reversing 12 Barb. 481.

The distinction between a tenancy at will and at sufferance is, that the former is created by the consent, and the latter by the laches of the landlord, who may enter and put an end to the tenancy when he pleases. But before entry, the lessor cannot maintain an action of trespass against the tenant by sufferance, as his first occupation was through the act of the lessor, and, therefore, lawful.

The purchaser of a life estate, who holds over after its termination, is not a tenant by sufferance to the remainderman. Livingston v. Tanner, 14 N. Y. 64, revg. 12 Barb. 481.

Where the grantor of lands holds over after day agreed on, he is a tenant at sufferance. Hyatt v. Wood, 4 Johns. 150; Wood v. Hyatt, id. 313; Jackson v. Gilchrist, 15 id. 89.

See also as to tenants at sufferance under the common law rules. Johns. Ca. 123; Hyatt v. Wood, 4 Johns. 150; Wood v. Hyatt, 4 id. 313; Jackson v. Gilchrist, 15 id. 89 at 106.

Formerly tenants at sufferance were not entitled to notice to quit before eiectment. Jackson v. Parkhurst, 5 Johns. 128.

Determination of the Tenancy by Notice.—By the Revised Statutes, whereever there is a tenancy at will, or by sufferance, created by the tenant's holding over his term, or otherwise, the same may be terminated by the landlord's giving one month's notice in writing to the tenant, requiring him to move. At the expiration of the month, the landlord may re-enter or bring ejectment, or remove the tenant. 1 R. S. 745, § 7.

Real Property Law, § 198; see supra, Title VII.
Where a tenant for a year holds over, he is not entitled to notice to quit where a tenant for a year noise over, he is not entitled to notice to quit as a tenant at sufferance; but may be removed by summary proceedings, unless he holds over for such a length of time as to imply assent of the landlord. Rowan v. Lytle, 11 Wend. 616; Smith v. Littlefield, 51 N. Y. 539. Nor is a tenant for lives, holding over without permission, a tenant at

sufferance, entitled to notice. Livingston v. Tanner, 14 N. Y. 64; Nims v.

Sabine, 44 How. Pr. 252.

See, more fully, as to the above statutory notice, its service, and when it is requisite, supra, pp. 206, 207.

Sales on Execution.— Estates at will or by sufferance as such. are not liable to sale on execution.

1 R. S. 722, § 5; Real Property Law, § 23; Colvin v. Baker, 2 Barb. 206; Dickinson v. Smith, 25 id. 102.

But a tenancy from year to year may be so sold. Bigelow v. Finch, 17

Barb. 394.

Grants by Tenants at Will or Sufferance.— A tenant at will or by sufferance has no estate that can be granted by him to a third person.

And one who enters under a lease or assignment from a tenant at will, is a disseizor, and is liable in trespass at the option of the landlord.

Reckhow v. Schanck, 43 N. Y. 448.

Guardians, etc., Holding Over .- Guardians and trustees of infants, and every other person who shall hold over, without consent, any estate determined on any life or lives, shall be adjudged a trespasser, and liable in damages.

Code Civ. Proc., § 1664, following 1 R. S. 749, § 7. This section of the Revised Statutes covered also the case of husbands seized in right of their wives; this clause was however omitted from the Code. See *supra*, Chap. III, the emancipatory acts.
See also "Ejectment" and "Summary Proceedings," infra, Chap. XLI.

TITLE IX. MERGER.

The doctrine of merger is applicable not only to estates for years, but to other interests and estates, legal and equitable. Its main features are given collectively in this chapter, as being a more convenient arrangement for reference than their distribution under the various chapters to which they may respectively relate.

When the term of years and the next expectant estate meet in one person, a merger takes place by which the elder term merges in the latter, and becomes extinct. Or when a greater estate and a lesser fall together in one person, the latter is merged in the former. The more remote estate must be the next vested in reversion or remainder, without any intervening vested or contingent; and the estate in reversion or remainder must be at least as large as the preceding estate. As a general rule, also, where the estates are equal there is no merger.

The doctrine of merger applies only where there is a legal estate: as where the title and a lien, or a legal and an equitable, or a larger and a lesser estate meet.

Where the two estates are successive, and not incompatible, there may be no merger.

Doe v. Walker, 5 Barn. & Cress. 111; 4 Kent, 101; Schermerhorn v. Merrill, 1 Barb. 512; Reed v. Latson, 15 Barb. 9; James v. Morey, 2 Cow. 246.

An estate may merge for one part of the land and continue in the remaining part of it.

remaining part of it.

If the estates are held in different legal rights, there will be no merger, provided one of the estates be an accession to the other merely by act of law, as by marriage, by descent, by executorship or by intestacy.

When the other estate had been added by act of the party, as by purchase, then the merger takes place, if the power of alienation extends to both estates. Preston on Con. 3, 25; 4 Kent, 101; Hosford v. Merwin, 5 Barb. 51.

Under the above principles, an estate for years may merge in an estate in fee or for life; and an estate pur autre vie may merge in an estate for one's own life.

So, also, if the legal and equitable estates in land are coextensive and unite in the same person, the equitable is merged in the legal estate, which would then descend according to the rules of law applicable to it; as, for example, if the legal estate in fee descend ex parte materna, and the equitable estate in fee ex parte paterna, the equitable estate is merged in the legal, and both go in the line of descent of the legal estate (as per rules of descent, infra, Chap. XIV).

Vide Nicholson v. Halsey, 1 Johns. Ch. 417.

So, also, if the owner of the equity of redemption pays off an existing mortgage and takes an assignment of it, it will be intended that the mortgage is extinguished, unless it is made to appear that he has some beneficial interest in keeping the legal and equitable estates distinct, or has so declared his intention. He will not be allowed to keep the mortgage on foot to the preudice of a bona

fide purchaser under him. The mortgage will be kept on foot if for the benefit of an infant's estate.

Purdy v. Huntington, 42 N. Y. 334; Gardner v. Astor, 3 Johns. Ch. 53; Starr v. Ellis, 6 id. 393; James v. Morey, 6 id. 417; 2 Cow. 246; In re De Kay, 4 Paige, 403; Cooper v. Whitney, 3 Hill, 96; Smith v. Roberts, 91 N. Y. 470, distinguished and limited, 53 Hun, 73; Abbott v. Curran, 98 N. Y. 665.

When the mortgage has become once merged, it cannot be restored so

when the mortgage has become once merged, it cannot be restored so as to give priority over a junior lien. Angel v. Boner, 38 Barb. 425.

The conveyance of mortgaged premises from the owner thereof to the mortgagee, will not operate as a merger of the mortgage in the legal title, where it was not the intention of the parties that it should have that effect. Van Nest v. Latson, 19 Barb. 604; DeLisle v. Herbs, 25 Hun, 485.

A charge will not merge in the inheritance if contrary to the interest of the owner of the estate. Davis v. Barrett, 11 Eng. L. & Eq. 317; Johnson v. Webster, 31 id. 98.

Where the executor of a mortgage purchased in his own right the

v. Webster, 31 id. 98.

Where the executor of a mortgagee purchased, in his own right, the premises under the foreclosure of a second mortgage, it was held that the first mortgage was not merged in the fee. Clift v. White, 12 N. Y. 519.

Where the owner of the equity of redemption of mortgaged premises made a second mortgage, and then took an assignment of the first mortgage, which he afterward assigned to a third person, it was held that the existence of the second mortgage at the time of these assignments prevented the merger of the first. Evans v. Kimball, 1 Allen, 240. See also Purdy v. Huntington, 42 N. Y. 334; Smith v. Roberts, 62 How. Pr. 196.

The owner of land, who paid off a mortgage on it in ignorance of a subsequent judgment lien, held entitled to have the mortgage reinstated. Barnes v. Mott, 64 N. Y. 397.

Where a mortgagor, who had sold the equity with covenants of assump-

Where a mortgagor, who had sold the equity with covenants of assumption, took an assignment, there was merger. Fairchild v. Lynch, 46 Super. 1.

Where a first mortgagee buys the equity of redemption at foreclosure of second mortgage, the judgment may direct that there be no merger, and in that case he may sell it and then foreclose his first mortgage. Clements v. Griswold, 46 Hun, 377.

The equity is the second of the of an outstanding losse of a portion of

The acquisition by owner of fee of an outstanding lease of a portion of the premises for a term of years, under which a building erected thereon by the lessee is declared in legal effect to be personal property subject to right of removal at the expiration of the term, does not merge the title to such building in the fee of the land, since such title does not rest upon the law of merger, but upon the terms of the lease. Sweet v. Henry, 175 N. Y. 268.

Although at law when the greater and lesser estates meet and coincide in the same person, the lesser estate becomes annihilated, in equity the rule is not inflexible. There, it depends on the intention of the parties and other equitable considerations. Merger is not favored in equity, and is generally allowed merely to promote the intention of the party. At law, merger will operate, even though one of the estates be held in trust, and the other beneficially, by the same person; or if both the estates were held by the same person on different trusts. Equity, however, would interpose and prevent the merging, if the justice of the case required it.

As a general rule, an equitable estate would merge in the legal title is subsequently acquired by the cestui que trust. In equity, the rule would be modified by the intention of the party and the

requirements of justice, so that the equitable estate, if necessary, might be kept in existence.

Thus, if an equity of redemption were conveyed to a mortgagee, with an Thus, if an equity of redemption were conveyed to a mortgagee, with an express agreement between the parties that the deed should not operate as a merger of the mortgage, except at the election of the mortgagee, equity would preserve the two estates distinct, unless the mortgagee appear to have elected that they should be merged. So, also, if the executor of the mortgagee purchase the fee in his individual capacity, he has the right of election in equity. So, also, if it be for the interest of a person in whom the legal and equitable estate unite, or if the person, being an infant, or lunatic, cannot elect, and it is for his interest, the law will imply an intention to keep the equitable estate alive. Millard v. McMullen, 5 Hun, 272, affd., 68 N. Y. 345; DeLisle v. Herbs, 25 Hun, 485; Jackson v. Littell, 56 N. Y. 108; Purdy v. Huntington, 42 id. 334; Sheldon v. Edwards, 35 id. 279; Reed v. Latson, 16 Barb. 9; Spencer v. Ayrault, 10 N. Y. 202; 4 Kent. 103; Clif v. White, 12 N. Y. 519, revg. 15 Barb. 70; James v. Morey, 2 Cow. 246; Cooper v. Whitney, 3 Hill, 95; Bostwick v. Frankfield, 74 N. Y. 207; Binnse v. Paige, 1 Ct. of App. Cas. 139.

It has been lately declared that it is not definitely decided that the union of the legal title and the beneficial interest in the same person operates to destroy the express trust. Rankin v. Metzer, 69 App. Div. 264, 269.

The court might, as in the case of the death of a trustee, exercise its power to prevent the failure of a trust provision by reason the conjoined interests of the trustee. Id.; Losey v. Stanley, 147 N. Y. 560; Matter of Conger, 81 App. Div. 493, 498.

See Fowler's Real Property Law (2d ed.), 371, 386, and cases cited; also infra, Chap. XXIII, "Mortgages," Title VIII. express agreement between the parties that the deed should not operate as

TITLE X. SURRENDER.

Where an estate for life or years is yielded up to the next estate in reversion or remainder, the former estate becomes extinguished by act of the parties. The surrender is made by act of parties, and not by operation of law, as in case of merger.

The surrender must be to the immediate lessor or his assignee or privy in estate; and, as has been seen above, must be in writing (supra, Tit. II), if the lease is for over a year.

Millard v. McMullen, 68 N. Y. 345.

The surrender of an estate being required by statute to be in writing (2 R. S. 134, § 6; Real Property Law, § 207), calling it a forfeiture, and agreeing it shall be a forfeiture, cannot dispense with the requirements of the statute, or change its character. Allen v. Brown, 60 Barb. 39. Nor is a parol agreement to terminate a lease good without a surrender if it has more than a year to run. Wilson v. Lester, 64 Barb. 431. See contra, Vandekar v. Reeves, 40 Hun, 430.

The Revised Statutes provided that, if a lease be surrendered to be renewed, and a new lease be made by the chief landlord, such new lease shall be valid without surrender of the under leases derived out of the surrendered lease; and the chief landlord, the lessee, and the holders of the under leases, shall have the same rights as if the original lease were continued; and the chief landlord shall have the same remedies for rent, etc., as under the original lease, and to the extent of the rents and duties therein reserved.

1 R. L. 442; 1 R. S. 744; Laws of 1846, Chap. 274.

This provision, re-enacted in a much altered form, but without change in

substance, is now embodied in the Real Property Law, § 196.

Accepting a new valid lease, operates in law as a surrender of the old. Livingston v. Potts, 16 Johns. 28; Van Rensselaer v. Penniman, 6 Wend. 569; Schieffelin v. Carpenter, 15 id. 400; Abell v. Williams, 3 Daly, 17. Such intention is presumed from the acts of the parties, but such intention cannot be presumed, if evidently against the intent of the parties, and the rules of common sense. Van Rensselaer v. Penniman, 6 Wend. 569, supra; Coe v. Hobby, 72 N. Y. 141.

The unexpired term of a year in a lease for three years may be surrendered by parol. Smith v. Devlin, 23 N. Y. 363; Kelly v. Noxon, 64 Hun, 281; Hurley v. Sehring, 17 N. Y. Supp. 7. But see Wilson v. Lester, 64 Barb. 431; Smith v. Niver, 2 id. 180; Harrower v. Heath, 19 id. 331. Modification as to rent is not surrender. Coe v. Hobby, 7 Hun, 157, affd., 72 N. Y. 141. Parol agreement of rescission or modification of lease under seal, founded to a new consideration held good. Heavy M. Krupwinder 25 Hun, 116.

on a new consideration, held good. Hogan v. Krumwiede, 25 Hun, 116. See also Tallman v. Earle, 13 N. Y. Supp. 805, and supra, 181.

Reduction of rent to tenant about to move out, held good. Cooper v. Fretnoransky, 16 N. Y. Supp. 866.

Where the landlord entered upon premises abandoned by the tenant, leased them and took the key, held that this discharged payment of subsequent rent. Smith v. Wheeler, 8 Daly, 135; Morgan v. Smith, 70 N. Y. 537.

The mere acceptance of the keys by landlord without consent to the sur-

render is not a surrender and acceptance. Thomas v. Nelson, 69 N. Y. 118; 17 Hun, 319; Spies v. Voss, 9 N. Y. Supp. 532; Haynes v. Aldrich, 133 N. Y. 287; Underhill v. Collins, 132 id. 269.

Surrender to be operative must be to some one qualified to accept it, or to release the tenant. Baylis v. Prentice, 75 N. Y. 604; Ramsay v. Wilkie,

13 N. Y. Supp. 554.

Acceptance of new tenants by landlord operates as an acceptance of a surrender. Fobes v. Lewis, 2 Wkly. Dig. 65.

Where parties entered into an agreement under seal, to arbitrate the question of damages on the surrender of a lease, one clause of the agreement being "the lease shall be surrendered," held, the agreement operated as a surrender and cancellation of the lease and no action was maintainable on same. Harris v. Hiscock, 91 N. Y. 340.

Holding over after expiration of a term constitutes a tenancy from year

to year which may be surrendered at the end of any year. Rohrback v. Crosset, 19 N. Y. Supp. 450; Haynes v. Aldrich, 133 N. Y. 287.

As to surrender for a new lease which proves inoperative. See Chamberlain v. Dunlop, 126 N. Y. 45.

Where there is an express covenant to pay rent, no surrender of the lease is to be inferred from the mere fact of occupancy by an assignee of the lessee and the acceptance of rent from the assignee by the lessor. Wallace v. Dinniny, 11 Misc. 317. See also Requa v. W. P. Co., 11 Misc. 322. Retention of keys sent to him without return by the landlord does not constitute an acceptance of the surrender. Doolittle v. Selkirk, 7 Misc. 722.

Handing over keys to janitor when not a surrender. Johnson v. Doll, 11 Misc. 345.

Where a tenant abandons the premises, the landlord held to owe him no duty to relet them. Clendinning v. Lindner, 9 Misc. 682.

A surrender may also be implied in law. This is commonly called a surrender "by operation of law."

A surrender of an estate for life or years to the owner of the next immediate estate in reversion or remainder is implied by law.

where an estate incompatible with the existing estate is accepted by the lessee — e. g., as where the lessee takes a new lease of the same lands from the reversioner or remainderman; strictly, such new estate must be transferred by writing.

Where a tenant restores possession to the landlord, or where the tenant assents to his leasing to a third person, a surrender will also be implied. In such cases, however, it is considered that no surrender will be implied in law, unless there is an actual change in possession.

Schieffelin v. Carpenter, 15 Wend. 400; Van Rensselaer v. Penniman, 6 Wend. 569; 4 Kent. 103; Nichells v. Atherstane, 10 Ad. & El. N. S. 944; Dodd v. Acklorn, 6 Mann & Gr. 673; Lawrence v. Brown, 5 N. Y. 394; Springstein v. Schemerhorn, 12 Johns. 357; Lewis v. Augermiller, 89 Hun, 65.

Where landlord, having refused surrender, let premises in his own name on the tenant's abandonment, without tenant's consent, held a surrender by operation of law. Gray v. Kaufman D. & I. C. Co., 162 N. Y. 388. Silence,

no consent. Id.

Where rent in a lease was payable at the end of each month, and the tenant, upon the request of the landlord let in a new tenant during the last month, having ceased to occupy himself, held a surrender and acceptance and no rent due for that month. Smith v. Wheeler, 8 Daly, 135.

A new agreement made by a landlord with a third party, with the assent

of the tenant, will also operate in law to discharge the lessee from the covenants of a lease and will be construed as a virtual acceptance of a surrender

offered by the tenant. Murray v. Shave, 2 Duer, 183.

It has been held that a rescission of the lease may be implied by abandonment and other acts in pais, without a written surrender. Hegeman v. McArthur, 1 E. D. Smith, 147; Townsend v. Albers, 3 E. D. Smith, 560; Vandekar v. Reeves, 40 Hun, 430.

An agreement to surrender need not be express, but may be inferred from

An agreement to surrender need not be express, but may be inferred from the acts of the parties. Bedford v. Terhune, 30 N. Y. 453.

An agreement to surrender may be enforced. Bogert v. Dean, 1 Daly, 259. An agreement to accept surrender may be qualified, as that the lease shall be canceled as of a certain date, and rent will be due to such date. Roe v. Conway, 74 N. Y. 201. A surrender by mutual agreement does not bar an action by tenant for damages for breach of covenant to repair. Rewey v. Riley, 17 Weekly Dig. 573.

As to implied surrender by acceptance of rent from another, see Wilson v. Lester, 64 Barb. 431; Gray v. Kaufman D. & I. C. Co., 162 N. Y. 388.

Acceptance or surrender does not discharge from rent already due. Conklin v. White, 17 Abb. N. C. 315.

TITLE XI. MISCELLANEOUS PROVISIONS.

Emblements.— The tenant for years at the end of the term, is not entitled to emblements - i. e., crops, etc., in the ground, provided the lease be for a certain period. It is otherwise where the determining event is uncertain - i. e., if a tenant for life make a lease for years, the lease being determined by his death. So in the case of the determination of a tenancy at will.

Clarke v. Rannie, 6 Lans. 210; Reeder v. Sayre, 70 N. Y. 180; Mahoney v. Parley, 17 Weekly Dig. 277.

As to emblements, vide supra, p. 150.

As to emblements in case of ejectment for nonpayment of rent, see full discussion in Samson v. Rose, 65 N. Y. 411.

Estovers.— A lessee is entitled to reasonable estovers i. e., timber for fuel, fencing, etc. Vide supra, Chap. VI, Tit. II.

7 T. R. 234; Clark v. Cummings, 5 Barb. 339.

But the cutting of trees, except under special circumstances, is an act of waste.

McGregor v. Brown, 10 N. Y. 114.

Attornment.—By the Revised Statutes, the attornment of a tenant to a stranger was made absolutely void, and was not in any wise to affect the possession of his landlord, unless it be made—

- I. With the consent of the landlord; or,
- 2. Pursuant to, or in consequence of, a judgment at law, or the order or decree of a court of equity; or,
 - 3. To a mortgagee after the mortgage had become forfeited.
 - 1 R. S. 744, \S 3. Now Real Prop. Law, \S 194. See decisions supra, Tit. II, p. 190.

Notice to Quit by Tenant.— If a tenant give notice of his intention to quit, and shall not deliver up possession at the time specified, the tenant, his executors or administrators shall thenceforward pay the landlord, his heirs or assigns, double rent while the tenant is in possession.

1 R. L. 440; 1 R. S. 745, § 10; Real Prop. Law, § 199; Herter v. Mullen, 9 App. Div. 593, revd. on facts, 159 N. Y. 28.

Notice to Quit by Landlord.— If any tenant for life or years, or any other person who may have come into the possession of lands, etc., under or by collusion with such tenant, shall willfully hold over any lands, etc., after the termination of the term, and after demand made and one month's notice in writing given, in the manner prescribed, he is liable for double the yearly value of the lands or tenements for so long as he keeps the person out of possession, and also for any special damage incurred; and there shall be no relief in equity against any recovery at law therefor.

1 R. L. 440; Laws of 1820, 179; 1 R. S. 745; Laws of 1846, Chap. 274; Real Prop. Law, § 200.

Holding over tenant remaining in possession after the end of term may, at option of landlord, be held to have renewed. Phillips v. Fogarty, N. Y. Daily Reg., Feb. 22, 1884, citing Schuyler v. Smith, 51 N. Y. 309, and Giles v. Comstock, 4 id. 270; Tuomey v. Dunn, 42 Super. 291, revd., 77 N. Y. 515, on other grounds. See also Long v. Stafford, 103 N. Y. 274; Haynes v. Aldrich, 133 N. Y. 287.

Holding Over after Expiration.—Tenant occupying on lease from May to May, and holding over, can at the election of the landlord be held liable for another year's renewal at same terms and on same conditions. Schuyler v. Smith, 51 N. Y. 309; Ackley v. Westervelt, 86 id. 448; Langbran v. Smith, 75 id. 205; Coudert v. Cohn, 118 id. 309; Haynes v. Aldrich, 133 id. 287; Rohrbach v. Crossett, 19 N. Y. Supp. 450. See also p. 185.

Retention of possession, however, caused by sickness is not a holding over. Herter v. Mullen, 159 N. Y. 28, revg. 9 App. Div. 593.

Rent Pavable after a Life Estate, etc.— As between tenants for life and remaindermen, rent accruing on leases executed by the testator of the parties and becoming due after the termination of the life estate, could not, at common law, be apportioned, but belonged to the remainderman.

Marshal v. Mosely, 21 N. Y. 280.

And so it was between executors of a lessor and remaindermen. A remainderman who succeeded to the reversion was entitled to the whole rent as an entire sum due him, if it was not payable until after the decease of the testator. The heir also took it as against the executors as an incident of the reversion. But, by Laws of 1875, Chap. 542, apportionment might be made in all such cases. This law was repealed by Laws of 1893, Chap. 686, and the mode of apportionment was re-enacted therein in detail. Vide subra. p. 150.

Code Civ. Proc., § 2720; Fay v. Holloran, 35 Barb. 295; Jones v. Felch, 3 Bos. 63.

By the Revised Statutes, if a tenant for life die on or after rent due and payable to him on a demise made by him, his executors, etc., may recover from the under-tenant the whole rent due. If he died before the rent is due, they may recover the proportion of rent which accrued before his death.

1 R. S. 747; Real Prop. Law, § 192. As to apportionment of rent charges and services, see Van Rensselaer v. Bradley, 3 Denio, 135; 1 Bos. 88; Van Rensselaer v. Chadwick, 22 N. Y. 32, and supra, p. 145.

Rights of grantors, assignees, heirs and executors of lessors or grantors to recover rent, etc., also rights of lessees and their representatives, vide supra, Chap. V, Tit. IV.

Deeds of Lease and Release.—The Revised Statutes provide that deeds of lease and release may continue to be used, and shall be deemed grants; and as such shall be subject to all the provisions in the chapter (Chap. I, Part II) concerning grants.

1 R. S. 739, § 142; Real Prop. Law, § 211. As to this form of conveyance for the transfer of fees, vide infra, Chap. XX.

Fixtures.— As to what fixtures and structures by tenants are considered as attached to and part of the realty so as to be incapable of removal by the tenant after the expiration of the term, vide supra, p. 116.

The law on this subject belongs more appropriately to works on the relation of landlord and tenant than to a review of this nature. The cases are full of refinements on this subject, and the law undergoes frequent change. The general principle is that nothing of a personal nature is considered a part of the realty, unless it be in some way permanently, or at least habitually, attached to the land or some building on it. It need not be constantly fastened; nor need it be so fixed that detaching will disturb the earth, or rend any part of the building.

It is also, however, a general principle of modern adoption that constructions, though firmly affixed by a tenant to buildings, if so fixed for the purpose of carrying on a business of a nature personal to the tenant, are personal property, and may be removed by him.

Vanderpoel v. Van Allen, 10 Barb. 157; Goddard v. Gould, 14 id. 662; Laflin v. Griffiths, 35 id. 58; Murdock v. Gifford, 18 N. Y. 28; Ford v. Cobb, 20 id. 344; Swift v. Thompson, 9 Conn. 63; Gale v. Ward, 14 Miss. 352; Voorhies v. McGinnis, 48 N. Y. 278; Cook v. The Champlain Transp. Co., 1 Den. 92; McKeage v. Han. Fire Ins. Co., 81 N. Y. 38; Davidson v. Westch. G. L. Co., 99 id. 558; Andrews v. Day Button Co., 132 id. 348; Wiggins Ferry Co. v. O. & M. R. Co., 142 U. S. 396; Howe's Cave Assn. v. Houck 66 Hun. 205 Houck, 66 Hun, 205.

Houck, 66 Hun, 205.

See as to assets for administration, 2 R S. 82, § 6, repealed by L. 1893, Chap. 686, which re-enacted the same provisions substantially. See now Code Civ. Proc., § 2712. Also Chap. XVII, infra.

A tenant under a ground case has no right to remove a dwelling house erected by him on the land in the absence of express provision in lease giving him the right. Precht v. Howard, 187 N. Y. 136.

New erections though authorized by lessor when not covered by covenants in lease. Burke v. Tindale, 12 Misc. 31; Howe's Cave Assn. v. Houck, 66

In case a bay window erected with lessor's consent, its removal by the city is not an eviction justifying an abandonment, though the lease contained a covenant for quiet enjoyment. Burke v. Tindale, 12 Misc. 31.

It is also, however, a general rule that whatever is annexed or affixed to the freehold, by being let into the soil or annexed to it, or to some erection upon it, to be habitually used there; particularly if for the purpose of enjoying the realty, or some profit therefrom, is a part of the freehold and cannot be removed.

Buckley v. Buckley, 11 Barb. 43, and cases cited. But not fixtures for trade, etc., not essential for support. 2 R. S. 82, § 6; see also L. 1893, Chap. 686; Code Civ. Proc., § 2712, subd. 4.

Taxation .- People v. Barker, 153 N. Y. 98.

Wine Plants are not fixtures. 46 Barb. 278. Nor is nursery stock. Duffus v. Bangs, 43 Hun, 52, affd., 122 N. Y. 423.

Crops.—Colville v. Miles, 127 N. Y. 159; Gregg v Boyd, 69 Hun, 588. Fixtures as between assignee of lessor and the lessee. Thorn v. Sutherland,

123 N. Y. 236; Talbot v. Cruger, 81 Hun, 504, affd., 151 N. Y. 117.

As between new lessee taking bill of sale from old lessee on expiration of term of latter. Talbot v. Cruger, 81 Hun, 504, affd., 151 N. Y. 117. See as to fixtures in general. McRae v. Cent. Nat. Bk., 66 N. Y. 489; Finkelmeier v. Bates, 92 id. 172; Hart v. Sheldon, 34 Hun, 38; Andrews v. Day Button Co., 132 N. Y. 348; Loeser v. Liebmann, 137 id. 163; Stephens v. Ely, 162 id. 79.

Waiver .- Tenant having right to remove fixtures waives same by accepting a new lease without such right being specified.

Talbot v. Cruger, 81 Hun, 504, affd., 151 N. Y. 117.

Tenants Sued in Ejectment .- A tenant sued in ejectment, or for the recovery of the land occupied by him, or the possession thereof, shall forthwith give notice thereof to his landlord, under the penalty of forfeiting the value of three years' rent of such property, to the landlord or other person of whom he holds.

1 R. L. 444; 1 R. S. 748; Real Prop. Law, § 195.

Use and Occupation.—By the Revised Statutes, a landlord may recover a reasonable satisfaction for use and occupation by any person, under any agreement, not made by deed. If any parol demise or agreement not made by deed, by which a certain rent is reserved, appears in evidence, the plaintiff may use it as evidence of the amount of the damages.

1 R. S. 748; Real Prop. Law, § 190.

This action for use and occupation lies only where the relation of landlord and tenant exists. It is founded on contract, express or implied; and an action therefor cannot be sustained if that relation has ceased during the time sued for.

time sued for.

Bancroft v. Wardwell, 13 Johns. 489; Jennings v. Alexander, 1 Hilt. 154; Osgood v. Dewey, 13 Johns. 240; Cleves v. Willoughby, 7 Hill, 83; Featherstonhaugh v. Bradshaw, 1 Wend. 134.

Will not lie where neither party expected rent to be paid. Collyer v. Collyer, 113 N. Y. 442.

The lessee may be sued for the use and occupation of his under-tenant. Moffat v. Smith, 4 N. Y. 126; Bedford v. Terhune, 30 N. Y. 453; Giersted v. O. & A. R. Co., 69 id. 343.

It was hold at first that a landlord could only recover in an action for

v. O. & A. R. R. Co., 69 1d. 343.

It was held, at first, that a landlord could only recover in an action for use and occupation, for the time the tenant had actually entered into possession and occupied the premises, either by himself or by his sub-tenant or agent. Croswell v. Crane, 7 Barb. 191; Seaman v. Ward, 1 Hilt. 52.

It is held, however, in the case of Hoffman v. Delahanty, 13 Abb. 388, that the action would lie where the lands were held by the defendant without

that the action would be where the lands were held by the defendant without being actually occupied, even since the Revised Statutes.

The cases of Wood v. Wilcox, 1 Den. 37, and Beach v. Gray, 2 id. 84, were overruled in that particular. The above case of Hoffman v. Delahanty was sustained in Hall v. The Western Transportation Co., 34 N. Y.

284, where it is held that if the power to use and occupy is given by the landlord to the tenant, so far as the landlord is concerned he has performed on his part, and the action is maintainable. App'd, Lynk v. Weaver, 128 N. Y. 171.

The action for use and occupation lies where the holding is under an implied, as well as where it is under an express permission, and the tenant who goes in under an implied license is not to be permitted to dispute the title. Pierce v. Pierce, 25 Barb. 243.

As to the evidence of value in the action, see Williams v. Sherman, 7

Wend. 109.

The action will not lie against a vendee who took possession, but did not complete the purchase. Smith v. Stewart, 6 Johns, 46: Bancroft v. Wardwell. 13 Ĵohns. 489.

It lies against a lessee holding over. Abeel v. Radcliffe, 13 Johns. 297. See also Vernam v. Smith, 15 N. Y. 328.

It seems that it lies against one who entered under a void lease and occupied. Thomas v. Nelson, 69 N. Y. 118.

Waste.— Tenants for years are liable for waste.

Vide supra, p. 151; and McGregor v. Brown, 10 N. Y. 114; McCoy v. Wait, 51 Barb. 225; United States v. Bostwick, 4 Otto, 53.

A condition in a lease giving a right of re-entry in case of waste, is not a limitation of the estate, but a condition which makes the estate a conditional one, which could only be determined by a trial and adjudication, or by the legal surrender of all the rights of all the parties in interest. Allen v. Brown, 60 Barb. 40.

An alteration of a building leased is not necessarily waste. Aberle v.

Fajen, 42 Super. 217.
In absence of express covenant not to do so, a tenant may paint signs on the wall of the building leased by him. Baldwin v. Morgan, 43 Hun, 355.

The Words "Real Estate" and "Conveyance" as applied to "Leases."—The Revised Statutes provide that the term "real estate," as used in the chapter relative to the proof and recording of deeds shall be construed as coextensive in meaning with "lands, tenements, and hereditaments," and as embracing all chattels real, except leases for a term not exceeding three years. The word "conveyance" is to include such leases.

1 R. S. 763; Real Prop. Law, § 240; 35 Barb. 334.

By the Revised Statutes the provisions of the chapter were not to extend to leases for life or lives, or for years, in the counties of Albany, Ulster, Sullivan, Herkimer, Dutchess, Columbia, Delaware and Schenectady. But § 240 of the Real Property Law applies only to leases theretofore made of lands in those counties.

Remainders on Terms of Years.—Vide infra, Chap. IX.

Tenants who have Paid Taxes.—Where taxes have been collected against occupants or tenants, where others are liable therefor, they may recover the same, or deduct the same from rent due or accruing.

1 R. S. 419; Tax Law, G. L., Chap. XXIV, L. 1896, Chap. 908, § 78.

Assessments.—Tenants for a less term than twenty-five years may also deduct from their rent assessments for work on the highway, at a certain amount per day, unless otherwise agreed.

Laws of 1826, Chap. 228; I R. S. 509, §§ 30, 31, as amended, L. 1864,
Chap. 395. See L. 1849, Chap. 250; 1837, Chap. 431; 1882, Chap. 107.
See for this provision now, the Highway Law, G. L., Chap. XIX, L. 1890, Chap. 568, § 39.

Formerly the rate was \$.625 per day in most counties, but one dollar in others. The rate is now uniform under the above section of the Highway Law.

Taxes.— As to assessment of leases against persons entitled to rents in leases for over twenty-one years.

Law of May 13, 1846, Chap. 327; as amended, Law of April 19, 1858, Chap. 357; the Tax Law, G. L., Chap. XXIV, L. 1896, Chap. 908, § 8. Such rents are taxable, though less than twenty-one years of the original term remains unexpired at the time of the assessment. City of Buffalo v. Le Couteulx, 15 N. Y. 451.

This provision of the Tax Law (L. 1896, Chap. 908, § 8) held authorized

as a valid exercise of the legislative power, even if double taxation, which however it is not. Woodruff v. Oswego Starch Factory, 177 N. Y. 23.

Action on Leases for Life.—By the Revised Statutes any person having rent due on a lease for life or lives may have the same remedy to recover such arrears by action of debt as if such lease were for years.

1 R. S. 438; 1 R. S. 747, §§ 19-21; Real Prop. Law, § 191. This also applies to rents dependent on the life of another. Id.

Executors and Administrators.— They may have the same remedies for rent due their testator that he might have had if living.

1 R. S. 747, §§ 21, 23; L. 1846, Chap. 274; Real Prop. Law, § 193.

Oil Leases Construed.— Eaton v. Wilcox, 42 Hun, 61.

See Wagner v. Mallory, 169 N. Y. 501. Right to produce oil is personal property. Id.

Computation of Time.— Time is to be computed according to the Gregorian or new style; the 1st of January to be reckoned the first day of the year since 1752.

Whenever the term "years" is used in any statute, deed, contract, or public or private instrument, it shall be deemed to consist of 365 days; a half-year, of six months; and a quarter of a year, of three months; and the added day of a leap year, and the day immediately preceding, shall be reckoned as one day. The word "month" is to be taken, when used as above, as a calendar and not a lunar month.

1 R. S. 605, 606; Statutory Construction Law, G. L., Chap. I, L. 1892, Chap. 677, §§ 25, 26, 27; L. 1894, Chap. 447, amending statutory law as to computation of time; giving detail of months and days; and how cal-

Yearly rent, payable from and after May 1, is not due until May 2, of the following year. Mack v. Burt, 5 Hun, 28.

Champerty.— Leases in violation of the spirit as well as the letter of the statutes against champerty are void.

The People v. The Mayor, 19 How. Pr. 289.

Leases of State Salt Lands.— See Law of April 15, 1859, Chap. 346, §§ 23, 44; Salt Springs Law, General Laws, Chap. XIII, L. 1892, Chap. 684, amd. by L. 1897, Chap. 261, and L. 1898, Chap. 27.

Leases by Executors.— When an order has been made by the surrogate for the mortgage, lease, or sale of a decedent's estate, if the executor, administrator, etc., is disqualified or removed, etc., the order may be carried out by the successor of the person who has died, been removed or become disqualified.

Law of April 6, 1850, Chap. 162; repealed, L. 1880, Chap. 245; Code Civ. Proc., § 2770. This section was in turn repealed by L. 1904, Chap. 750, which however amended § 2760 of the Code of Civil Procedure, which continues the authority in the hands of the successor of an executor or administrator. See Code Civ. Proc., § 2760.

Railroads Held Under Lease .- See Law of April 3, 1867, Chap. 254; and Law of May 11, 1869, Chap. 844.

See the Railroad Law, G. L., Chap. XXXIX, L. 1890, Chap. 565, as amended. See Chap. II, supra.

Leases on Land Taken for Streets in New York City.- By Law of April 9, 1813 (2 R. L. 417, § 181), where land is taken in New York city for streets held under lease, all parties are discharged therefrom. Where part only of the lands is taken, the lease continues as to the remainder, and a proportionate part of the rent is payable therefor.

The above provisions in favor of the tenant may be waived by him. Phyfe v. Connor, 45 N. Y. 102.

Vide Consolidation Act, 1882, Chap. 410, § 1021, and amendments; Greater New York Charter, L. 1897, Chap. 378, as amended by L. 1901, Chap. 466, § 996.

Assets for Administration.— Leases for years and lands held from year to year, are assets for administration.

1 R. L. 365; 2 R. S. 82; Code Civ. Proc., § 2712, subd. 1.

Judgments as liens on Estates for Years.—Vide infra. Chap. XXXVII.

Bawdy-Houses .- If lessees are convicted of a misdemeanor in keeping a bawdy-house on the demised premises, the lease or agreement shall be void, and the landlord may have the same remedies as against a tenant holding over.

2 R. S. 702, § 29; L. 1873, Chap. 583. Gilhooley v. Washington, 4 N. Y. 217; s. c., 3 Sandf. 332; 3 Parker's Crim. R. 544.

Illegal Use of Premises.-A lease valid on its face is not to be condemned as unlawful and therefore an unenforceable instrument because the purposes as unlawful and therefore an unenforceasile instrument because the purposes for which the premises are to be used might under certain circumstances be within the prohibition of the statute; and the proof must be conclusive. Shedlinsky v. Budweiser Brewing Co., 163 N. Y. 437.

By Law of 1868, Chap. 764 (repealed, L. 1880, Chap. 245), and now by Code Civ. Proc., § 2237, persons keeping such houses may be removed on application by the landlord or others in the neighborhood.

Opium joints .- See Penal Code, § 388.

Possession by Tenant.—The possession by a tenant shall be deemed the possession of the landlord until the expiration of twenty years from the determination of the tenancy, or where there has been no written lease until the expiration of twenty years from the time of the last payment of rent, notwithstanding that such tenant may have acquired another title, or may have claimed to hold adversely to his landlord. But such presumption shall not be made after the said periods.

2 R. S. 294; Code of Proc., § 86; Code Civ. Proc., § 373; Tyler v. Heidorn, 46 Barb. 439.

Redemption of Leases after Sales on Execution.— Vide infra, Chap. XXXVIII, "Sales on Execution," and Law of May 16, 1837, Chap. 462, repealed by L. 1877, Chap. 417. Provision for redemption is now made by the Code of Civil Procedure, which makes leasehold property, when five years of the term of the lease remain unexpired, real property as to executions.

Co. Civ. Proc., §§ 1430, 1446 et seq.

Rents Payable by Estate of a Decedent.—The Revised Statutes provide that a surrogate may give a preference to rents due or accruing upon leases held by a testator or intestate, over debts of the fourth class, in the payment of debts if it appear to be of benefit to the estate.

2 R. S. 87, § 30; L. 1893, Chap. 686; Code Civ. Proc., § 2719.

Distress for Rent.— Was abolished by Law of 1846, Chap. 274. Vide supra, p. 144.

St. Regis Indians, Leases by.—Law of 1841, Chap. 143. See Chap. III, Tit. II.

Summary Proceedings to Recover Possession of Lands. — As to these and the rights of lessees for over five years to redeem, vide infra, Chap. XLI.

Forcible Entry and Detainer.—Vide infra, Chap. XLI.

Leases by Special Partners.— L. 1872, Chap. 114.— They may lease to general partners.

Surplus Moneys.— As to interest of lessees in surplus moneys, after foreclosure against the lessor, see Clarkson v. Skidmore, 46 N. Y. 297.

Dock Department Leases.— L. 1889, Chap. 521, amending L. 1882, Chap. 410, § 716.

Charter of the City of New York, L. 1897, Chap. 378, amd. L. 1901, Chap. 466, §§ 818, 825.

Leases of Railroads.— See L. 1890, Chap. 565, Art. III. Matter of N. Y. C. R. R. Co., 49 N. Y. 414, and *supra*, p. 221.

Sub-Leases by Corporations held Void.— Met. Conc. Co. v. Abbey, 52 Super. 97.

CHAPTER IX.

EXPECTANT ESTATES.

TITLE I .- ESTATES IN REMAINDER.

II .- RULE IN SHELLEY'S CASE.

III .- EXECUTORY DEVISES.

IV .- SUSPENSION OF THE POWER OF ALIENATION.

V .- DIRECTION FOR ACCUMULATION.

VI .- GENERAL PROVISIONS AS TO FUTURE ESTATES.

VII .- ESTATES IN REVERSION.

By the Revised Statutes, estates in expectancy are defined to be those where the right of possession is postponed to a future period, and are divided into

- 1. Estates commencing at a future day, which are denominated, Future Estates; and
 - 2. Reversions.

1 R. S. 723, § 9; 1 R. S. 726, § 42.
See now Real Property Law, § 26; N. Y. S. & T. Co. v. Schoenberg, 87 App. Div. 262, 266.

A Future Estate is one limited to commence in possession on a future day, either without the intervention of a precedent estate, or on the determination by lapse of time, or otherwise, of a precedent estate created at the same time.

See Hennessy v. Patterson, 85 N. Y. 91, for explanation of doctrine of remainder, both vested and contingent under the Revised Statutes and at common law.

TITLE I. ESTATES IN REMAINDER.

An estate in remainder is a future estate, depending upon a particular prior estate created at the same time, and limited to take effect and be enjoyed after that prior or precedent estate is determined—the two together constituting only one entire estate in fee.

Definition Under Revised Statutes.— In the Revised Statutes of 1830, a future estate is defined to be an estate limited to commence in possession, at a future day, either without the intervention of a precedent estate, or on the determination, by lapse of time or otherwise, of a precedent estate created at the same time.

1 R. S. 723, § 10; see Real Prop. Law, § 27.

Where it is uncertain whether the person holding the antecedent estate is still alive, provision is made by statute to ascertain the fact, and to establish the presumption of decease. A person being absent for seven years together, is presumed dead in any action concerning lands, unless there is proof to the contrary. Code Civ. Proc., § 841; 1 R. S. 749, § 6, based on Law of February 6, 1788; 2 Greenl. 20 (vide supra, p. 149).

The Revised Statutes also declare that where a future estate is dependent on a precedent estate, it is a remainder, and may be created and transferred by that name.

1 R. S. 723, § 11; Real Prop. Law, § 28.

The law of remainders, under the common law, is intricate and voluminous. It is now much simplified by the statutes of this State.

See Real Prop. Law, L. 1896, Chap. 547, Art. II.

Some of the most important common law rules, however, as well as the statutory enactments modifying them, it may be well to refer to, particularly as the statutory provisions of 1830 would not affect rights vested before they took effect.

Remainders on a Fee.—By the common law no remainder could be limited after the grant of an estate in *fee* simple (although this might be done as a future use or executory devise).

The Revised Statutes, however, declare that two or more future estates may be created to take effect in the *alternative*, so that if the first in order shall fail to vest, the next in succession shall be substituted for it, and take effect accordingly.

1 R. S. 724, § 25; Real Prop. Law, § 41.

They also altered the common law, so as to allow a contingent remainder in fee to be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited, shall die under the age of twenty-one years, or upon any other contingency by which the estate of such persons may be determined, before they attain their full age.

1 R. S. 723, § 16; Real Prop. Law, § 32. Temple v. Hawley, 1 Sandf. Ch. 154; Van Horne v. Campbell, 100 N. Y. 287.

They also allow a fee to be limited on a fee, on a contingency to happen within the prescribed period.

1 R. S. 724, § 24; Real Prop. Law, § 40. Vide infra, Title IV.

The Precedent Estate.—By the common law there must always be a precedent or particular estate supporting the remainder, which precedent estate had to be created by livery of seizin, even if a chattel interest for a term of years, because no freehold estate could pass without immediate livery of seizin. The livery to the tenant of the particular estate enured to the benefit of the remainderman, the two estates being considered one in law. If the particular estate was void in its creation, or was afterward defeated, the remainder was defeated also, if it rested upon the same title as the particular estate; and, by the common law, the remainder had to vest during the continuance of the particular estate, or eo instanti it determined. The rule was somewhat relaxed in "Wills" and "Conveyances to Uses."

Inasmuch as if there was any interval between the remainder and the particular estate the remainder became void, on the principle that a free-hold could not be made to commence in futuro, the particular estate was often vested in trustees, to prevent the defeat of the remainder by the ces-

sation of the particular estate.

Remainders were thus upheld by way of use; the inheritance or use, until the contingency arose, resulting to the grantor or his heirs, or springing or shifting as provided. Remainders created by wills were also upheld as executory devises, when they would as remainders be void. See Tit. III., infra.

As to limitations in trust to preserve contingent remainders when such trusts were legal in this State, see Vanderheyden v. Crandall, 2 Den. 9; s. c., under name of Wendell v. Crandall, 1 N. Y. 491; Van Rensselaer v.

Poucher, 5 Den. 35.

As will be seen hereafter (infra, Chap. X), all uses and trusts are by the Revised Statutes abolished in this State, except as specially provided, and are now turned into legal estates; and, under the laws applicable to expectant estates, as herein set forth, there is no necessity for such legal machinery as above to preserve remainders. See also Real Prop. Law, Art. III.

The old conveyances to uses would not now be effective under our statutes, but the use would vest in the beneficiary as a legal estate. Vide infra,

Chap. X.

The Revised Statutes provide that no expectant estate can be defeated or barred by any alienation or other act of the owner of the intermediate or *precedent* estate, nor by any destruction of such precedent estate, by disseizin, forfeiture, surrender, merger, or otherwise. The above provision is stated not to be construed to prevent an expectant estate from being defeated in any manner or by any means provided by the party creating the estate, nor shall any expectant estate, thus liable to be defeated, be on that ground adjudged void in its creation.

Vol. I, 725, §§ 32, 33; Real Prop. Law, § 47.

The statute also prescribes that no remainder valid in its creation, shall be defeated by the determination of the precedent estate, before the happening of the contingency; but the remainder shall take effect on the happening of the contingency.

1 R. S. 725, § 34; Real Prop. Law, § 48.

Two or more future estates may be created to take effect in the alternative, so that if the first in order shall fail to vest, the next in succession shall be substituted for it, and take effect accordingly.

1 R. S. 724, § 25; Real Prop. Law, § 41. Higgins v. Downs, 101 App. Div. 119.

Commencement of the Estate.—The Revised Statutes provide that the delivery of the grant where an expectant estate is created by grant, and, where it is created by devise, the death of the testator, shall be deemed the time of the creation of the estate.

1 R. S. 726, § 41.

Future estates are either vested or contingent.

Vested Remainders, or remainders executed, are those where there is a present fixed right of future enjoyment; when the interest is fixed, though it is uncertain whether it will ever take effect in possession. It is not the uncertainty of *enjoyment* in future, but the uncertainty of the *right* to that enjoyment which makes the difference between a vested and contingent interest.

Hawley v. James, 5 Paige, 318; 16 Wend. 61. Vested Remainders, as to what are, see Stokes v. Weston, 142 N. Y. 433; Campbell v. Stokes, Id. 23; Dimmick v. Patterson, Id. 322; Miller v. Gilbert, 3 Misc. 43; Barlow v. Jaquelin, 67 Hun, 311; Nelson v. Russell, 135 N. Y. 137; Van Axte v. Fisher, 117 id. 401; Lougheed v. Dykeman's Bap. Ch. 129 id. 211; Camp v. Cronkright, 59 Hun, 488; s. c., 13 N. Y. Supp. 307.

The Revised Statutes define them as "When there is a person in being, who would have an immediate right to the possession of the lands upon the ceasing of the intermediate or precedent estate." Under this definition, if there is a person in being who would be entitled to take if the precedent estate should presently determine, his interest is a vested future estate, notwithstanding that it may be liable to be defeated by his decease before the precedent estate actually determines.

1 R. S. 723, § 13; see now Real Prop. Law, § 30. Croxall v. Shererd, 5 Wall. 268; Sheridan v. House, 4 Abb. App. Cas. 218; Herriot v. Prime, 155 N. Y. 5; Kernochan v. Marshall, 165 N. Y. 472; Dougherty v. Thompson, 167 N. Y. 472.

Where a devise is to minors, for example, but that they should not take *until* they severally arrived at full age, the estate vests in interest on testator's death, although possession is postponed.

Post v. Hayes, 30 Barb. 312; Young v. Langbein, 7 Hun, 151. Compare McGill v. McMillan, 23 Hun, 193; Townshend v. Frommer, 125 N. Y. 446.

No remainder will be construed to be contingent, which may be held vested.

Moore v. Lyons, 25 Wend. 119; Croxall v. Shererd, 5 Wall. 268; Williamson v. Fields, 5 Sandf. Ch. 533; McKinstay v. Sanders, 2 Supm. 181, Affd., 58 N. Y. 662. But see Townshend v. Frommer, 125 N. Y. 446, and Hobson v. Hale, 95 id. 588, 612.

The distinction is often nice and difficult to draw, but is important, as it may affect the right of survivorship and inheritance, as well as the right of conveyance, before the provision of the Revised Statutes allowing the transfer of expectant estates, whether vested or contingent.

Where an estate is limited to a man for life, remainder to his children, the children living at the death of the testator take vested remainders, subject to open and let in subsequent born children for their vested proportions.

Miller v. Macomb, 26 Wend. 229, affg. 9 Paige, 265; Baker v. Lorillard, 4 N. Y. 257; Vanderheyden v. Crandall, 2 Den. 9, affd., 1 N. Y. 491; Harman v. Osborne, 4 Paige, 336; Moore v. Littel, 41 N. Y. 66; Doe v. Provost, 4

Johns. 61. But compare Hennessy v. Patterson, 85 N. Y. 91, 99. See, generally, Livingston v. Green, 6 Lans. 50, affd., 52 N. Y. 118; Manice v. Manice, 43 id. 303, 368; Matter of Brown, 29 Hun, 412, affd., 93 id. 295; Lockman v. Reilley, 29 Hun, 434; revd. on other grounds in 95 N. Y. 64; Howell v. Mills, 56 N. Y. 226; McGill v. McMillan, 23 Hun, 193; Embury v. Sheldon, 68 N. Y. 228; Smith v. Scholtz, 68 id. 42; Stowell v. Graves, 2 Supm. 211; Hopkins v. Hopkins, 3 id. 526; Lane v. Brown, 20 Hun, 382; Sheridan v. House, 4 Abb. App. Cas. 218; Chinn v. Keith, 4 Supm. 126.

Person having a vested remainder in a future estate has a right to income accruing between death of life-tenant and vesting in possession, if not otherwise disposed of; it passing "to the person presumptively entitled to the next eventual estate." Embury v. Sheldon, 68 N. Y. 227.

The existence of a trust does not prevent the gift to a remainderman from vesting. Lyons v. Mahan, 1 Dem. 180, affd., 98 N. Y. 372 (citing Stevenson v. Lesley, 70 N. Y. 512; Robert v. Corning, 89 id. 225).

Postponement of enjoyment will not prevent vesting. Matter of Hulse,

35 Hun, 331.

But where a remainder is limited to issue of the life-tenant who survive him, it will not vest. Byrnes v. Labagh, 38 Hun, 523, modified 103 N. Y.

Will devising to wife for life and on her death to children of testator, and to issue of deceased children the share the parent would have taken, held to mean a vested estate to children liable to be divested by death during life of mother. Camp v. Cronkright, 13 N. Y. Supp. 307, s. c., 59 Hun, 488.

Remaindermen as Parties to Real Actions.— The estate of parties to be divided among such of whom as shall survive a cestui que trust is contingent, not vested, and they are not necessary parties to an action of foreclosure. Townshend v. Frommer, 125 N. Y. 446; New York S. & T. Co. v. Schoenberg, 87 App. Div. 262.

In other actions, however, than simple foreclosures contingent remainder-

men are necessary parties. Id.
See also, as to this, "Partition" and "Foreclosure." Chaps. XXX and

XXVIII, infra.

As to the duty of the court to protect unborn children, in an action which might otherwise extinguish their interest. See Kent v. Church of St. Michael, 136 N. Y. 10, and cases cited.

Contingent or Executory Remainders.—These are where the estate in remainder is limited to take effect, either to a dubious or uncertain person, or upon a dubious and uncertain event, so that the particular estate may chance to be determined, and the remainder never take effect. The Revised Statutes define a remainder as contingent, while the person to whom, or the event upon which, it is limited to take effect, remains uncertain.

1 R. S. 723, § 13; see now Real Prop. Law, § 30.

30 Eng. Law & Eq. 435; Crofts v. Middleton, 35 id. 466; 34 id. 207; Williamson v. Field, 5 Sand. Ch. 533; Wolfe v. Van Nostrand, 2 N. Y. 436; Grout v. Townsend, 2 Den. 336; Nellis v. Nellis, 99 N. Y. 505.

Where there is a devise to one person in fee and in case of his death to another, the contingency referred to is the death of the first named devisee during the lifetime of the testator, and if such first named devisee survives the testator he takes an absolute fee. Newcomb v. Lush, 84 Hun, 254.

The Contingency.—A general rule of the common law as to contingent remainders, was that the remainder must be limited to some one that might by common probability be in esse at the time or before the particular estate determined. It had to be a common or near possibility, as death, or death without issue, or coverture, If founded on a remote possibility it was void.

In a devise a limitation over to the heirs of B. would pass a fee, although B. were living; otherwise if the devise were of a present estate. Campbell v. Rawdon, 19 N. Y. 412, revg. 19 Barb. 494.

A possibility upon a possibility held void on a devise to the son of an unborn child, made before the Revised Statutes. Jackson v. Brown, 13

After giving the income of a fund to a nephew for life, testatrix bequeathed it absolutely to the daughter of said nephew, should she survive him. Should she die without issue during his lifetime, the fund was given to other legatees. The daughter, a minor having no issue, survived her father. Held, that not having died without issue during the lifetime of her father, she took the fund absolutely. Caswell v. Slater, 3 Misc. 168.

The Revised Statutes provide that no future estate otherwise valid, shall be void on the ground of the probability or improbability of the contingency on which it is limited to take effect.

1 R. S. 724, § 26; see Real Prop. Law, § 42; Purdy v. Hayt, 92 N. Y. 446, 456; Kelley v. Hogan, 71 App. Div. 343, 349.

Conditional Limitations.— As above seen, by the rules of the common law, a remainder had to be limited so as to await the natural determination of the particular estate, and not to take effect in possession upon an event which prematurely determined it; as in case of a forfeited condition, which would determine the precedent estate before its natural limitation.

If limitations on such estates, however, were made in conveyances to uses and in wills, they were good as conditional limitations, or future or shifting uses, or executory devises; and upon breach of the condition, the first estate *ipso facto* determined, without entry, and the limitation over commenced in possession. By the Revised Statutes a remainder may be limited on a contingency which, in case it should happen, would operate to abridge or determine the precedent estate, and every such remainder shall be construed a *conditional limitation*, and shall have the same effect as such limitation would have by law.

1 R. S. 725, § 27; see Real Prop. Law, § 43; Fowler's Real Prop. Law (2d ed.), 294-297.

Where there is a devise with limitation over in case devisee dies without having disposed of the property by deed or will, held that the limitation was void for repugnancy. Kelley v. Hogan, 71 App. Div. 343.

By the Revised Statutes, also, when a remainder on an estate for life or years shall not be limited on a contingency defeating or avoiding such precedent estate, it shall be construed as intended to take effect only on the death of the first taker, or the expiration by lapse of time of such term of years.

l R. S. 725, § 29; see Real Prop. Law, § 44; 4 Kent 224; Embury v. Sheldon, 68 N. Y. 227.

Devise to one in fee, and in case of his death to another, means death before testator unless a different intent, is indicated. Benson v. Corbin, 78 Hun, 202. See, also, Newcomb v. Lush, 84 Hun, 254; Stokes v. Weston, 142 N. Y. 433.

Transfer of Remainders.— All contingent and executory interests were assignable in equity. And all contingent estates of inheritance, as well as springing and executory uses and possibilities, coupled with an interest where the person to take was certain, were transmissible by descent, and were devisable and assignable. If the persons were not ascertained, they were not then possibilities coupled with interest, and they could not either be devised or descend, at common law.

A mere contingency or possibility not vested, where the grantor had no right at the time but a mere possibility, could not, prior to the Revised Statutes of 1830, it was held, be transferred, and would not pass a title subsequently acquired, except where there was a warranty in the conveyance which operated by way of estoppel.

This was considered the settled law of this State prior to the Revised Statutes, as decided in the following well-known cases: Jackson v. Wright, 14 Johns. 193; Jackson v. Winslow, 9 Cow. 1; Pelletran v. Jackson, 11 Wend. 110; Jackson v. Waldron, 13 id. 178; Edwards v. Varick, 5

Den. 664. Not fully followed in the more recent case, however, of Lintner Den. 664. Not fully followed in the more recent case, however, of Lintner v. Snyder, 15 Barb. 621. It was there held that a present right, though not to vest in possession until a future event, might be released to one in possession; and in Miller v. Emans, 19 N. Y. 385, it was held that a future contingent interest could pass by release, and the old cases were overruled so far as conflicting in that particular. See, also, Moore v. Littel, 41 N. Y. 66; Pond v. Bergh, 10 Paige, 140, and Wilson v. Wilson, 32 Barb. 328, which holds that such an interest could be mortgaged.

As to when life-tenant and remainderman cannot unite to convey, see

Kilpatrick v. Barron, 54 Hun, 322, affd., 125 N. Y. 751.

By the Revised Statutes all estates in expectancy are descendible, devisable, and alienable, in the same manner as estates in possession.

1 R. S. 725, § 35; see Real Prop. Law, § 49.
Kenyon v. See, 94 N. Y. 563; Griffin v. Shepard, 40 Hun, 355, affd.,
124 N. Y. 70; Pickert v. Windicker, 73 Hun, 476.
Even since the Revised Statutes, however, it has been held that contingent remainders could not be sold under execution. Jackson v. Middleton, 52 Barb. 9; Nichols v. Levy, 5 Wall. 433; Nicoll v. N. Y. & E. R. R. Co., 12 N. Y. 121 at 133; Lawrence v. Bayard, 7 Paige, 76; 45 B. 469. The joint deed of life-tenant and remainderman will not convey whole estate if latter's estate depends on his living longer than some third person. Norton v. Duffy, 15 Week. Dig. 529.

event, may be sold on execution. Sheridan v. House, 4 Abb. App. Cas. 218. A court of equity will uphold an assignment of a bare possibility made for value, e. g., the right of an heir apparent. Stoker v. Eyclesheimer, 4 Abb. App. Cas. 309.

As to descendibility of contingent remainder, see Hennessy v. Patterson, 85 N. Y. 91.

Whatever one owns he may sell, even if the date of full possession and enjoyment is not due. Lewisohn v. Henry, 179 N. Y. 352, 361.

Owners of such estates must be made parties. N. Y. S. & T. Co. v.

Schoenberg, 87 App. Div. 262.

A judgment lien attaches to an alternative future estate. Higgins v. Downs, 101 App. Div. 119.

TITLE II. THE RULE IN SHELLEY'S CASE.

It has been seen (supra, p. 124) that a grant without additional words of inheritance gave only an estate for life. Hence the word heirs was necessary to create a fee simple, and heirs of the body a fee tail. These are called words of limitation, as limiting or describing the interest.

But if a remainder were given to the heirs of A., where an estate of freehold is at the same time given to A., the heirs took by descent, and not by purchase. Taking by "purchase," in law, comprehends every species of acquisition in contradistinction to hereditary descent and escheat. The celebrated rule in Shelley's Case (I Co. 104) is this, viz.: "When the ancestor, by any gift or conveyance, takes an estate of freehold, and in the same gift or conveyance, an estate is limited, either mediately or immediately, to his heirs in fee or in tail, in such cases the word heirs is a word of limitation of the estate, and not a word of purchase," and the remainder was said to be executed in the ancestor, where there is no intermediate estate, or vested where an estate for life or in tail intervened. By force of the rule, the ancestor took the whole estate, and the heirs, if they took at all, could only take by descent, which of course might be barred by grant or devise. The technical legal principle of the rule was that the words "heirs" or "heirs of the body" created a remainder in fee or in tail, which the law, to prevent an abeyance, until the heirs could be determined, vested in the ancestor, who is tenant for life; and by the conjunction of the two estates he became tenant in fee or in tail.

The word "heirs" had to be used to make the rule applicable, and the estate of the ancestor had to be a freehold. The words "lawful issue" have been held to have as extensive a signification as heirs of the body. Kingsland v. Rapelye, 1 Edw. Ch. 1. If the heirs were designated nominatim or as a class, the rule did not apply, nor if the person to take the first estate were deceased. Brunt v. Gelston, 2 Johns. Cas. 384. The rule was also often relaxed in interpreting wills and marriage settlements, and in executory trusts. Tallman v. Wood, 26 Wend. 9. If the word "issue" was defined as referring to a certain class, as issue living at the time of the devisee's death, or "children," the rule did not apply. Cushing v. Henry, 4 Paige, 345; Matter of Sanders, 2 id. 293; Conklin v. Conklin, 3 Sandf. Ch. 64; Christie v. Phyfe, 19 N. Y. 344; Post v. Post, 47 Barb. 72; Rogers v. Rogers, 3 Wend. 503; Campbell v. Rawden, 18 N. Y. 412.

The origin and polity of the rule arose from the feudal tenure, which favored descents, among other reasons, because if the heirs took as purchasers, the lord would be deprived of certain feudal incidents. Some, however, claim that the rule was not even adjudicated in Shelley's Case, and maintain that the real reason for the rule is conjectural.

Tudor, Lead. Cas. R. P., 599; Butler, Note on Fearne Cont. Rem., 28; Hargrave, Law Tracts, "Observations on the Rule"; Challis, 135; Daniel v. Whartenby, 17 Wall. 639, 642; Strahan, Prop., 143; Perrin v. Blake, Hargrave, Collect. Juridica and Law Tracts, No. X, 487. But Fearne, Preston and Challis admit that this case is an express authority for the rule. Fearne, Cont. Rem., 181, 182; 1 Prest., Est., 347; Challis, 132; Fowler Real Property, 300.

By reflecting on this theory of the rule, however, the rule itself is easily remembered. Upon the abolition of feudal tenures, the reason for the rule no longer existed, but the rule itself remained.

This rule in Shelley's Case was recognized and adopted in the courts of this State, and considered to be of binding authority,

and where words of procreation were used the fee tail was turned into a fee simple, under the statute of 1786, supra, p. 127.

The rule was held applicable alike to equitable and legal estate, Brant v. Gelston, 2 Johns. 384; Kingsland v. Rapelye, 3 Eds. Chan. 1; Schoonmaker v. Sheeley, 3 Den. 485; Brown v. Lyon, 6 N. Y. 419, but not to an executory trust under a will in certain cases. Wood v. Burnham, 6 Paige. 513; Tallman v. Wood, 26 Wend. 9. See also Croxall v. Shererd, 5 Wall. 268, and the cases above cited; also the more recent case, Post v. Post, 47 Barb. 72.

Nor does it apply where the first taker's estate was equitable and the remainder legal. Smith v. Scholtz, 68 N. Y. 42; Seaman v. Harvey, 16

Nor to a devise to testator's son "during his natural life, and after his death to his issue lawfully begotten of his body, to such issue, their heirs and assigns forever." Daniel v. Whartenby, 17 Wall. 630.

It was held to apply in a will where a contingent life estate with re-

mainders to heirs was given. Spader v. Powers, 56 Hun, 153.

The revisers of the Statutes in 1830, however, recommended the abolition of the rule as being one "purely arbitrary and technical, and calculated to defeat the intentions of those who are ignorant of technical language."

Abolition of the rule since 1830.—The Revised Statutes have accordingly declared that where a remainder shall be limited to the heirs, or heirs of the body of a person, to whom a life estate in the same premises shall be given, the persons who, on the termination of the life estate, shall be the heirs or heirs of the body, of such tenant for life, shall be entitled to take as purchasers by virtue of the remainder so limited to them.

1 R. S. 725, § 28. See Real Property Law, § 44. See Barber v. Cary, 11 N. Y. 397, 401; Surdam v. Cornell, 116 id. 305; 86 Hun, 106; Moak v. Moak, 8 App. Div. 197; McGillis v. McGillis, 11 id. 359.

The practical operation of the abolition of the rule is, in cases where

the rule would otherwise apply, to change what would under the rule be a fee, into a precedent estate and remainder.

A devise therefore, or grant, since the Revised Statutes to A. for life, and after his decease to his heirs and assigns forever, would give the heirs. and after his decease to his heirs and assigns forever, would give the heirs. a vested interest in the land, subject to open and let in after-born children; the interest of each, however, being liable to be defeated by his death before the first taker. Moore v. Littel, 40 Barb. 488, affd., 41 N. Y. 66; Campbell v. Rawdon, 18 id. 412, 416.

A devise to A. and his issue, A. takes a fee. Hilliker v. Bast 64 App. Div. 552. Cf. Matter of Gordon, 82 App. Div. 439.

See on this subject Fowler's Real Property Law (2d ed.), 298-301.

TITLE III. EXECUTORY DEVISES.

The above and other strict rules of the common law applicable to remainders were, in the case of devises, somewhat relaxed. In wills, what would often be a bad remainder under the above rules. would, in order to effectuate the intention of the testator, be upheld as an executory devise.

Though, by rule of law, what is capable of being supported as a contingent remainder, is never construed an executory devise, Wolfe v. Van Nostrand, 2 N. Y. 436; and it is often questionable whether a devise will be held a contingent remainder or a conditional fee with an executory devise over on the determination of the fee. 30 Eng. L. & Eq. 435.

An executory devise of lands is defined as such a disposition of them, by will, that thereby no estate vests at the death of the devisor, but only on some future contingency; and it is one that could not take effect as a contingent remainder.

Thus, it needed no particular estate to support it, and a fee might be limited to commence in futuro on a contingency - a fee also might be limited on a fee, which could not be done as a contingent remainder. Nor could an executory devise be defeated by destruction of the precedent estate, nor by a common recovery. generally.

Jackson v. Bull, 10 Johns. 19; Jackson v. Robins, 16 id. 537; Prindle v. Beveridge, 7 Lans. 225, affd., 58 N. Y. 592. See cases infra, Chap. XV, Title IX, on "Inconsistent Devises."

Any contingencies provided for, however, had to be such as would happen within a reasonable time, i. e., lives in being and twenty-one years. Jackson

v. Billinger, 18 Johns. 368.

Otherwise it might be void as creating a perpetuity. See *infra*, Title IV. In an executory devise also, a term of years might be limited over, after a life estate created in the same term.

An executory devise has been held valid to a corporation to be created.

Inglis v. Trustees, etc., 3 Pet. 99.

But a contingent remainder would not take effect limited to a corporation that had no power to take. Leslie v. Marshall, 31 Barb. 560. See infra. Chap. X, Title VIII, "Trusts for Charitable Uses," and infra, Chap. XV, Title X, "Devises to Corporations."

A change of circumstances either before or after testator's death might convert an executory devise into a remainder. Where there is a valid executory devise, and the freehold is not in the meanwhile disposed of, the inheritance descended to the testator's heir, until the event happened. As to distinction between contingent remainders and executory devises, see Leslie v. Marshall, 31 Barb. 560.

There is now no such thing as an executory devise. Tilden v. Green, 130

N. Y. 47.

All former executory uses, contingent remainders and executory interests or devises are now known as future estates, and even remainders vested in interest, if possession is postponed, are so designated. Real Property Law,

See Fowler's Real Property Law (2d ed.), 198, 199.
For the present provisions of law regarding future estates, see Real Property Law, L. 1896, Chap. 547, Art. II.

TITLE IV. SUSPENSION OF THE POWER OF ALIENATION.

By the common law, perpetuities and restraints upon alienation were not encouraged or sustained, and limitations were resorted to by way of executory devise, to continue the possession of estates in families and prevent alienation, thereby avoiding the strict rules of the common law which prohibited the limitation of a fee on a fee, or the creation of a freehold in futuro, except as a remainder. In time, the principle establishing the limitations of terms in remainder, in succession, was firmly settled by judicial decision.

Time.— The utmost length allowed by the common law, for the contingency of an executory devise of any kind to happen, is that of a life or any number of lives in being, at the time of the creation of the estate, and twenty-one years afterward.

See the citations in Fowler Real Property (2d ed.), 240, 241.

This was the rule established in the case of the Duke of Norfolk (3 Cases in Chan. 1), in 1685, and in Stevens v. Stevens (2 Barn. K. B. 375), in 1736, where the doctrine was finally settled and defined by precise limits. It was recognized in this State in the case of Jackson v. Billinger, 18 Johns. 368, and others; and any further period held too remote as tending to create a

See also Lorillard v. Coster, 5 Paige, 177-188, 219, revd., 14 Wend. 265;

Hawley v. James, 16 id. 61.

The law was changed by the Revised Statutes and the absolute power of alienation cannot be suspended by any limitation or condition whatever, for a longer period than during the continuance of not more than two lives in being at the creation of the estate. except in the single case of a contingent remainder in fee, which may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited, shall die under the age of twenty-one years, or upon any other contingency by which the estate of such persons may be determined before they attain full age.

1 R. S. 723, §§ 15, 16; see Real Property Law, § 32. Harris v. Clark, 7 N. Y. 242; Radley v. Kuhn, 97 id. 26; Smith v. Chesebrough, 176 id. 317, revg. 82 App. Div. 578.

The construction and application of this apparently plain provision of the statutes has been attended with great difficulty and much diversity of opinion. The leading features of construction evoked in its interpretation will be here briefly given.

By the Revised Statutes every future estate is declared to be void in its creation which suspends the absolute power of alienation for a longer period than is above prescribed; and such power of alienation is declared to be suspended when there are no persons in being by whom an absolute fee in possession can be conveyed.

1 R. S. 723, § 14; Real Property Law, § 32.

The suspension which it is the purpose of the statute to limit. may be effected by one of two methods; either by providing for the creation of future estates to take effect upon the happening of some prospective event, the occurrence of which is essential to the vesting of such future estate, or by conveying the estate to trustees upon some authorized trust. The law against the suspension of the alienation is held applicable to every species of conveyance and limitation, whether it be by deed or will; whether it be directly to a party or indirectly in trust to the use of a party, or to one thereafter to come into existence; and whether limited by an executory devise or a springing use.

It also applies to present as well as to future estates, and to naked powers in trust as well as to estates in trust.

Hawley v. James, 16 Wend. 61; Coster v. Lorillard, 14 id. 265; Amory v. Lord, 9 N. Y. 403; Yates v. Yates, 9 Barb. 324.

But not to limitation of time in which to exercise a power of sale. Stewart v. Hamilton, 37 Hun, 19; Robert v. Corning, 89 N. Y. 225; Betts v. Betts, 4 Abb. N. C. 317.

As to purpose of the law, see Beardsley v. Hotchkiss, 96 N. Y. 201. As to fullest possible limitation of an estate, see Kelso v. Lorillard, 85 N. Y. 177.

A suspension of the power of alienation as to real estate occurs only when there are no persons in being by whom an absolute estate in possession can be conveyed.

Sawyer v. Cubby, 146 N. Y. 192.

Various Decisions .- As it would be impossible to fully digest the many cases under this rule of law, otherwise than as to main points, a list is given of cases, in many instances not elsewhere cited, illustrating various decisions had upon special wordings and constructions, viz.:

McGrath v. Van Stavoren, 8 Daly, 454; Kelso v. Lorillard, 85 N. Y. 177, affg. 8 Daly, 300; Guggenheimer v. Sullivan, 12 Wkly. Dig. 541; Colton v. Fox, 67 N. Y. 348, affg. 6 Hun, 49; followed in Morris v. Porter, 52 How. Pr. 1; Bowers v. Beekman, 16 Hun, 268; Monarque v. Monarque, 80 N. Y. 320; distinguished, Ward v. Ward, 105 id. 68; Tiers v. Tiers, 32 Hun, 184, affd., 98 N. Y. 568; Seaman v. Harvey, 16 Hun, 71; Trolan v. Rogers, 79 id. 507; Cowen v. Rinaldo, 82 id. 479; Stehlin v. Stehlin, 67 id. 110; Dammert v. Osborn, 140 N. Y. 30; Murphy v. Whitney, id. 541; Hope v. Brewer, 136 id. 126; Galway v. Brice, 10 Misc. 255; Greene v. Greene, 125 N. Y. 506; Deegan v. Wade, 144 id. 573; Dana v. Murray, 122 id. 604; Sanford v. Goodell, 82 Hun, 369; Sawyer v. Cubby, 146 N. Y. 192; Haynes v. Sherman, 117 id. 433; Bindrim v. Ullrich, 64 App. Div. 444; Matter of Murray, 75 id. 246; McGuire v. McGuire, 80 id. 63; Hagemeyer v. Saulpaugh, 97 id. 535; Coon v. Coon, 38 Misc. 693; Smith v. Chesebrough, 176 N. Y. 317, revg. 82 App. Div. 578; Herzog v. Title G. & T. Co., 177 N. Y. 86, revg. 85 App. Div. 549. N. Y. 86, revg. 85 App. Div. 549.

A devise however, should be construed, if possible, so as to sustain it. Coon v. Coon, 38 Misc. 693,

As to Devises to Charitable Corporations.— Vide Chap. XV.

Powers of Sale .- Vide Chap. XVII.

Power of Appointment. Hillen v. Iselin, 144 N. Y. 365; Dana v. Murray, 122 id. 604.

Trusts.— Vide Haynes v. Sherman, 117 N. Y. 433; Schermerhorn v. Cotting, 131 id. 48.

The tendency of the courts is toward liberality in construing the Statute of Uses and Trusts and while there is no abatement in the strictness with which limitations are construed which transgress the rule of perpetuity, dispositions by way of trust within that limit will be sustained if they can fairly be brought within the spirit of the statute, although not within its literal language. Cochran v. Schell, 140 N. Y. 516.

Character of the Limitations.— The rule is well settled that any limitation is void by which the suspension of the power of alienation will not necessarily, under all possible circumstances, terminate within the prescribed period. It is not enough that it may so terminate.

If the limitation may, by possibility, exceed two lives in being, it is void. The validity of the limitation is to be determined by the character of the limitation when created, and not by the event as it turns out in fact.

Coster v. Lorillard, 14 Wend. 265; 5 Paige, 172; Schetler v. Schetler, 41 N. Y. 328; Fowler v. Depau, 26 Barb. 224; Hawley v. James, 16 Wend. 61; Everitt v. Everitt, 29 Barb. 112, revd., 29 N. Y. 39; Williams v. Conrad, 30 Barb. 524; Armory v. Lord, 9 N. Y. 403; Tayloe v. Gould, 10 Barb. 398; Brown v. Evans, 34 id. 594; De Barante v. Gott, 6 id. 492; Sanford v. Goodell, 82 Hun, 369; Bird v. Pickford, 71 id. 142, revd., 141 N. Y. 18. In the cases of Lang v. Ropke, 5 Sandf. 363, and Griffin v. Ford, 1 Bos. 123, a contrary view is expressed; but these latter cases are considered to be overruled in Odell v. Youngs, 64 How. Pr. 56. See Radley v. Kuhn, 97 N. Y. 26; Shipman v. Rollins 98 id. 311, as to suspended bequest; also Cowen v. Rinaldo, 82 Hun, 479, 484, revg., 8 Misc. 115.

As to elimination of estate, causing the over suspension before will goes into effect, not remedying the defect, see Odell v. Youngs, 64 How. Pr. 56; or by refusal of wife to accept a life estate in lieu of dower, Bailey v. Bailey, 28 Hun, 603; 97 N. Y. 460.

Allowing reasonable time, after full statutory limit has been reached, in

Allowing reasonable time, after full statutory limit has been reached, in which to sell, held not to further suspend vesting. Betts v. Betts, 4 Abb.

N. C. 317.

The illegality of the provisions in such case, that the estate shall not be partitioned or divided for a period of six years, does not affect the will, but may be disregarded, as an invalid limitation on the ownership in fee of the property. Greene v. Greene, 125 N. Y. 506.

A two years' suspension before the inception of the trusts in a will; held,

could be expunged without making any change in testator's plans. Smith v. Chesbrough, 176 N. Y. 317, revg. 82 App. Div. 578.

Devise to issue of children deceased at partition is invalid. There might be suspension for more than two lives. Henderson v. Henderson, 46 Hun, 509, revd., 113 N. Y. 1, but on this point approved.

Valid when the estate can in no case be tied up longer than during two

Valid when the estate can in no case be tied up longer than during two lives: Bird v. Pickford, 141 N. Y. 18.

The Lives in Being.—Lives in being at the death of the testator, or the time of the conveyance, are alone to be considered. By the statute, successive estates for life can only be limited to persons in being at the creation thereof.

Stevens v. Müller, 2 Dem. 597.

The lives must be designated, either by naming the persons in particular, or by limiting the estate on the first and second lives in a designated class, so that the persons whose lives are to furnish the measure of suspension can be ascertained in the instrument by which the disposition is made. Hawley v. James, 16 Wend. 61; Jennings v. Jennings, 5 Sandf. 174; 7 N. Y. 547; Lang v. Ropke, 5 Sandf. 363; Dodge v. Pond, 23 N. Y. 69; Griffin v. Ford, 1 Bos. 123; Gott v. Cook, 7 Paige, 521, affd., 24 Wend. 641; Everitt v. Everitt, 29 N. Y. 39; Manice v. Manice, 43 id. 303.

A future estate or interest in property may be valid if it is so limited as to vert in interest.

as to vest in interest, so as to be alienable at the termination of two lives in being at the time of the creation thereof, although it will not vest in possession immediately upon the determination of such two lives. Kain v. Gott, 7 Paige, 521, affd., 24 Wend. 641.

The lives which limit the duration of a trust need not be those of the beneficiaries.

Crook v. County of Kings, 97 N. Y. 421; Bailey v. Bailey, Id. 460; Woodgate v. Fleet, 64 id. 566.

Absolute Term in Lieu of Lives .- No absolute term, however short, in lieu of lives, is valid. Life must, in some form, enter into the limitation.

Home v. Van Schaick, 20 Wend. 564; Tucker v. Tucker, 5 N. Y. 408; Boynton v. Boynton, 1 Den. 53; Hawley v. James, 16 Wend. 61; Dodge v. Pond, 23 N. Y. 69; Garvey v. McDevitt, 72 id. 556; Rice v. Barrett, 102 id. 161; Cruikshank v. Home for the Friendless, 113 id. 337.

But an absolute term in the alternative would not vitiate. Phelps v. Phelps, 28 Barb. 121, affd., 23 N. Y. 60.

So suspension to a day named would be void. DeKay v. Irving, 5 Den. 646; Williams v. Williams, 8 N. Y. 525.

Or to hold property until a certain corporation might be created. Yates v. Yates, 9 Barb. 324. Or to suspend alienation until certain mortgages are paid. Killam v.

Allen, 52 Barb. 605.

Or to trustees to manage an estate for life and a year after. Tucker v. Tucker, 5 Barb. 99, affd., 5 N. Y. 408. Or to trustees after two years from testator's death. Smith v. Chesebrough,

176 N. Y. 317, revg., 82 App. Div. 578.

A suspension for three years is also held invalid. Moore v. Moore, 47
Barb. 257; Smith v. Edwards, 88 N. Y. 92; Garvey v. McDevitt, 72 id. 556. But a power to sell lands may be restricted for a fixed period. Stewart v. Hamilton, 37 Hun, 19. Or for a convenient period. Hope v. Brewer, 136 N. Y. 126.

The suspension of the power of alienation during one life and during one minority thereafter, is not void, and is not rendered void by the addition thereto of a period of one year for division of the estate. Galway v.

Brice, 10 Misc. 255.

An agreement between the owners of a farm that it shall be held jointly by them, and upon the death of either should pass by descent or devise to the survivors and on the death of the last survivor should pass to a nephew, held not in contravention of the statute against perpetuities, as it appeared to be intended that the property might be alienated at any time. Murphy v. Whitney, 140 N. Y. 541.

The Remainder need not be to a Person in Being.—A remainder in fee in real estate, to take effect after the expiration of two lives in being at the testator's death, may be created in favor of a person not in being at the time; and in such a case a further contingent remainder in favor of a person not in being at the creation of the estate, may be limited to take effect in the event that the person to whom the remainder is first limited shall die under the age of twenty-one years.

1 R. S. 723, § 16; Real Prop. Law, § 32.

Supra, p. 235; Manice v. Manice, 43 N. Y. 303. Same in case of a trust.

DePeyster v. Beekman, 55 How. Pr. 90.

A trust to accumulate rents, etc., during the minority of the first of such remaindermen, and for his benefit, is valid. Manice v. Manice, 43 N. Y. 303.

Kilpatrick v. Johnson, 15 N. Y. 322.

But a limitation during the life of the wife of a son unmarried at testator's death, being possibly for a life in esse, is void. Tiers v. Tiers, 98 N. Y. 568, following Schettler v. Smith, 41 N. Y. 328; Lee v. Lee, 2 How. Pr. N. S. 76.

Minorities.— A limitation upon minorities is held virtually a limitation upon lives.

Post v. Hover, 30 Barb. 312, affd., 33 N. Y. 593; Tayloe v. Gould, 10 Fost v. Hover, 30 Barb. 312, affd., 33 N. Y. 593; Tayloe v. Gould, 10 Barb. 388; Lang v. Ropke, 5 Sandf. 362; Jennings v. Jennings, 7 N. Y. 547; Everitt v. Everitt, 29 N. Y. 39.

So, a limitation until the youngest of four daughters becomes of age, is good. James v. Beasley, 14 Hun, 520; Mullins v. Mullins, 11 Misc. 463; but see Walsh v. Waldron, 17 N. Y. Supp. 829; s. c., 63 Hun, 315.

Suspension "until my youngest child becomes of age," held valid. Stehlin v. Stehlin, 67 Hun, 110.

Trust until a son reach twentyone or die and then until a doubter.

Trust until a son reach twenty-one or die, and then until a daughter reach twenty-one or die, and then in further trust, held invalid. Cowen v. Rinaldo, 82 Hun, 479, revg. 8 Misc. 115.

An express trust suspending alienation during a minority is not an absolute term of years, irrespective of life, but is determined by the death of the minor before he arrives at full age.

Lang v. Ropke, 5 Sandf. 363; McGowan v. McGowan, 2 Duer. 171; Benedict v. Webb, 98 N. Y. 460.

See Real Prop. Law, § 32. The last sentence in the section is new and provides as follows: "For the purpose of this section a minority is deemed a part of a life and not an absolute term equal to the possible duration of such minority."

Where trustees, however, are directed to hold and manage an estate until the youngest of three children become of age, it is held that the provision is void if the interest in the fund does not vest in the children until the youngest becomes of age. But if the respective interests vest distributively in the children on the death of the testator, but the fund is not payable to them until the happening of the event mentioned, then the power of alienation is not unduly suspended, and the trust is valid. So, also, if the interests tion is not unduly suspended, and the trust is valid. So, also, if the interests were joint instead of in common, and the whole remained contingent and unvested until the majority of the youngest of the three children, the absolute ownership would be suspended during three minorities, which would be illegal. Everitt v. Everitt, 29 N. Y. 39; Hawley v. James, 16 Wend. 61; Coster v. Lorillard, 14 id. 265; Patterson v. Ellis, 11 id. 260; Matter of Lapham, 37 Hun, 15; James v. Beasley, 14 id. 520; Muller v. Struppman, 6 Abb. N. C. 343; Simpson v. English, 4 Supm. 80.

The leading inquiry upon which the question of vesting or not vesting turns, is whether the gift is immediate, and the time of payment or of enjoyment only postponed, or is future and contingent, depending upon the beneficiary arriving at full age or surviving some other person, or the like. If futurity be annexed to the substance of the gift, the vesting is suspended; but if it appear to relate to the time of payment, only, the gift vests instanter; and words directing division or distribution between two or more objects at a future time, are equivalent to a direction to pay.

Radley v. Kuhn, 97 N. Y. 26. See Jarman on Wills, 700; Gilman v. Reddington, 24 N. Y. 9; Hobson v. Hale, 95 N. Y. 588, 612.

Reddington, 24 N. Y. 9; Hobson v. Hale, 95 N. Y. 588, 612.

A trust to continue until the testator's youngest child, if living, attain the age of twenty years, has been held void; or for a life, and until five minors, attain full age. Boynton v. Hoyt, 1 Den. 53; Tayloe v. Gould, 10 Barb. 388; Post v. Hover, 30 id. 312, affd., 33 N. Y. 593; Savage v. Burnham, 17 id. 561. See as to "Trusts," Chap. X.

In a certain case, however, the words "on my youngest child attaining twenty-one," were construed as the youngest child living at the death of the testator. Eells v. Lynch, 8 Bos. 465.

Also, a trust for the education of four minors, with a provision for the accumulation of the surplus, and the division of the fund as they successively become of age when each cestuic que trust was to receive his portion

sively become of age, when each cestui que trust was to receive his portion of it, has been held void. Jennings v. Jennings, 7 N. Y. 547 affg., 5 Sandf. 174; Vail v. Vail, 7 Barb. 226, affd., 10 N. Y. 69.

In the case of Burke v. Valentine, 52 Barb. 412, it was held, that where

the executors do not take an estate in trust, but the interest of the estate is in the wife and children, a direction to the executors to convert the estate into money and apply it to the use of the wife and children, and after the youngest child should arrive at age to divide it among the children, share and share alike, was valid. This case was so decided on the principle that the limitation would depend on the life or minority of the youngest child, and would vest at once in all the children living when either event happened - i. e., the child's majority or his decease. But see Walsh v. Waldron, 17

N. Y. Supp. 829; s. c., 63 Hun, 315.

The principal of the distinction between the above cases seems to be that where the youngest of a class is specifically referred to, the limitation

may be valid, but otherwise if the limitation is made to an entire class.

In construing the clauses of the James Will, in Hawley v. James, above referred to, Nelson, Ch. J., states, in holding the limitation invalid, that the words, "youngest of my children and grandchildren," standing alone, might well enough refer to the youngest of each class. The clause was held invalid, because it, in addition, specified the youngest living and attaining the age of twenty-one years, by which the intent to apply it to all the children was apparent.

The above is the distinction made in McGowan v. McGowan, 2 Duer, 57, where the limitation was made that upon the youngest son (being named) coming of age the estate was to be divided among testator's seven children (naming them), and should any die, that the estate should be divided

among the survivors.

among the survivors.

It is held, also, that although, by statute, the power of alienation of real estate may be lawfully suspended for the term of a minority, after the expiration of two lives in being, by means of a contingent remainder, to take effect in the event of the death of the first remainderman in fee during his effect in the event of the death of the first remainderman in fee during his minority, the absolute ownership of personal estate cannot be suspended beyond two lives in being. Manice v. Manice, 43 N. Y. 303; Howe v. De Hay, 5 Den. 646. See 1 R. S. 773, §§ 1, 2; Personal Prop. Law, G. L. Chap. XLVII; L. 1897, Chap. 417, § 2.

A suspension by a condition limiting an estate over on the contingency that a person shall leave no children that arrive at the age of twenty-one, was held void; inasmuch as it was on the lives of an uncertain number of children who might die before twenty-one. Brown v. Evans, 34 Barb. 594; see also Taylog v. Gould 10 Barb. 320.

see also Tayloe v. Gould, 10 Barb. 389.

The Statute has reference only to lives that suspend the power of alienation.— In the case of Hunter v. Hunter, 17 Barb. 25, it is held that a devise to E. for life, then to I. in fee, and, on his dying without leaving lawful issue at the time of his death, over to his sisters in fee, is not too remote, the power of alienation not being suspended by the lives of the children of I. The statute is held to have reference to lives only, the continuance of which actually suspend the power.

This case also holds that a suspension of the power of alienation resulting simply from minorty, is not such as is contemplated by the statute. See also Woodgate v. Fleet, 64 N. Y. 566; Provost v. Provost, 70 N. Y. 141.

Annuities and Charges.— In view of the provisions of the statute which forbid the alienation of trust estates, directions to trustees for the disposition of property will be upheld, as powers in trust or as mere charges on the realty, if possible, instead of trust estates in the lands, so that provisions may be saved from invalidity, as against the law relative to perpetuities; and the lands will be treated as subject to alienation in spite of the power in trust, or as not held through the trust as one of the estates on the existence of which the limitation is based. Annuities, therefore, will be upheld, if possible, as charges on real estate, where the trust for their payment is void.

Tucker v. Tucker, 5 N. Y. 408; McGowan v. McGowan, 2 Duer, 57; Emmons v. Cairns, 3 Barb. 243; Hunter v. Hunter, 17 Barb. 25; Manice v. Manice, 43 N. Y. 303; Killam v. Allen, 52 Barb. 605; Griffin v. Ford, 1 Bos. 123; Lang v. Ropke, 5 Sandf. 363.

A charge upon the income of a testator's estate for the education of his grandchildren, is held not void as illegally suspending the power of alienation of the real estate, and the absolute ownership of the personal property. Hunter v. Hunter, 17 Barb. 25.

And a mere charge on lands to raise annuities is held not to suspend the power of alienation. O'Brien v. Mooney, 5 Duer, 51; Eells v. Lynch, 8 Bos. 465. See also infra, Chap. X, Tit. IV.

But where the vesting of the remainder is postponed for an undue number of annuitant lives, the whole provision has been held invalid.

Hobson v. Hale, 95 N. Y. 588, 612. See 1 R. S. 726, §§ 37, 38; Real Prop. Law, § 51, and Tit. V, infra.

Separate Estates or Distributive Interests.—There should be a specific division and several appropriations, otherwise if there is a devise in trust to more than two for life jointly of the whole fund or estate, the courts will not divide the shares as independent trusts, although they will construe them so if they can. Limitations over would refer to the time appointed for the division, and not its completion, unless there is direction otherwise.

Westerfield v. Westerfield, 1 Brad. 137; Thompson v. Thompson, 28 Barb. Westerfield v. Westerfield, I Brad. 137; Thompson v. Thompson, 28 Barb. 432; Tucker v. Bishop, 16 N. Y. 402; McSorley v. Wilson, 4 Sandf. Ch. 515; Mason v. Jones, 2 Barb. 229; Coster v. Lorillard, 14 Wend. 265; Hone v. Van Schaick, 7 Paige, 221, affd., 20 Wend. 564; Kane v. Gott, 7 Paige, 521; 24 Wend. 641; Wagstaff v. Lowerre, 23 Barb. 209; Van Vechten v. Van Vechten, 8 Paige, 104; Cromwell v. Cromwell, 3 Edw. 495; Harrison v. Harrison, 42 Barb. 162, affd., 36 N. Y. 543; Everitt v. Everitt, 29 id. 39; Jennings v. Jennings, 7 id. 547; Amory v. Lord, 9 id. 403; Manice v. Manice, 43 id. 303; Vail v. Vail, 7 Barb. 226, affd., 10 N. Y. 69; Matter of Verplanck, 91 N. Y. 439; Colton v. Fox. 67 id. 348.

91 N. Y. 439; Colton v. Fox, 67 id. 348.
When, therefore, a capital is appropriated for annuities, there should be a distinct capital for each annuity, and the lives are applied to such capital distinctively. Mason v. Mason, 2 Sandf. Ch. 432; Lang v. Ropke, 5 id. 363; Boynton v. Hoyt, 1 Den. 53; Savage v. Burnham, 17 N. Y. 561.

The courts lean to holding a gift to several, to be in severalty, although there be no direction to sever the shares pending the trust.

Matter of Lapham, 37 Hun, 15; Matter of Verplank, 91 N. Y. 439; Wells v. Wells, 88 id. 323; Dickie v. Van Vleck, 5 Redf. 284; Leavitt v. Wolcott, 65 How. Pr. 51, revd., on another point, 95 N. Y. 212; Moore v. Hegeman, 72 id. 376; Monarque v. Monarque, 80 N. Y. 320, distinguished, Ward v. Ward, 105 id. 68; Bingham v. Jones, 25 Hun, 6; Meserole v. Meserole, 1 id. 66, declared overruled, 27 St. Rep. 516.

Trust during minority of six children held good; the court construing the language of the will to mean a gift to the children as tenants in common, each share to be managed during the minority. Mullins v. Mullins, 11 Misc. 463

Effect of a Power to Exchange or Re-invest.— A mere power to exchange, change, or re-invest the estate or fund does not obviate the objection as to alienability within the rule against perpetuities.

Hawley v. James, 16 Wend. 61, and 9 Paige, 318; Belmont v. O'Brien, 12 N. Y. 394; Brewer v. Brewer, 11 Hun, 147.

Power to Lease or Sell.—The absolute power of alienation is considered suspended, notwithstanding a qualified power is given to trustees to lease the estate, and to sell such portions as might be necessary to discharge liens, etc.

Amory v. Lord, 9 N. Y. 404; Hobson v. Hale, 95 id. 588. A power of sale not amounting to a positive direction cannot be deemed to evade the effect of the statute restricting suspensions of the power of alienation. *Id.* and Eells v. Lynch, 8 Bosw. 465; Manice v. Manice, 43 N. Y. 303; *In re* Christie, 133 *id.* 473.

As to where a power of sale does suspend. Dana v. Murray, 122 N. Y. 604.

When the Statute does not Apply.—Any direction for the holding beyond two designated lives in being is not invalid, however. if there are persons in being by whom a valid legal title to the property may be conveyed.

Everitt v. Everitt, 29 Barb. 112; 29 N. Y. 39; Gilman v. Reddington, 24 id. 9; Smith v. Scholtz, 68 id. 41; Foote v. Bruggerhof, 66 Hun, 406; Dugan v. Wade, 144 N. Y. 573.

A power of sale to be exercised after a definite term does not necessarily create an illegal restraint upon alienation. Buchanan v. Tebbets, 69 Hun, 81. The law of the place where the gift is to take effect and which governs the trustees and the property when transmitted there is controlling, not the law of this State. Hope v. Brewer, 136 N. Y. 126.

Successive Life Estates .- By the Revised Statutes, also, successive life estates shall not be limited, except to persons in being at the creation thereof; and where a remainder shall be limited on more than two successive estates for life, all the life estates subsequent to those of the two persons first entitled thereto shall be void. And upon the death of those persons, the remainder shall take effect in the same manner as if no other life estate had been created.

 R. S. 723, § 17; see Real Property Law, § 33.
 Purdy v. Hayt, 92 N. Y. 446; Bailey v. Bailey, 28 Hun, 603, modified. 97
 N. Y. 460; Leavitt v. Wolcott, 65 How. Pr. 51; Woodruff v. Cook, 61 N. Y. 638; Matter of Conger, 40 Misc. 157.

Regarding personal property, see Strang v. Strang, 4 Redf. 376.
As to distribution of profits to persons entitled to next eventual estate, see Van Emburgh v. Ackerman, 3 Redf. 499. Vide infra, Title VI.

Valid and Invalid creation of Future Estates.— If successive legal estates are created beyond the terms allowed by the Revised Statutes, as above, the first two would be valid, and the others void. But if mere equities all dependent upon a trust which is continuous are created, and the trustees are clothed with the entire estate, legal and equitable, and the trust is void, the equitable interests have been

held all to fail, as they are all dependent upon the trust, and fail with it.

Tucker v. Tucker, 5 Barb. 99, affd., 5 N. Y. 408; Hone v. Van Schaick, 20 Wend. 564; Hobson v. Hale, 95 N. Y. 588.

If the trust sought to be created fail or be ineffectual, a bequest may be supported. So, if the purposes of the trust are separable. and some of them must arise within two lives, and others only become operative after two lives, the former may be sustained and not the latter; but not if all parts of the trust are dependent and entire. or the separation would work an injustice.

Everitt v. Everitt, 29 N. Y. 39; Post v. Hover, 33 id. 593; Clemens v. Clemens, 60 Barb. 366; Manice v. Manice, 43 N. Y. 303; Benedict v. Webb, 98 id. 460.

The equitable and later view in this State is that courts will, if possible, separate the trust, if not absolutely entire, and pronounce ulterior limitations invalid, and uphold less remote ones, so as to carry out, at least partially, the intent of the testator. Harrison v. Harrison, 41 Barb. 162; Savage v. Burnham, 17 N. Y. 561, overruling Amory v. Lord, 9 id. 403; Tiers v. Tiers, 32 Hun, 184, affd., 98 N. Y. 568.

The doctrine held by the earlier cases and the Court of Appeals, in Amory v. Lord, 9 N. Y. 404, seems modified by the latter and more liberal doctrine

of the courts in subsequent cases, and it appears now to be established as a principle controlling the interpretation of trusts, that although limitations bad by statute may be enveloped in a single trust with others that are good, the trust may be supported for its valid purposes.

The statutes also provide, as a rule of guidance for the courts, that in the construction of every instrument creating or conveying, or authorizing the creation or conveyance of any estate or interest in lands, it shall be the duty of courts to carry into effect the intent of the parties, so far as such intent can be collected from the whole instrument, and it is consistent with the rules of law.

1 R. S. 748, § 2. See Real Property Law, § 205.
Westerfield v. Westerfield, 1 Brad. 137; Woodruff v. Cook, 47 Barb. 304;
61 N. Y. 638. As to the construction of the above last-named provision, reference may be made to the following cases: Williams v. Williams, 8 N. Y. 525, 539; Darling v. Rogers, 22 Wend. 483, 489; Parks v. Parks, 9 Paige, 107, 116; McDonald v. Walgrove, 1 Sandf. Ch. 274, 275; Howland v. Union Theological Seminary, 3 Sand. 82 at p. 110; 3 Duer, 554; 20 How. Pr. 321; 11 Abb. 37; 32 Barb. 45; 13 id. 127; 5 id. 103; 2 id. 368. See also more fully, infra, Chap. X, Tit. IV.

Limitations in the Alternative.—Limitations made to take effect on alternative events, one of which is too remote, and the other valid, as within the prescribed limits, although the limitation be void, so far as it depends on the remote event, will be allowed to take effect on the happening of the alternative one.

1 R. S. 724, § 25; Real Property Law, § 41; Fowler v. Depau, 26 Barb. 234; Schettler v. Smith, 41 N. Y. 328; Van Horne v. Campbell, 100 id. 287.

Corporations.— A bequest to a corporation for any or all the purposes of its incorporation is valid, although the duration of the trust be unlimited.*

Wetmore v. Parker, 52 N. Y. 450; Robert v. Corning, 23 Hun, 299, 305, affd., 89 N. Y. 225.

See, further, infra, Chap. X, Tit. VIII, as to Corporations.

The above provisions specified in this title, and the provisions embraced in the ensuing titles of this chapter, apply as well to remainders as to executory devises (formerly so called), and are contained in Art. I, Tit. II, Chap. I, Part II, of the Revised Statutes.

See now Real Property Law, Art. II, § 20 et seq.

TITLE V. DIRECTIONS FOR ACCUMULATION.

Dispositions of the rents and profits of lands, it is provided by the Revised Statutes, to accrue and be received at any time subsequent to the execution of the instrument creating such disposition, shall be governed by the rules established in the article of the statutes in relation to future estates in land. (See Tit. IV.)

Provision is made relative to the disposition by will or deed of the rents and profits of lands, to be governed by the above rules, and if accumulation be directed to commence on the creation of the estate, it must be made for the benefit of one or more minors then in being, and to determinate with their minority; and if the accumulation is to commence at any time subsequent to the creation of the estate, it shall commence within the time above limited for the vesting of future estates, and during the minority of the persons for whose benefit it is directed, and terminate on their attaining full age. All accumulations beyond such minorities are void.

If there be at any time a valid suspension of the power of alienation or of the ownership, during which time the rents are undisposed of, and there is no valid direction for their accumulation, they will belong to the person presumptively entitled to the next eventual estate.

1 R. S. 726, §§ 36-39; Real Property Law, §§ 50-53.

All directions for the accumulation of the rents and profits of real estate, except such as are allowed in the article as above, are declared void.

1 R. S. 726, § 38; Real Property Law, § 51. See also Revisers' note to 1 R. S. 725, §§ 36, 37, 38; Title IV, Chap. X, "Trusts;" Savage v. Burnham, 17 N. Y. 561.

^{*} This statement must, however, be taken with considerable qualification, as a bequest to a corporation for any of its corporate purposes is not strictly a trust.

Accumulation must be for the benefit of the minor only and must end with his majority. Matter of Hayden, 77 Hun, 219; Hormdorf v. Hormdorf, 13 Misc. 343 and cases cited.

Accumulations go to legal representatives of deceased infant; not to person next entitled to the corpus of the trust fund. Smith v. Parsons, 146

N. Y. 116.

The income upon a trust estate, accumulated during the minority of the life beneficiary, cannot be added to the capital when such beneficiary reaches her majority, and thereafter be held in trust with the principal of the trust estate. Tweddell v. N. Y. Life Ins. & Trust Co., 82 Hun, 602 and cases cited; Thorn v. De Breteuil, 179 N. Y. 64.

A will giving property to executors in trust to receive the rents and deposit them until the expiration of ten years, and at that time to sell the property and distribute the proceeds and accumulations among children, Brandt v. all of whom were of full age, is void under the above statutes.

Brandt, 13 Misc. 431.

An accumulation for three, and also ten years held invalid. Morgan v. Masterson, 4 Sandf. 442; Converse v. Kellogg, 7 Barb. 590. Or until the longest liver of a class die. Lovett v. Kingsland, 44 Barb. 561.

The above prohibition of the Revised Statutes does not apply to trusts created before they went into effect. Bryan v. Knickerbacker, I Barb. Ch.

If the trust be void, the income descends as if the testator had died in-

testate. Vail v. Vail, 4 Paige, 317; s. c., 7 Barb. 226.

If the accumulation operates for the benefit of adults as well as minors, the trust is void; and the beneficiaries must, by the terms of the will, be minors at the decease of the testator. Kirkpatrick v. Johnson, 15 N. Y. 322.

A postponement of a division of a testator's estate, makes in law an accumulation. Converse v. Kellogg, 7 Barb. 590; Vail v. Vail, supra; Simpson v. English, 4 N. Y. S. C. 80.

A trust to accumulate rents and profits for the benefit of the testator's wife and minor children would be void, such trusts being allowed for the benefit of minors only. Boynton v. Hoyt, 1 Den. 53.

A trust to accumulate income for children not in existence at the time when the accumulation is to commence, or whose right to the accumulated fund is contingent, is void. Haxtun v. Corse, 2 Barb. Ch. 506; Kirkpatrick v. Johnson, 15 N. Y. 322. See also infra, as to minors in esse.

If the estate limited to an infant is contingent, the accumulation cannot

be considered to be for his benefit. Manice v. Manice, 43 N. Y. 303.

A trust for an accumulation for a lunatic would be void, unless a minor. Craig v. Craig, 3 Barb. Ch. 76.

A trust for accumulation may be implied from the general terms of a will. Vail v. Vail, 4 Paige, 317; 7 Barb. 226.

Where a class is designated, it is not necessary that all should be living when the accumulation commences, provided that at the commencement it goes for the benefit of such as are in esse exclusively, and that those who subsequently become entitled fall within the prescribed rules laid down by the statute. Such a succession of accumulations is not objectionable if the statute. Such a succession of accumulations is not objectionable, if they are all made to terminate within the prescribed legal limits. Mason v. Mason, 2 Sandf. Ch. 432.

A trust to accumulate rents and profits for the benefit of an infant who was not in esse at the creation of the trust, in order to be valid, must be so was not in esset at the creation of the trust, in order to be value, must be so limited that the accumulation will commence and terminate within the compass of some two ascertained lives in being at the creation of the trust. Gott v. Cook, 7 Paige, 521; Craig v. Craig, 3 Barb. 76. See on this point, United States Trust Co. v. Soher, 178 N. Y. 442.

A trust to accumulate during minority, and thereafter to pay over the entire income of the accumulated fund to the beneficiary for life, the principal of his death to go to other property is void. Prov. v. Heremon. 92

cipal, at his death, to go to other persons, is void. Pray v. Hegeman, 92 N. Y 508. So also a trust to accumulate for life. Cook v. Lowry, 29 Hun, 20, affd., 95 N. Y. 103.

A void direction for accumulation will not render a legacy wholly void. The direction might be stricken out of the will, and the legacy and the general purposes for which it was given might remain. Williams v. Williams, 8 N. Y. 525. See also Cochrane v. Schell, 40 id. 516; United States Trust Co. v. Soher, 178 id. 442.

Accumulations vest absolutely when minor is twenty-one, and cannot be

divested afterward. Gilman v. Healy, 1 Dem. 404.

Trusts for years and accumulations to pay legacies are void. Matter of Starr, 2 Dem. 141.

Starr, 2 Dem. 141.

Trust to apply surplus after paying legacies, etc., to pay mortgages, invalid. Cowen v. Rinaldo, 82 Hun, 479, 484.

A discertionary power given to trustees to make a disbursement of income upon trust property if restricted to such matters as tend to preserve it, or to make it efficient for earning purposes, is not a violation of the statute against accumulations. Matter of Nesmith, 140 N. Y. 609.

Accumulation to pay off indebtedness, held void. Matter of Hoyt, 71 Hun, 13; Hascall v. King, 162 N. Y. 134.

For similar provisions concerning accumulations of personal property, see 1 R. S. 773, 774, §§ 3, 4; Personal Property Law, G. L., Chap. XLVII; L. 1897, Chap. 417, § 4.

See also, as to the above statutory provisions, Dodge v. Pond, 23 N. Y. 69; Robinson v. Robinson, 5 Lan. 165; Manice v. Manice, 43 N. Y. 303; Cromwell v. Coddington, N. Y. Daily Reg. March 3, 1884; Barbour v. De Forest, 95 N. Y. 13; Gilman v. Healy, 1 Dem. 404; Kalish v. Kalish, 166 N. Y. 368; Smith v. Chesebrough, 176 id. 317; United States Trust Co. v. Soher, 178 id. 442; Thorn v. De Breteuil, 179 id. 64.

Where Accumulations may be taken for Education of Minors.

- By the Revised Statutes, when any minor for whose benefit a valid accumulation of the interest or income of personal property shall have been directed, shall be destitute of other sufficient means of support or of education, the Supreme Court or Surrogate may cause a suitable sum to be taken from the moneys accumulated, or directed to be accumulated, and to be applied to the support or education of such minor.

1 R. S. 726, § 39; am'd by L. 1891, Chap. 172, 173. Se now Real Property Law, § 51.

Matter of Wagner, 81 App. Div. 163.

Maintenance for infants cannot be allowed by the Court of Chancery out of a fund which, upon the happening of the event contemplated by the testator in the bequest of such fund, will not belong to the infants but to some other person. In re Davison, 6 Paige, 136. See In re Turner, 10 Barb.

Posthumous Children.— These would take under a direction for accumulation for "children" or "issue," and they will be construed to be "children" during the lifetime of the father. Mason v. Jones, 2 Barb. 299.

See also supra, Tit. IV, as to provisions for the benefit of minors that may unduly suspend the power of alienation. Also "Trusts," Chap. X, infra.

TITLE VI. GENERAL PROVISIONS AFFECTING FUTURE ESTATES.

The Revised Statutes on the subject of the limitation and creation of future estates by act of parties, in effect destroyed the distinctions between contingent remainders and executory devises.

They are now equally future or expectant estates, subject to the same provisions, and may be created either by grant or will, and every species of future limitation is brought within the same definition and control.

The rules for the creation and construction of future estates established by the common law, however, apply to cases arising previous to the Revised Statutes, and, in that view, are still a necessary branch of legal knowledge. They cannot, in a work of this kind, be more than briefly alluded to, and the various refinements and intricacies of the subject, built up through the course of centuries, under the requirements of social intercourse, will have to be specially referred to when cases necessitating further investigation may arise. The Revised Statutes abolished *all* expectant estates other than provided for in Art. I, Tit. II, Chap. I, Part II.

See 1 R. S. 726, § 42. See now Real Property Law, § 26, to same effect. New York Security & Trust Co. v. Schoenberg, 87 N. Y. 262, 266. Vide Kent, vol. 4, as to the prior law regulating expectant estates.

Through the operation of our statutes also, uses being abolished, as will be adverted to more particularly hereafter, all expectant estates in the shape of springing, shifting or secondary uses, created by conveyances to uses, have, in effect, become contingent remainders, and subject to the same rules. In this connection, the law relative to Uses and Trusts, infra, Chap. X, will have to be attentively considered.

The following additional provisions affecting future estates were enacted by the Revised Statutes of 1830, in Part II, Chap. I, Tit. II, Art. I. See I R. S. 721 et seq.

The old sections of the statutes with reference to corresponding provisions in the present law are given.

Successive Estates for Life.—§ 17. Successive estates for life shall not be limited, unless to persons in being at the creation thereof, and where a remainder shall be limited on more than two successive estates for life, all the life estates subsequent to those of the two persons first entitled thereto, shall be void, and upon the death of those persons, the remainder shall take effect in the same manner as if no other life estate had been created.

See now Real Property Law, § 33. La Farge v. Brown, 31 App. Div. 542.

Estates for Life on a Term of Years.—§ 21. No estate for life shall be limited as a remainder on a term of years, except to a person in being at the creation of such estate.

Real Property Law, § 37.

Life Estate in a Term.—A point of difference formerly existing between a remainder and an executory devise was, that by an executory devise, a term

of years might be given to one man for his life, and afterwards limited over to another, which could not be done by deed. At common law, the grant of the term, to a man for life, would have been a total disposition of the whole term, and a freehold had to be limited on a freehold.

The Revised Statutes provide that an estate for life may be created in a

term of years, and a remainder limited thereon. 1 R. S. 724, § 24.

See now Real Property Law, § 40.

Remainder on Life Estate, pur autre vie. By the Revised Statutes, also, it is provided that no remainder shall be created upon an estate for the life of any other person or persons than the grantee or devisee of such estate, unless such remainder be in fee; nor shall a remainder be created on such an estate, in a term of years, unless it be for the whole residue of such term. 1 R. S. 724, § 18.

When a remainder shall be created on such a life estate, and more than two persons shall be named as the persons during whose lives the life estate shall continue, the remainder shall take effect upon the death of the two persons first named, in the same manner as if no other lives had been introduced.

1 R. S. 724, § 19. Real Property Law, §§ 34, 35.

Remainder on a Term .- § 20. A contingent remainder shall not be created on a term of years, unless the nature of the contingency on which it is limited be such that the remainder must vest in interest during the continuance of not more than two lives in being, at the creation of such remainder, or upon the termination thereof.

See now Real Property Law, § 36; Butler v. Butler, 3 Barb. Ch. 304.

Chattels Real.—All the above provisions relative to restriction on alienation, shall also apply to chattels real, so that the absolute ownership of a term of years shall not be suspended for a longer period than the absolute power of alienation can be suspended in respect to a fee. 1 R. S. 724, § 23. See now Real Property Law, § 39.

Of the Words "Dying without Issue," before the Revised Statutes .-Previous to the Revised Statutes, if an executory devise were limited to take effect on a dying without heirs, or on failure of issue, or "without leaving issue," or "without issue," the limitation was held to be void, because the contingency was too remote, as it was interpreted not to take place until after an indefinite failure of issue, i. e., until the line became extinct, and the estate might not vest within the compass of twenty-one years and nine months after lives in being, unless a contrary intention were manifested in the will, limiting the vesting of the estate to the time of the death of the first taker, and showing that a definite failure of issue was intended. Jackson v. Billinger, 18 Johns. 368; 3 Sandf. Ch. 64; Miller v. Macomb, 26 Wend. 229; Patterson v. Ellis, 11 id. 259; Seaman v. Harvey, 16 Hun, 71; and see cases infra.

The case of the Trustees, etc., v. Kellogg, 16 N. Y. 83, holds that the words "dying without lawful issue," meant issue living at the death of the

first taker, as judged by the context in that case.

In case the remainder over was so held to vest on an indefinite failure of issue, the courts determined that the first taker took a fee, cut down to a fee tail which the New York statute turned into a fee. Kingsland v. Rapelye, 3 Eds. Chan. 1; Jackson v. Billinger, 18 Johns. 368, and the limitation over was void as being too remote.

The strict rule was often relaxed, however, where a contrary intent to creating the perpetuity was manifested from the context or qualifying words, and the limitation might be construed as an executory devise, without con-

templation of indefinite failure of issue.

Unless such qualifying words, however, were used, on the interpretation of wills made before the Revised Statutes, the words, "dying without issue," were construed as meaning an indefinite failure of issue.

The cases in this State are numerous, and support the strict English common-law rule above given. The leading ones are Patterson v. Elis, 11

Wend. 259; Miller v. Macomb, 26 id. 229; Van Vechten v. Pearson, 5 Paige, 512; Jackson v. Waldron, 13 Wend. 178; Wilkes v. Lyon, 2 N. Y. 333; Tator v. Tator, 4 Barb. 431; Wilson v. Wilson, 32 id. 328; Lott v. Wyckoff, 2 N. Y. 355.

A contrary intent would be inferred by the use of the words "living," or "leaving issue behind," or "without children," or to the "survivors of issue," or "brothers." Or if the devise over were of a life estate, or the estate were charged with payments to a person in being, or his executors, a definite failure of issue would be inferred as the intention of the testator.

As if the devise over were to a collateral, e. g., a brother of the first taker; or, if the devise over were on a failure of "legitimate heirs," construed as children. Anderson v. Jackson, 16 Johns. 382; Cutter v. Dougherty, 23 Wend. 513; Lovell v. Buloid, 3 Barb. Ch. 137; Ferris v. Gibson, 4 Edw. 707; Hill v. Hill, 4 Barb. 419; Wilson v. Wilson, 32 id. 328; Heard v. Horton, 1 Den. 165; Trustees, etc., v. Kellogg, 16 N. Y. 83; Weller v. Weller, 28 Barb. 588; Jackson v. Elmendorf, 3 Wend. 222; Prindle v. Beveridge, 7 Lans. 225, affd., 58 N. Y. 592.

Where there was a devise to two or more, and upon the death of either without issue, then to the survivors, the mention of survivors and the devise over to surviving devisees were sufficient to show that the testator intended a definite failure of issue, i. e., at the death of the first devisee. Fosdick v. Cornell, 1 Johns. 440; Jackson v. Staats, 11 id. 337; Anderson v. Jackson, 16 id. 382; Wilson v. Wilson, 32 Barb. 328; Cutter v. Dougherty, 23 Wend. 513. And see Fowler's Real Property Law (2d ed.), 217, 283, 284, 285.

Change by Revised Statutes as to the words "Dying Without Issue."—By the Revised Statutes it is declared that where a remainder in fee shall be limited upon any estate, which would be adjudged a fee tail, according to the law of the State, as it existed before the abolition of entails, i. e., July 12, 1782, the remainder shall be valid as a contingent limitation upon a fee, and shall vest in possession on the death of the first taker without issue living at the time of such death.

1 R. S. 722, § 4. Real Property Law, § 22.

It is further declared that when a remainder shall be limited to take effect on the death of any person without "heirs" or "heirs of his body" or without "issue," the words "heirs" or "issue" shall be construed to mean heirs or issue living at the death of the person named as ancestor.

1 R. S. 724, § 22; Real Property Law, § 38; Sherman v. Sherman, 3 Barb. 385; Matter of Moore, 152 N. Y. 602; Schlereth v. Schlereth, 173 id. 444.

The introduction of these words "without issue living at the time of

The introduction of these words "without issue living at the time of such death," removes the former obscurity, which, on this subject, was a fruitful source of litigation, and was the cause of legal controversy for many years.

This provision is applicable to wills made before the statute, where the testator died after it. Depeyster v. Clendennin, 8 Paige, 295, affd., 26 Wend. 23; Bishop v. Bishop, 4 Hill, 138; Sherman v. Sherman, 3 Barb. 385; Prindle

v. Beveridge, 7 Lans. 225, affd., 58 N. Y. 592.

Posthumous Children.—Posthumous children are also allowed to take in the same manner as if living at the death of their parents. and are considered included in the words "heirs, issue, or children."

And a future estate dependent upon a decease without issue, etc., may

be defeated by the birth of a posthumous child capable of taking by descent.

1 R. S. 725, § 30, 31. See now Real Property Law, § 46.

An unborn child, after conception, if it be subsequently born alive, and so far advanced toward maturity as to be capable of living, is considered as in esse from the time of its conception. Hone v. Van Schaick, 3 Barb. Ch.

As a necessary party to a real estate action, see "Foreclosure," Chap. XXVIII; "Partition," Chap. XXX, etc.

Freehold Estates in futuro and other Provisions by Statute.-The Revised Statutes further prescribe: "Subject to the rules established in the preceding sections of this article, a freehold estate as well as a chattel real, may be created to commence at a future day; an estate for life may be created, in a term of years. and a remainder limited thereon; a remainder of a freehold or chattel real, either contingent or vested, may be created expectant on the determination of a term of years; and a fee may be limited on a fee. upon a contingency, which, if it should occur, must happen within the period prescribed in this article."

1 R. S. 724, § 24.

Real Property Law, § 40.
At common law, owing to the necessity of an immediate livery of seizin, a freehold estate could not be created to commence in possession at a future day, unless as a remainder, and if an estate in remainder were limited in contingency, and amounted to a freehold, a vested freehold had to precede it, and pass at the same time out of the grantor.

Transfer of Expectant Estates.— Vide supra, p. 230.

Charitable Uses.— As to the law of trusts for charitable uses as affecting restrictions on the alienation of property. See Chap. X. Tit. VIII. infra.

Other Provisions affecting Expectant Estates.— Vide supra, Tit. I, and Chap. X, infra, on "Uses and Trusts."

Abolition of other Expectant Estates.—The Revised Statutes provide that all expectant estates, except those enumerated therein, and as above set forth, are abolished.

1 R. S. 726, § 42. See now Real Property Law, § 26.

The complicated law on the above subjects, in connection with the law of uses and trusts, which, based on the feudal relation, grew up with the development of the English nation into proportions ever extending as the requirements of the age demanded, which became a science so subtle and so profound as to occupy the lives and engross the intellects of the most cultured thinkers of the day, and which taxed all the learning and logical discrimination of a Mansfield, a Hale and a Hardwicke to expound and apply; this law has been, as is above seen, reduced by wise legislation into comparatively simple and express rules.

The Revision of 1830 cut away the complex forms and stubborn dogmas that had grown, through time, around the law of future estates, arising out of feudal rules, and the efforts at their evasion. and placed before the modern student such law modified, shaped and reduced into strong, plain features. This revision has been corrected and supplemented by the Real Property Law of 1896, which aimed to preserve the simple features of the Revision of 1830.

Apportionment and Sales of Real Estate for Taxes and Assessments where there are Future Estates .- By Law of May 26, 1841, Chap. 341, where there are several persons having estates in possession, reversion, or remainder, in any village or city in the State, and the land is sold, or liable to sale, for taxes or assessments, a suit may be instituted for an apportionment of moneys for their payment, or for redemption of the land, and the court may extend the time for redemption to six months after the judgment, or may order a

contingent owners, if unknown, need not be made parties to make title. Interests that have been unduly charged may be equalized by charges against other estates, and shall be a lien thereon. The act is not to affect contracts or covenants as to taxes, nor relative rights of persons as to their liability

for such payments.

Vide Laws of 1842, Chap. 154, and of 1854, Chap. 393, as to mode of

making sales, and testing the validity of the assessment.

By Laws of 1855, April 12, Chap. 327, the law was made applicable also to persons being presumptively entitled by virtue of any deed or will, on the death of any person in being, or on the happening of any contingency in the instrument expressed. Provisions are made as to the sale and redemption by unknown owners.

Two years arrears of taxes not sufficient ground for relief under Laws 1855, Chap. 327, amd. L. 1869, Chap. 859. Foran v. Foran, 15 N. Y. Supp. 51. By Law of May, 1869, Chap. 859, the law was made applicable to all

real estate in the State.

It is to be observed that before the Law of 1855, the judgment and sale only passed the rights of parties to the suit. This Law of 1855 has been held constitutional, and that possible or contingent interests, and those of persons not in being, could be cut off by a sale. The same principle applies as in partition suits, where future contingent interests of persons not in being are barred by the proceedings, as being virtually represented by those in whom the present estate is vested. Jackson v. Babcock, 16 N. Y. 246; Mead v. Mitchell, 17 N. Y. 210; Leggett v. Hunter, 19 id. 445; Norsworthy v. Bergh, 16 How. Pr. 315; Powers v. Barr, 24 Barb. 142.

Apportionment may also be made, as to a dowress and the other owners. Law of April 12, 1855, Chap. 327; Linden v. Graham, 34 Barb. 316; Garham

v. Dunigan, 2 Bos. 516; 6 Duer. 629.

The above cases it may be well to consult as to the practice in such actions, form of decree, etc. See also 2 How. App. Cases, 489.

These acts were repealed by The Tax Law; G. L., Chap. XXIV; Laws of

1896, Chap. 908, q. v.

Presumed Death of Life Tenant.—A person, upon whose life an estate in real property depends, who remains without the United States, or absents himself in the State, or elsewhere, for seven years together, is presumed to be dead, in an action or special proceeding concerning the property in which his death comes in question, unless it is affirmatively proved that he was alive within that time.

Code Civ. Proc., § 841; 19 Car. II, Chap. 6; 1 R. L. 103, § 1; 1 R. S. 749; 13 How. Pr. 120; 3 Abb. 224; McCartee v. Camel, 1 Barb. Ch. 455; Young v. Shulenberg, 165 N. Y. 385.

This provision relates only to a case where the right to the possession of real property depends upon the life of a third person and has no application to a person who is the owner of the property. Matter of the Board of Education of New York, 173 N. Y. 321.

Liabilities of Guardians and Others Holding Over.-A person in possession of real property, as guardian or trustee for an infant, or having an estate determinable upon one or more lives, who holds over and continues in possession after the determination of such particular estate, without the express consent of the person then immediately entitled, is a trespasser. An action may be maintained against him or his executor or administrator, by the person so entitled, or his executor or administrator, to recover the full value of the profits received during the wrongful occupation.

Code Civ. Proc., § 1664; 1 R. L. 167, § 7; 1 R. S. 749; Livingston v.

Tanner, 14 N. Y. 64; Torrey v. Torrey, id. 430; supra, p. 152.

Remedies of Reversioners and Remaindermen for Waste or Trespass .--A person seized of an estate in remainder or reversion may maintain an

action of waste or trespass for any injury done to the inheritance, notwith-standing any intervening estate for life or years.

Code Civ. Proc., §§ 1665; 1 R. L. 527, § 33; 1 R. S. 750; 29 Barb. 15; Livingston v. Haywood, 11 Johns. 429; Van Deusen v. Young, 29 N. Y. 1; Robinson v. Wheeler, 25 id. 252; 47 Barb. 309; Robinson v. Robinson, 70 N. Y. 147; Thompson v. Manhattan Ry. Co., 130 id. 360; vide supra, p. 151.

Ejectment.—As to the rights of reversioners and remaindermen to have ejectment after decease of the person holding the life estate, who has yielded up the estate or made default, vide infra, "Ejectment," Chap. XLI.

Recoveries in Real Actions as affecting Remaindermen and Reversioners .-As to recoveries by agreement of parties or by fraud affecting such persons, vide infra, "Ejectment," Chap. XLI.

Partition Suits as affecting Remainders .- Vide infra, "Partition," Chap. XXX.

Writs of Error by Reversioners and Remaindermen .- As to these, see 2 R. S. 591. (Now abolished, Code Civ. Proc., § 1293.)

Real Actions.- Rights of reversioners and remaindermen in, vide infra. Chap. XLI.

Private Statutes Divesting the Estate of Remaindermen.-As to the unconstitutionality of these, vide infra, Tit. VII.

TITLE VII. ESTATES IN REVERSION.

An estate in reversion is the residue of an estate left with the grantor or his heirs, to commence in possession after the determination of some particular estate granted by him. It arises not by deed or devise, but by operation of law, and is transferable as other estates. It is founded on the feudal principle that the fief reverts to the lord on the death of the feudatory and his heirs.

The Revised Statutes describe a reversion as "the residue of an estate left in the grantor or his heirs, or in the heirs of a testator, commencing in possession on the determination of a particular estate granted or devised."

1 R. S. 723. See now Real Prop. Law, § 29.

There can be no reversion upon a fee, whether the fee be absolute or conditional; and where a condition is annexed to the grant of a fee, the estate granted is not determined by a breach of the condition, but by entry, and therein it differs from a reversion, which takes effect immediately on the determination of the particular estate.

Vide supra, Chap. V, Tit. III and IV, "Estates on Condition;" Phomix v. Commissioners, etc., 12 How. Pr. 1. Fowler, Real Property Law (2d ed.), 160, 208.

Acts Divesting Title of Owners in Remainder or Reversion.-A private statute authorizing proceedings divesting such owners of their estates by sales through trustees is unconstitutional, they being not incapacitated by infancy or otherwise, and no necessity for legislation being apparent, none such will be presumed. And the existence of a necessity for legislative action will not be presumed when the facts which would create it are neither shown

will not be presumed when the facts which would create it are neither shown by proof nor recited in the statute.

Powers v. Bergen, 6 N. Y. 358: Leggett v. Hunter, 19 id. 446; Brevoort v. Grace, 53 id. 245. See also infra, Chap. XXV, "Infants' Estates."

Any title, therefore, through trustees, under such a statute, would be invalid. It is held, however, that the Legislature, in the exercise of its tutelary power over the persons and property of infants and others under disability, may provide by public or private acts for converting real estate, in which they have vested or contingent interests into personal property or securities, when necessary for their benefit, and may exercise this power as well in respect to the contingent interests of persons yet to be born as to the right of persons in esse. The Legislature has no power to authorize the sale of separate pieces of property in which separate families of infants or incompetents are severally interested, and the bringing of the avails thereof into a common fund. Ebling v. Dreyer, 79 Hun, 319. See above cases, and infra, Chap. X, "Trusts;" as to sales and mortgages by trustees, Chap. XXV, "Sales of Infants' Estates," and Chap. XVIII, "Sales by Order of Surrogates." rogates."

Apportionment of Taxes and Assessments and Sales of the Estates of Reversioners therefor.—As to this, vide supra, p. 252.

Sale on execution.—A reversionary interest, although it is uncertain, may be sold on execution.

Woodgate v. Fleet, 44 N. Y. 1.

CHAPTER X.

USES AND TRUSTS IN REALTY.

TITLE I .- USES AND TRUSTS BEFORE THE REVISED STATUTES.

II.— CHANGES BY STATUTES IN THIS STATE. III.— CREATION OF TRUSTS.

IV .- TRUSTS ALLOWED BY STATUTE. V .- IMPLIED AND RESULTING TRUSTS.

VI.— ASSIGNMENT AND TRANSFER OF TRUSTS. VII.— THE TRUSTEE.

VIII .- TRUSTS FOR CHARITABLE USES.

IX.— MISCELLANEOUS PROVISIONS AS TO TRUSTS.

TITLE I. USES AND TRUSTS BEFORE THE REVISED STATUTES.

A use is defined as existing where the legal estate of lands is in one person, in trust or confidence, that another shall enjoy the possession, take the profit, and direct their conveyance for his own benefit. While the formal legal title remains in the former, the beneficial interest is vested in the latter.

It is said that uses were originated by sacerdotal corporations to evade the statutes of mortmain, and were gradually established to mitigate the evils of the feudal system, and save lands from attainder, forfeiture, and other incidents.

Before the Statute of Uses hereafter adverted to, a use was a mere beneficial interest of an equitable nature, the feoffee or trustee being the real owner of the estate at law, and the cestui que use having only a beneficial enjoyment arising out of the confidence or trust.

The confidential obligation required no consideration to raise it, and would be enforced in equity; and if no use were declared, and the feoffee had taken without consideration, a use resulted to the feoffor. The Court of Chancery would not compel the execution of a use unless it had been raised for a good and valid consideration; and where one made a feoffment to another without any consideration, equity presumed that he meant it for the use of himself, unless he expressly declared it to be to the use of another; and the grantor in the former case became entitled to the use of the lands conveyed. If a valuable consideration appeared, equity raised a use correspondent to such consideration; and if, in such case, no use was expressly declared, the person to whom the legal estate was conveyed, and from whom the consideration moved, was entitled to the use.

Whenever the use limited by a deed expired or could not vest, the title reverted to him who raised it, unless on consideration paid, when it passed to him who paid it, if the conveyance was in fee. Vandervolgen v. Yates, 9 N. Y. 219, affg. 3 Barb. Ch. 242; Jackson v. Myers, 3 Johns. 388; Fisher v. Fields, 10 id. 494, 504.

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Uses were descendible, alienable and devisable, without words of limitation, and might be created *in futuro* without previous limitation, and might be shifted to vest in the alternative, or depend upon contingencies, or be made revocable and the use changed; and might be limited over upon the happening of future events to an indefinite extent.

Uses, being serviceable in evading the strict rules of the common law, and in facilitating transfers of property not allowed by it, became preverted to mischievous purposes, and led to the practice of abuses, and to the defrauding of creditors and purchasers, and the defeating of dower and curtesy; and to great confusion and obscurity of title.

The Statute of Uses.—An entire reform of the law was made by the Statute of 27 Henry VIII, Chap. 10, commonly called the Statute of Uses, which transferred the uses into possession, by turning the beneficial interest of the cestui que use into a legal estate, and declared that the legal estate should be annexed to the use. The object of the law was to destroy that double property in land, which had been introduced by the invention of uses. After the statute, as every deed capable of raising a use was, by force of the statute, rendered also capable of passing the legal estate, new forms of conveyance were introduced, by which the title and the possession of lands were transferred without livery of seizin, which, at common law, was indispensable to pass a freehold. These conveyances will be specially referred to in a subsequent chapter.

The Statute of Uses, however, did not in effect, as will be seen, change the qualities or properties of uses, although the beneficial interest was transferred into a direct legal estate in the land. It might still be subject to the conditions and limitations characteristic of uses, and future interests in land were created and upheld as contingent, springing, shifting, or secondary and resulting uses, to be limited under the restrictions adopted against perpetuities, the abstruse law on which subjects cannot be here pursued. The Revised Statutes, in allowing all conveyances of future as well as present interests in lands to be made by grant or assignment (I R. S., 726), as well as devise, and by abolishing uses except as specified, simplified the means of transfer of real estate, and rendered most of the common law on the subject of uses and trusts inoperative here, although cases may still arise under instruments made before the Revised Statutes, that may require special investigation

of this intricate subject. And these provisions of the Revised Statutes have been re-enacted in the Real Property Law (L. 1896, Chap. 547).

Under the construction given by the courts to the Statute of Uses, the object of the statute, which was to convert nominal uses into legal estates, was not carried out.

The construction of the statute, by the courts of equity, operated so as not altogether to destroy uses, but upheld them under another name. Although a use upon a use was void at law, the statute, it was held, executed the first use, and the courts of equity enforced the second use as a trust, under the plea that the second uses were uses to which the statute did not transfer the possession, but that they still continued distinct from the legal estate. Therefore, under a bargain and sale deed to A. in fee, to the use of B. in fee, the statute (through the bargain raising the use) passed the estate to A. by executing the use, and effectuated the use to B. as a trust to be enforced in equity, although void, nominally, as a use.

In the interpretation of the Statute of Uses by the courts, it was considered that it was not the intention of the statute to defeat and destroy the beneficial interest of the cestui que use, but only to change his mere equitable interest in the use of the property into a legal estate, in the property itself, of the same quality and duration as the equitable one. Where the beneficial use, therefore, could not take effect, as a legal estate, in the cestui que use, it was held to take effect as a trust (in the same manner as if the statute had not been passed), where it could take effect as a trust consistently with the rules of law.

Thus secondary uses were established as trusts; and a system of trusts was gradually formed as fiduciary estates distinct from the legal estates, and to be enforced in equity; and a trust became what a use was before the statute, and was said to be a use not executed by the statute. The cestui que trust was considered seized of the freehold in equity, and his interest was disposable, descendible, and devisable, as if a legal estate; and might be created subject to the same limitations; and curtesy, though not dower, was also allowed in trust estates. An assignment of the trust, if the intent was manifest, carried the fee without words of inheritance; and the cestui que trust might pass his interest without the technical forms required by the common law to pass the legal estate. The whole practical effect of the act, therefore, was to change, not the estate, but the trustee, by executing the first use,

but preserving the second. Thus, by a strict construction of the Statute of Uses, passive uses might still be created, by limiting a use upon a use, as the statute only executed the use in the first cestui que use, who was allowed to hold the estate for the benefit of the second.

Neither the letter nor policy of the statute, it was also held. prevented the creation of active trusts, that is legal estates, impressed with some duty in their control, management or disposition for the benefit of some person or class of persons other than the trustee.

Trusts of this kind gradually grew up and expanded to meet the wants and wishes of the community, according to the discretion of the author of the trust, and undefined by any statute or rule. Where the instrument did not, in terms, vest the legal title in the trustee, there was always a question whether the nature of the trust or duty declared, was such as to render the presence also of the legal estate necessary or convenient. If so, the title was deemed to vest in the trustee accordingly. If not, then the estate remained in the donor and his heirs, subject to the trust as a power. Powers were equally undefined as trusts. The intention as to the legal estate being unexpressed, powers began where trusts terminated; but to ascertain the dividing line between them was often attended with difficulty, and perplexing questions arose on the subject, and are still of frequent occurrence before the courts of the State. The distinction between trusts and powers, although sought to be defined by our statutes, and the limits of each expressed, is still a matter of considerable obscurity in the interpretation of instruments creating them.

A trust to pay the rents and profits to J. during life, and after her death to convey to such of her children as should survive her, contained in a deed

to convey to such of her children as should survive her, contained in a deed of bargain and sale made before the Revised Statutes, was not executed as a legal estate in the cestui que trust, by the law of uses then in force. By such a trust the children of J., during her life, took vested equitable estates in remainder, subject to be defeated, wholly by their dying before her; or, in part, by the coming in esse of after-born children of J. The Revised Statutes subsequently enacted did not turn these equitable estates into legal ones during the life of J. Wood v. Mather, 38 Barb. 473.

See Fowler's Real Property Law, (2d ed.), Introduction, 26 et seq., for an analysis of the development of the law; also Fowler's History of the law of Real Property, 140, 141

of Real Property, 140, 141,

TITLE II. CHANGES BY STATUTE IN THIS STATE.

The condition of the law in this State at the time of the revision of 1830, as to uses and trusts, was as above set forth.

The English statute of uses had been re-enacted in 1787 here; but no other change in our jurisprudence had been made on the

subject. That act, passed on February 20, 1787 (1 Web. 66; 1 R. L. 72), provides that the possession of lands shall follow the use, and transfers the possession, estate and seizin to the extent of the use, and cestuis que use are to have all the rights and remedies of owners. It also provided that all grants and conveyances, etc., made to the extent of the use of a person, should be valid against him to that extent.

This act was repealed by the general repealing Act of 1828, and the provisions of the Revised Statutes were then substituted.

By Chap. I, Tit. II, Art. 2, Part 2, §§ 45, 46, the Revised Statutes of 1830 declared that uses and trusts, except as authorized and modified in the "Article," are abolished; and every estate and interest in lands is declared to be a legal right, cognizable as such in the courts of law, except when otherwise provided in the chapter; and every estate held as a use executed under any former statute of this State is confirmed as a legal estate.

See now Real Property Law, Laws of 1896, Chap. 547, §§ 70, 71, re-enacting these provisions without material change.

Section 47 provides as follows: "Every person, who, by virtue of any grant, assignment or devise, now is, or hereafter shall be entitled to the actual possession of lands, and the receipt of the rents and profits thereof, in law or in equity, shall be deemed to have a legal estate therein, of the same quality and duration, and subject to the same conditions, as his beneficial interest."

1 R. S. 727, § 47; 1 R. L. 72.

This provision would apply as well to trusts created before the Revised Statutes as to those created thereafter. Bellinger v. Shafer, 2 Sandf. Ch. 293.

The word "assignment" was intended to include the transfer of chattel interests; it having been theretofore decided that the assignment of a term of years was not reached by the Statute of Uses.

This section was re-enacted without material change in the Real Property

Law, § 72.

See Hopkins v. Kent, 145 N. Y. 363; Ullman v. Cameron, 92 App. Div. 91.

Section 48 is as follows: "The last preceding section shall not divest the estate of any trustee, in any existing trust, where the title of such trustees is not merely nominal, but is connected with some power of actual disposition or management, in relation to the lands which are the subject of the trust."

1 R. S. 727, § 48. See now Real Property Law, § 72.

The Revised Statutes further provided as follows: "Every disposition of lands, whether by deed or devise, hereafter made, shall

be directly to the person in whom the right to the possession and profits, shall be intended to be invested, and not to any other, to the use of, or in trust for, such person; and if made to one or more persons, to the use of, or in trust for, another, no estate or interest, legal or equitable, shall vest in the trustee."

1 R. S. 728, § 49; 1 R. L. 72. Re-enacted without material change in the Real Property Law, § 73. An invalid trust becoming a passive trust, the title vests in beneficiary directly. Murray v. Miller, 178 N. Y. 316.

See Matter of Gawne, 82 App. Div. 374.

Held applicable to personalty. Matter of De Rycke, 99 App. Div. 596.

§ 50. The above sections are not, however, to apply to trusts arising or resulting by implication of law, nor to trusts thereafter allowed, in the above chapter, as to which vide infra. Title IV.

1 R. S. 728, § 50. See now Real Property Law, § 73. Also these sections which take away the nominal title and vest it in the

Also these sections which take away the nominal title and vest it in the beneficiary intended do not apply to a case where the grantee has himself a beneficial interest in the grant and is something more than a holder of a mere nominal title. King v. Townsend, 141 N. Y. 358, 364.

A trust in a deed to convey the premises to such person as the wife of grantor shall appoint, is held void; and where the trustee is not vested with the right to the possession, rents, or profits of the lands conveyed, for any purpose, either for himself or any other person, the deed or trust will be regarded as void. Hotchkiss v. Elting, 36 Barb. 38.

By the Revised Statutes, also, "Every express trust, valid, as such, in its creation, except as herein otherwise provided, shall yest the whole estate in the trustees, in law and in equity, subject only to the execution of the trust. The persons for whose benefit the trust is created, shall take no estate or interest in the lands, but may enforce the performance of the trust in equity."

1 R. S. 729, § 60.

This section was re-enacted in the Real Property Law in the following terms:

"Except as otherwise prescribed in this chapter, an express trust, valid as such in its creation, shall vest in the trustee the legal estate, subject only to the execution of the trust, and the beneficiary shall not take any legal estate or interest in the property, but may enforce the performance of the trust."

R. P. L. § 80.

The changes, it should be noted, give only the legal estate to the trustee, and provide that the beneficiary shall have "no legal estate" as distinguished from "no estate" of the Revised Statutes.

Butler v. Baudouine, 84 App. Div. 215. See also Kelley v. Hogan, 71 App. Div. 343; Lewisohn v. Henry, 179 N. Y. 352.

The person creating the trust, however, may dispose of the lands subject to the execution of the trust, and the grantee or devisee takes them subject to the execution of the trust.

1 R. S. 729, § 61; R. P. Law, § 81. Matter of Hitchins, 43 Misc. 485.

§ 62. "Where an express trust is created, every estate and interest not embraced in the trust and not otherwise disposed of, shall remain in, or revert to, the person creating the trusts, or his heirs as a legal estate."

1 R. S. 729, § 62. See now Real Property Law, § 82. For the trusts allowed by the Revised Statutes, vide Tit. IV. Where there is a valid trust for the sale of land, the party creating the trust and those holding derivative titles under him, have no rights, legal or equitable, until the purposes of the trust are satisfied. Their interests are subject to the execution of the trust absolutely; so that a subsequent grantee, from the creator of a trust to sell for the payment of debts, acquires no right of redemption. Briggs v. Davis, 21 N. Y. 574.

§ 67. "When the purposes for which an express trust shall have been created, shall have ceased, the estate of the trustees shall also cease."

1 R. S. 730, § 67. See now Real Property Law, § 89.

Sharman v. Jackson, 98 App. Div. 187.

This provision applies to cases arising before the Revised Statutes, as well as to those arising subsequently. Bellinger v. Shafer, 2 Sandf. Ch. 293.

L. 1875, Chap. 545, enacted that trusts for the benefit of creditors should cease and the property revert, after twenty-five years, unless some other limitation were provided. This is now § 90 of the Real Property Law.

In all cases of mere passive or naked trusts the Statutes have, therefore, by the above provisions, vested the legal estate in the person or persons entitled to the actual possession, and to the whole beneficial interest in the lands under the trust. They have turned the beneficial estate into a fee, where the trust is merely nominal, that is, where the trustee has a mere formal or naked title; and the operation of the 47th section, supra (now R. P. L., § 72), accomplished all that could have been effected by the most liberal interpretation of the "Statute of Uses."

Cushney v. Henry, 4 Paige, 345; Johnson v. Fleet, 14 Wend. 176; Frazer v. Western, 1 Barb. Ch. 220, affd., 3 Den. 611; Lang v. Ropke, 5 Sandf. 363; Verdin v. Slocum, 71 N. Y. 345.

A devise or conveyance of land, therefore, to trustees for another, but without limitation, or directing them to execute and deliver to another a conveyance for the uses and purposes, and with the restrictions set forth in a will, creates no valid trust in such trustees, and gives them no title or estate, but vests immediately and absolutely in the third person the land transferred. So, also, a devise to trustees to convey the legal estate to

those who should be entitled in remainder, is a void direction; and if that alone remains for them to do under a trust, their office as trustees ceases. Knight v. Weatherwax, 7 Paige, 182; Bogart v. Perry, 17 Johns. 351; Fellows v. Emperor, 13 Barb. 92; Adams v. Perry, 43 N. Y. 487; In re Livingston, 34 N. Y. 555; In re Craig, 1 Barb. 33; Rawson v. Lampman, 5 N. Y. 456; La Grange v. L'Amoureux, 1 Barb. Ch. 18; McComb v. Title G. & T. Co., 36 Misc. 370; Tuck v. Knapp, 42 Misc. 140.

A direction to hold and control property, and then to pay over, creates no estate in the trustee. Burk v. Valentine, 52 Barb. 412.

In the case of Adams v. Perry, 43 N. Y. 487, a devise of land to trustees to execute and deliver a deed to a corporation, for the uses and purposes in the will, was held to create no valid estate in such trustees, and to give them no title; but vested immediately in the corporation the land devised. This case also holds, that a bequest to trustees of personal estate, to those who should be entitled in remainder, is a void direction; and if that

This case also holds, that a bequest to trustees of personal estate, to vest and reinvest, and pay the income to an incorporated academy forever, is void under the statute of perpetuities. The statute, however, is held to have applied not to implied or constructive trusts, but to formal trusts; and would vest the legal title in the cestui que trust last named.

A devise to testator's wife, in trust for his children who should be under age at his death, was held void as to realty, though good as to personalty. Haggarty v. Haggarty, 9 Hun, 175.

If a valid trust were devised to the trustee for a particular purpose, the legal estate would be vested in him as long as the execution of the trust required it. It would thereafter, under the above provisions, vest in the person beneficially entitled to it.

Nicoll v. Walworth, 4 Den. 385; McCosker v. Brady, 1 Barb. Ch. 329, affd., 1 N. Y. 214; Sherman v. Jackson, 98 App. Div. 187. See further as to the estate of the trustees, pp. 268, 273, infra.

Trusts Executory or Executed.—A trust is executory when it is to be perfected at a future period by a conveyance or settlement, as in the case of a conveyance to B., in trust to convey to C.

It is executed, either when the legal estate passes, as in a conveyance to B. in trust, or for the use of C., or where only the equitable title passes, as in the case of a conveyance to B. to the use of C., in trust for D.

Active trusts.—Active or express trusts are those where the trustee is clothed with some actual power of disposition or management, which cannot be properly exercised without his having the legal estate and actual possession. If the trusts are not passive but active, and not, in the language of the statute (1 R. S. 727, § 48; R. P. L., § 72), supra, "merely nominal," but are connected with a power of management, they do not fall within the provisions of § 47 of the Revised Statutes (I R. S. 727, § 47; R. P. L., § 72), supra, and are not consequently prohibited by it. In such cases the estate, either by express words or by implication of law, vests in the trustee, and the cestuis que trustent have merely the beneficial estate and interest therein. If the trust, however, by its provisions, ceases to be active, it becomes executed by virtue of the statute, and the legal estate vests in the beneficiary.

1 R. S. 730, § 67; R. P. L. § 89.

McCosger v. Brady, 1 Barb. Ch. 329, affd., 1 N. Y. 214; Johnson v. Fleet,
14 Wend. 176; Nicoll v. Walworth, 4 Den. 385; Welch v. Allen, 21 Wend.
147; Welch v. Silliman, 2 Hill, 491; Brewster v. Striker, 2 N. Y. 19; Wood
v. Burnham, 6 Paige, 513; Wagstaff v. Lowerre, 23 Barb. 209; Heermans v.
Burt, 78 N. Y. 209; Sharman v. Jackson, 98 App. Div. 187.

The legal title to land conveyed to trustees of a religious corporation
for the purposes of the corporation is in the corporation itself. Van Deuzen
v. Trustees etc. 4 Abb. App. Cas. 465

v. Trustees, etc., 4 Abb. App. Cas. 465.

TITLE III. CREATION OF TRUSTS.

Three things are said to be necessary to the creation of a valid trust; first, sufficient words to raise it; secondly, a definite subject; and thirdly, a certain or ascertained object. The trust must appear in writing, with absolute certainty as to its nature, and the terms and conditions of it; and the instrument creating the trust must be certain in itself, or capable of being made so by reference to something else, whereby the terms can be ascertained with reasonable precision. No special instrument or technical form of words is requisite to create or declare a trust, if the intention be clear; and it may be gathered from different instruments.

Fisher v. Fields, 10 Johns. 495; Story's Eq., § 964; The Farmers, etc., Co. v. Carrol, 5 Barb. 613; Gomez v. Tradesmen's Bank, 5 Sandf. 102.

A statutory trust may be created by any words so that the purpose be clearly within the statute. Vernon v. Vernon, 53 N. Y. 351; Donovan v. Van De Mark, 78 id. 244; Morse v. Morse, 85 id. 53; Ward v. Ward, 105

The English Statute of Frauds (29 Car. II, Chap. 3) required a trust to be manifested in writing, and it could only be so created or transferred

under the signature of the party creating or transferring it.

A trust before the Revised Statutes need not have been created in writing, but it had to be manifested and proved by writing; and the nature of the trust, and its terms and conditions, had to sufficiently appear under the hand of the party creating it.

Steere v. Steere, 5 John. Ch. 1; Wheelan v. Wheelan, 3 Cow. 538; Throop v. Hatch, 3 Abb. 23, overruled, 117 N. Y. 131.

For a comprehensive statement of the growth of the law on this point,

see Fowler's Real Property Law (2d ed.), 650.

The Revised Statutes declared that "No estate or interest in lands, other than leases for a term not exceeding one year, nor any trust or power, over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent, thereunto

authorized by writing." The section was not to apply to wills or implied or resulting trusts (nor to declarations of trusts proved by any writing subscribed by any party declaring the same); nor to prevent, after a fine is levied, the execution of a deed or other instrument in writing, declaring the uses of such fine.

2 R. S., 134, §§ 6 and 7, as amended by Laws of 1860, Chap. 322. The amendment was the addition of the words in parenthesis.

These provisions, with the clause as to fines left out (all alienations by fine being void, Const. Art. I, § 14), are now embodied in the Real Property Law, § 207.

Ward v. Hasbrouck, 169 N. Y. 407; Pattat v. Pattat, 93 App. Div. 102; Hill v. Warsawski, 93 App. Div. 198; Jewett v. Griesheimer, 100 App.

Div. 210.

The prohibition of parol trusts cannot be invoked to protect clear fraud. Hall v. Erwin, 66 N. Y. 649.

So held in the case of a conveyance to a pastor by an aged and illiterate woman. McClellan v. Grant, 83 App. Div. 599.

In this State, although the trust must be created by writing, subscribed by the party creating it, the trust itself may be gathered from the instrument, even if it be a mere recital therein. If, therefore, a conveyance be received to the use of another, so that it appears that the cestui que trust is entitled to the actual possession of the lands, and the receipt of the rents and profits, its effect, under our statute, would be to vest the estate at law in the cestui; and it is not necessary that the trust clause should be expressed on the face of the conveyance, to bring the case within the statute.

Under 2 R. S. 135, § 7, as amended by L. 1860, Chap. 322 (now R. P. Law, § 207), providing that a declaration of trust in real property may be proved by any writing subscribed by the party declaring same, it is not necessary to produce a deed or formal writing in order to prove such a trust, but letters or informal memoranda, signed by the party, are sufficient if they show the nature, character and extent of the trust interest. Hutchins v. Van Vechten, 140 N. Y. 115. See also Gavin v. De Miranda, 76 Hun, 414; 79 id. 286; id. 329.

Neither is it necessary that specific directions in regard to the execution of the trust and the disposition of the trust property be given in the instrument creating the trust; and if an intention to create a definite trust can be fairly collected upon the face of the instrument it will be enforced. If, however, neither the object nor the beneficiary of the trust appear, the trust cannot be sustained.

Story Eq. Jur. 980; Bellasis v. Crampton, 2 Vern. 294; Throop v. Hatch, 3 Abb. 23, overruled, 117 N. Y. 131; Wright v. Douglass, 7 N. Y. 564, revg. 10 Barb. 97; Corse v. Legget, 25 id. 389; Dillaye v. Greenough, 45 N. Y. 438; Schell v. Merklee, 75 Hun, 74; Tilden v. Green, 130 N. Y. 29; Butler v. Green, 65 Hun, 99.

An indifferently worded trust or life estate held to create a fee. Thomson

v. Hill, 87 Hun, 111.

But the instrument or agreement by which the trust is sought to be created should show an intention to create a trust, and a beneficiary that is named or can be ascertained.

The absence of a definite beneficiary is, as a rule, a fatal objection to any attempt to create a valid trust. Wilcox v. Gilchrist, 85 Hun, 1.

Delivery of the trust instrument essential. Gavin v. De Miranda, 76 Hun,

See Laws 1893, Chap. 701, as to trusts not being invalid by reason of indefiniteness of beneficiary. See also R. P. Law, § 93. Also Dammert v. Osborn, 140 N. Y. 30; 141 id. 564; and also Tit. VIII, infra, as to charitable

A Trustee necessary.— It is also necessary to the lawful creation of a trust, or a power in trust, that the authority to perform the required act should be rightfully delegated to the trustee by the person having authority to dispose of the estate, or some interest therein, in the manner directed by the trust or power. The object or purpose of the trust also must be declared, in some manner, to some person that can legally execute it.

Selden v. Vermilyea, 3 N. Y. 425; Moore v. Moore, 47 Barb. 257.

A trustee, however, is not absolutely necessary to the validity of a trust, for a use being well declared the law will find a trustee wherever it finds the legal estate. Levy v. Levy, 33 N. Y. 97, and cases cited; and see infra, Tit. VII.

A Beneficiary Necessary.—To raise a trust, at common law, there must also be a definite grantee, devisee or donee, capable of coming into court and claiming the benefit of the grant, devise, or bequest.

A designated beneficiary is necessary to a valid trust. So where power A designated beneficiary is necessary to a valid trust. So where power is given to trustee to select a beneficiary the class of persons in whose favor the power may be exercised must be designated by the creator with such certainty that the court can ascertain who were the objects of the power. Powers v. Cassidy, 79 N. Y. 602; Tilden v Green, 130 id. 29.

A trust to an executor, however, to dispose of the property among "the charitable and benevolent institutions in the City of Rochester, as he shall choose and such sums and proportions as he shall deem proper;" held void for

failure to describe a class that could with reasonable certainty be identified and ascertained. People v. Powers, 147 N. Y. 104, revsg. 83 Hun, 104 (dis-

tinguishing Powers v. Cassidy, supra, as describing a definite class). See Fairchild v. Edson, 77 Hun, 298; Simmons v. Burrell, 8 Misc. 388. See also Holland v. Alcock, 108 N. Y. 312, as to trusts for "pious uses." Held invalid as there was no beneficiary in existence who could demand the

compare, however, Laws of 1893, Chap. 701, supra, and R. Prop. Law, § 93 (to the same effect, the Statute of 1893 not having been repealed), which provide that indefiniteness or uncertainty of persons designated as beneficiaries shall not invalidate a gift, grant, bequest or devise to religious, seducational, charitable or benevolent uses.

See also L. 1901, Chap. 291; Allen v. Stevens, 161 N. Y. 122; Kelly v. Hoey, 35 App. Div. 273; Hull v. Pearson, 36 App. Div. 224.

These statutes revived the common law doctrine of cy pres in connection

with charitable uses and re-established the charitable uses of the common law.

See Fowler's Real Property Law (2d ed.), 449-451; 2 Columbia Law Review, 10. These statutes are not retroactive, however. Murray v. Miller, 178 N. Y. 316.

At common law, where the trust is for an uncertain object, the property which is the subject of the trust is deemed to be undisposed of, and goes to those to whom the law gives the ownership, in default of disposition by the former owner.

Where the instrument creating the trust does not disclose the beneficiary, or give the means of definitely ascertaining him, it does not necessarily result that the creator of the trust is such beneficiary; and if the instrument is silent as to the persons to be beneficially interested in the trust, no trust whatever is created that the courts could execute. But any designation whereby they can be identified will be sufficient.

Dillaye v. Greenough, 45 N. Y. 438; Williams v. Williams, 8 id. 525; Levy v. Levy, 33 id. 97; Follett v. Badeau, 26 Hun, 253; Holmes v. Mead, 52 N. Y. 332; Gross v. Moore, 68 Hun, 412, affd., 141 N. Y. 559.

A bequest to executors for stated purposes, which cannot be carried out, is an attempt to create a trust, and cannot be sustained as an absolute bequest to the executors. *In re* Ingersoll's Will, 131 N. Y. 573; Schell v. Merklee, 75 Hun, 74.

Trust to receive rents and profits and apply as executors think best among heirs and charities held void for indefiniteness. Butler v. Green, 65 Hun, 99; Read et al. v. Williams, 125 N. Y. 560.

See also this subject of indefiniteness of beneficiary and of object of trust, *infra*, Tit. VIII, this chapter.

Precatory Words.—It is frequently a matter of discussion whether precatory words in a devise create a trust or are mere requests; and, as such, the performance of them optional with the donee.

The words "desire," "request," "entreat," "confidence," "hoping," "recommending," are sometimes to be construed as imperative words, and at other times not.

The following principles have been laid down as to the construction of precatory words. They are held to create a trust when —

- r. They exclude all option in the party who is to act;
- 2. The subject is certain;
- 3. The objects are not too vague and indefinite.

The words "in the fullest confidence" are held imperative and to create a trust.

Briggs v. Penny, 8 Eng. L. & Eq. 231; Lawless v. Shaw, Lloyd & Goold. Russ, 143; and cases cited in Taylor on Wills, 296; Story's Eq., § 1068; Tiffany & Bullard on Trusts, Chap. IV; Field v. Mayor, etc., 38 Hun, 590; In re Foley's Will, 10 N. Y. Supp. 12.

Precatory words, implying a wish, but expressly excluding any direction, held not to constitute a trust. In re Kelemon's Will, 57 Hun, 165, affd.,

Words "desire" or "request," when held to create a trust. Riker v. Leo,

115 N. Y. 93, 98,

That not every wish, entreaty or desire of a donor or testator will create a trust, see Birdsall v. Grant, 37 App. Div. 348; U. S. v. Loughrey, 172 U. S. 206, 221.

Parol Evidence.— Where there has been mistake or fraud parol evidence may be given to establish a trust, although a conveyance may be absolute; but the evidence must be clear and positive and define the trusts; and except in cases of mistake or fraud, no trust in land can be established in this way.

Harrison v. McMennomy, 2 Edw. 251; St. John v. Benedict, 6 Johns. Ch. 111; Rathbun v. Rathbun, 6 Barb. 98; Bitter v. Jones, 28 Hun, 492; Cook v. Barr, 44 N. Y. 156; Sturtevant v. Sturtevant, 20 id. 39; Wood v. Rabe, 96 id. 414; McCahill v. McCahill, 71 Hun, 221; Hall v. Erwin, 66 N. Y. 649; McClellan v. Grant, 83 App. Div. 599; Canda v. Totten, 157 N. Y. 281; Ahrens v. Jones, 169 id. 555.

See Real Prop. Law, § 234 (formerly 2 R. S. 135, § 10), and supra.

The law under this head comes under the special cognizance of courts of

Where No Mistake or Fraud.—The reported cases where it has been attempted to establish a trust by parol evidence are numerous, but the decisions are uniform that the Statute of Frauds cannot thus be set aside. Cook v. Barr, 44 N. Y. 156; Levy v. Brush, 45 id. 589; Wheeler v. Reynolds, 66 id. 227; Hutchins v. Hutchins, 98 id. 56; Hurst v. Harper, 14 Hun, 280; Hubbard v. Sharp, 11 N. Y. St. Rep. 802; Bauman v. Holzhausen, 26 Hun, 505; Gould v. Gould, 51 id. 9; Hutchinson v. Hutchinson, 84 id. 482.

Breach of an oral agreement to convey an interest in land is not fraudulent, or a trust arising by operation of law. Wood v. Rabe, 96 N. Y. 414; Hutchinson v. Hutchinson, 84 Hun, 482; Allen v. Arkenburgh, 2 App. Div. 452, 454.

Implied and Resulting Trusts are exceptions, vide infra, p. 281.

But a trust cannot be engrafted on a deed absolute on its face, by parol evidence, through a direction given after its execution. Any trust, to be established by parol, must be with reference to facts or acts simultaneous with the deed, and a part of the same transaction.

The acts constituting part performance, which will estop a party from insisting on the Statute of Frauds, which requires all trusts to be in writing, must be so clear, certain and definite in their object and design, as to refer exclusively to a complete and perfect agreement of which they are a part execution.

The grantor of a deed containing covenants of warranty would be estopped from claiming a resulting trust in the premises conveyed,

for his own benefit. So also where there is express declaration that a deed was made for the use of the grantee, for good and valuable consideration, there can be no resulting trust to the grantor. Rathbun v. Rathbun, 6 Barb. 98.

See further, as to parol evidence to create a trust, Tit. V, infra, "Implied and Resulting Trusts."

Secret Trust.— The Revised Statutes also provide: "Where an express trust is created, but is not contained or declared in the conveyance to the trustees, such conveyance shall be deemed absolute, as against the subsequent creditors of the trustees, not having notice of the trust, and as against purchasers from such trustees, without notice, and for a valuable consideration."

1 R. S. 730, § 64; Real Property Law, § 84; Kirsch v. Tosier, 143 N. Y. 390. But such a trust may be valid, in se. Van Cott v. Prentice, 35 Hun, 317, affd., 104 N. Y. 45.

Duration of the Trust Estate.— A trustee, or cestui que trust, would, before the Revised Statutes, take a fee without the word "heirs," when a less estate would not satisfy the object of the trust.

The general rule is that a trust estate is not to continue beyond the period required by the purposes of the trust; and notwithstanding a devise to trustees and their heirs, they would take only a chattel interest, where the trust does not require an estate of higher quality; and the language used in creating the estate will be limited to the purpose of its creation.

Selden v. Vermilyea, 3 N. Y. 525; 4 Kent, 233; Doe v. Considine, 6 Wall. 458; Fisher v. Fisher, 10 Johns. 505; Wright v. Miller, 8 N. Y. 9. See also infra, p. 281 seq.

Since the Revised Statutes, as seen above, p. 261, it has been the law that where the purposes for which an express trust shall have been created shall have ceased, the estate of the trustees shall also cease.

As a general rule, where trustees are given power to take charge of and manage lands and pay over rents, a fee will be held conferred by implication; also, generally, where it is necessary to carry out the intent of the creator of the trust, but only when so necessary. And in the case of express trusts, the whole estate is vested in the trustees, subject to the trust; the beneficiaries are to have no other estate than the right to enforce the trust.

1 R. S. 729, § 60; R. P. L., § 80. See also Tit. IV, infra.
Leggett v. Perkins, 2 N. Y. 297; Manice v. Manice, 43 id. 303; Vail v. Vail, 7 Barb. 226; 10 id. 69; Burke v. Valentine, 52 id. 412; Donovan v. Van De Mark. 78 N. Y. 244; Lewisohn v. Henry, 179 id. 352. And see infra, as to the nature of the estate given, Tit. IV.

Trust Created Without Knowledge of the Party.—A trust created for a person without his knowledge may be enforced by him; the acceptance of the trust by the trustee creating a privity in law, provided, by the agreement, the party creating the trust transfer his entire interest in the property, and transfer it for the entire benefit of the other.

Weston v. Barker, 12 Johns. 276; Hosford v. Merwin, 5 Barb. 51; Seaman v. Whitney, 24 Wend. 260; Martin v. Funk, 75 N. Y. 134, 141; Maloney v. Tilton, 22 Misc. 682. Vide infra, Tit. V, "Resulting and Implied Trusts." Murdock v. Aikin, 29 Barb. 59.

Declaration of trust by person in possession of property constitutes him thenceforward, trustee of the same, if founded on a valuable or meritorious consideration. Neilly v. Neilly, 23 Hun, 651.

Trust as to Realty in Another State.— Whether a trust created by a will, as to realty situated in another State, is valid or not, can only be determined by the courts of that State.

As to the effect of the lex loci upon realty, see fully, supra, Chap. IV; and particularly as to trusts. Knox v. Jones, 47 N. Y. 389. This case also holds that, although real and personal property be given by the same clause in a will, and upon the same trust, they are severable; and the validity of one will not depend upon that of the other. Therefore, if the testator were domiciled in this State at the time of his decease, the validity of the bequests might be determined by the laws of this State, while the decises might be would be determined by the laws of this State, while the devises might be determined by those of another.

See also Chap. XV, "Title by Devise," on this subject.

TITLE IV. TRUSTS ALLOWED BY THE STATUTES.

The revision of the statutes of this State in 1830 made important changes in the law of trusts, and enunciated the law applicable to them in a precise and definite code. These provisions of the revision of 1830 were retained, with minor changes, in the Real Property Law of 1806.

Reference is made below to the sections of the statutes by their original numbers, as contained in Part II, Chap. I, Tit. II, Art. II, of the Revised Statutes, and to the corresponding sections of the Real Property Law. L. 1896, Chap. 547.

It has been seen above (supra, Tit. I), how, under the provisions of those statutes, beneficial interests through passive trusts in land. have been converted into legal estates, and passive or nominal trusts abolished. It now remains to be seen what trusts are recognized by the statutes as valid.

"Uses and trusts, except as authorized and modified in this article, are abolished; and every estate and interest in lands, shall be deemed a legal right, cognizable as such in the courts of law, except when otherwise provided in this chapter."

1 R. S. 727, § 45; R. P. Law, § 71.

- "Express trusts may be created, for any or either of the following purposes:
 - " 1. To sell lands for the benefit of creditors.
- "2. To sell, mortgage or lease lands, for the benefit of legatees, or for the purpose of satisfying any charge thereon."

1 R. S. 728, § 55.

In the Real Property Law these provisions read:

"An express trust may be created for one or more of the following purposes:

- 1. To sell real property for the benefit of creditors;
- 2. To sell, mortgage or lease real property for the benefit of annuitants or other legatees, or for the purpose of satisfying any charge thereon."

Real Property Law, § 76.

(The other two subdivisions of this section are considered infra.)

A trust to sell lands to pay debts ceases when the debts are, in any mode, paid or discharged or outlawed, and the whole legal and equitable title becomes vested in the person entitled to the reversion, or his assignees. Selden v. Vermilyea, 3 N. Y. 525; Kip v. Hirsch, 18 Abb. N. C. 167; s. c., 103 N. Y. 565. See *infra*, Law of 1875, as to assignments to creditors. The purpose must fall in with the intent of the statute and is not to be

used to hinder creditors. Howell v. Donegan, 74 Hun, 410.

A trust to sell at a fixed date and pay legacies, held valid. Dugan v. Wade, 75 Hun, 39.

Trust to pay legacies and reduce mortgages, though limited on lives, when

held invalid. Cowen v. Rinaldo, 82 Hun, 479. To establish a valid trust under the first or second subdivision there must be an absolute and imperative direction to the executor to sell the real estate.

be an absolute and imperative direction to the executor to sell the real estate. Palmer v. Marshall, 81 Hun, 15.

Where the trustees are not also empowered to receive the rents and profits, no estate vests in them. Boynton v. Hoyt, 1 Den. 53.

For case where the trustees were held so empowered, see Robinson v. Adams, 81 App. Div. 20; also Potter v. Hodgeman, 81 App. Div. 233; Higgins v. Downs, 101 App. Div. 119; Brag v. O'Rourke, 89 App. Div. 400.

The statute does not apply to an executory contract for the sale of land. Hazewell v. Coursen, 36 Super. 459.

The trust provided for by the subdivision of the statute authorizing the creation of a trust to sell, mortgage or lease lands for the benefit of legatees, or for the purpose of satisfying any charge thereon, is a provision for aliena-

or for the purpose of satisfying any charge thereon, is a provision for alienation and not for the suspension of the power of alienation. Such a trust is a trust to sell land, or some interest in it, and the land descends subject to the execution of the trust, but no power is given by the statute to collect the rents. Id. Cowen v. Rindaldo, 82 Hun, 479.

If a trust is created for the payment of debts, and the assignees reconvey the real estate to the assignor before the debts are paid, such reconveyance is

void as to all creditors whose debts are not paid; and a recital that all debts are paid, in the conveyance, will not avail, even as to mortgagees without notice. Briggs v. Palmer, 20 Barb. 392.

A trust to receive rents, etc., and apply them to the payment of debts, may

be satisfied by a sale of the lands for a term of years, taking the whole rent

in advance, and discharging the debts, and such a sale is not contrary to the

statute. Rogers v. Tilley, 20 Barb. 639.

A power to sell lands and distribute the proceeds among those to whom the lands are devised, is not one of the purposes for which an express trust may be created. The sale, in that event, is for the benefit of devisees, not legatees. Lang v. Ropke, 5 Sandf. 363.

See also Lewisohn v. Henry, 179 N. Y. 352, 360; Russell v. Hilton, 80 App. Div. 178, affd., 175 N. Y. 525.

See further, as to the construction of the above subdivision 1, Chap XXXI, infra, "Insolvent Assignments."

3. "To receive the rents and profits of lands, and apply them to the education and support, or either, of any person, during the life of such person, or for any shorter term, subject to the rules prescribed in the first article of this title."

1 R. S. 728, § 55.

The words above, "education and support or either" were changed to "use" by law of April 20, 1830, Chap. 320, 384.

In the Real Property Law this subdivision reads:

3. "To receive the rents and profits of real property, and apply them to the use of any person, during the life of that person, or for any shorter term, subject to the provisions of law relating thereto."

Real Property Law, § 76.

A trust to apply rents to the use of a man's "family" would be valid.

Rogers v. Tilley, 20 Barb. 639.

A trust not authorizing the trustee to take possession or receive the profits, and not imposing any active duty on him, is void. Jarvis v. Babcock, 5 Barb.

Same as to a trust to convey. Cook v. Platt, 98 N. Y. 35.

Under this head an express trust may be created to receive rents and pay annuities. Mason v. Jones, 2 Barb. 229; Kane v. Gott, 24 Wend. 641; Cockrane v. Schell, 140 N. Y. 516.

A trust to receive rents and pay certain annuities for a prescribed term to two annuitants, if they should so long live, is a valid trust. McCosker v. Brady, 1 Barb. Ch. 329, affd., 1 N. Y. 214.

A trust to manage and dispose of land and pay over the income thereof to a person for his support and maintenance, would be valid, within the above provision. Campbell v. Low, 9 Barb. 585. But see Heermans v. Robertson,

Where the trustee is also the beneficiary, held, that he had a legal estate

for life. Rose v. Hatch, 125 N. Y. 427.

An attempt to give the beneficiary absolute control over the trust fund would render the trust void and cause the title to the whole propery to vest in the beneficiary instead of in the trustee. Ullman v. Cameron, 92 App. Div. 91.

A direction to hold and control property, and then to pay over, creates no estate in the trustees. Burke v. Valentine, 52 Barb. 412.

For a case where provisions were held insufficient to create a valid trust to receive and apply the rents and profits, see Kelley v. Hogan, 71 App. Div.

When trustees are given power to take charge of, manage and improve lands, and pay over the rents, a fee will be held conferred by implication, also generally, where it is necessary to carry out the intent of a testator, but not further than is necessary to carry out that intent. Leggett v. Perkins, 2 N. Y. 297; Manice v. Manice, 43 id. 303; Vail v. Vail, 7 Barb. 226; 10 id. 69. See also Burke v. Valentine, 53 id. 412; and "The Estate of the Trustees," infra.

A trust to apply rents during the lives of two persons, not the beneficiaries in the trust, held valid. Bailey v. Bailey, 97 N. Y. 460.

A devise to apply rents and profits to beneficiaries for a term of years, the lands then to be sold, would be void, as unduly suspending alienation. Beekman v. Bonsor, 23 N. Y. 298. So held as to a period of fifty years. Walter v.

Walter, Misc. August, 1908.

A devise to executors to apply moneys of an estate to the support of a family until the widow's decease or to a certain day, and thereafter that the executors should apply them to the support of testator's family, would be a valid trust until the appointed day, if the widow live so long. The further provision over would be void as tying up the estate beyond two lives in being. DeKay v. Irving, 5 Den. 646.

And see fully as to trusts under the above subdivision unduly suspending

Altuse to the state that a second and a second a

See a special alternative trust sustained. Roberts v. Carey, 84 Hun, 328. The rents, ctc., may be directed to be "paid over" instead of "applied." Such a trust is held an active trust. Kane v. Gott, 7 Paige, 524, affd., 24 Wend. 641; Leggett v. Perkins, 2 N. Y. 297; McKinlay v. Van Dusen, 76 App. Div. 200.

A trust created by a husband for the support and maintenance of his wife

is a valid trust. Calkins v. Long, 22 Barb. 97.

The case of Coster v. Lorillard, in the court of errors (14 Wend. 265), holds that a devise to A. and twelve nephews in trust, to pay over and divide profits among the twelve nephews during their natural lives, and to the sur-

vivors, is a void trust.

This case was decided on the principle that as the estate was inalienable, either by the trustees or the cestuis during the twelve lives, the trust was executed by the grantee of the trust was also invalid as a power in trust, as it was to be executed by the grantee of the trust for his own benefit. See *infra*, "Powers," Chap. XII. Some of the court were of opinion that the trust was void, as it directed a "paying over" instead of an "application" of the proceeds according to the strict words of the statute.

A devise to executors to sell or mortgage without power to collect the rents

and profits is not a trust estate, but a power only. Vide infra.

In considering the above subdivision the provisions of the Revised Statutes against perpetuities will have to be applied, vide supra, Chap. IX, Tit. IV.

And see, as to the estate of the trustees, infra, and supra, p. 268.

Where land was conveyed to A. in trust for others, with power to sell, etc., habendum "to the party of the second part, their heirs, etc.," it was held no trust, but a power. Syracuse Sav. Bk. v. Porter, 36 Hun, 168; Butler v. Boudouine, 84 App. Div. 215; Ullman v. Cameron, 92 App. Div. 91.

Another class of trusts allowed by the Revised Statutes is as follows:

4th. "To receive the rents and profits of lands and to accumulate the same for the purposes and within the limits prescribed in the first article of this title."

As to the validity of accumulations under this subdivision, vide supra, Chap. IX, Tit. V.

Duration.—In all the above cases, the legal estate is vested in the trustee, but no longer than the purposes of the trust require; then it reverts or vests as provided.

1 R. S. 729, 730, §§ 60, 62, 67. Real Prop. Law, §§ 80, 82, 89.

Where by ante-nuptial agreement all the husband's property was to go to his wife in default of issue, upon his death, intestate without issue, his heirs took a naked trust to convey to her upon demand. Johnston v. Spicer, 107 N. Y. 185.

To the same effect, see Sharman v. Jackson, 98 App. Div. 187.

Where the trust instrument provides that at the death of the life beneficiary the trustees shall convey the property to a person designated, or to one to be appointed, it is held that the trust does not continue until such conveyance be made, but that the death itself operates not only to terminate the trust, but to vest the title to the real estate at once, a formal conveyance by the trustees being wholly unnecessary. Watkins v. Reynolds, 123 N. Y. 211; Gomez v. Gomez, 81 Hun, 569; Roberts v. Cary, 84 id. 328.

Trusts must be Active.— To render a trust as to the rents and profits of real estate valid, under the above subdivisions, it is not only necessary that the trustee should be authorized to receive the rents and profits, but that he should be also empowered to apply the same, and a power to receive will be implied from a power to apply.

Vernon v. Vernon, 53 N. Y. 351.

Trusts also in a deed, permitting the grantors or others to remain in possession and receive rents, etc., of real estate, are void, if the trustees are not authorized to *receive* the rents and profits, notwithstanding they might be required to take care that the rents and profits are properly applied. The right to receive the rents and profits may be sometimes implied, *vide supra*, subdivision 3.

These rules are based upon the principle that as the trust imposes no active duty on the trustee, it is a mere formal trust, and no estate legal or equitable is vested in him. So, also, a devise of the rents and profits of lands, if there is nothing more in the will to show that the testator meant to create a valid trust, would be but another mode of making a devise of the land itself, during the prescribed period; and the legatee would take the legal estate, inasmuch, as has been seen above, mere passive trusts are no longer allowed; but beneficial interests in lands are converted into fees, where the trusts are merely nominal.

Vide Craig v. Craig, 3 Barb. Ch. 76; Wood v. Wood, 5 Paige, 596; Jarvis v. Babcock, 5 Barb. 139; Vernon v. Vernon, 53 N. Y. 351; Syracuse Savings Bank v. Holden, 105 id. 415; Helck v. Reinheimer, id. 470; and see supra, Chap. IX.

The Estate of the Trustees.— The Revised Statutes also provided as follows:

"Every express trust, valid, as such, in its creation, except as herein otherwise provided, shall vest the whole estate in the trus-

tees, in law and in equity, subject only to the execution of the trust. The persons for whose benefit the trust is created, shall take no estate or interest in the lands, but may enforce the performance of the trust in equity."

1 R. S. 729, § 60.

As seen above, Title I, this provision was changed in the Real Property Law, to read as follows:

"Except as otherwise prescribed in this chapter, an express trust." valid as such in its creation, shall vest in the trustee the legal estate. subject only to the execution of the trust, and the beneficiary shall not take any legal estate or interest in the property, but may enforce the performance of the trust."

Real Prop. Law, § 80. Vide supra. See also comments on changes in

wording, Fowler's Real Property Law (2d ed.), 408, 409.

The whole estate is vested in the trustee as formerly, no change on that score being intended. Northam v. Dutchess Co. Mutual Ins. Co., 166 N. Y.

The trustees are seized of such an estate as will authorize them to bring ejectment. McLean v. McDonald, 2 Barb. 534.

Where the trustee has authority to receive the rents and profits, the cestui has no estate or interest in the lands, or in their future income upon which has no estate or interest in the lands, or in their future income upon which he can create a lien or charge, for the purpose of protecting the estate or for any purpose. The trustee may have a lien upon it for charges incurred for its protection. Noyes v. Blakeman, 6 N. Y. 567. See also Leggett v. Perkins, 2 id. 297; Vail v. Vail, 7 Barb. 226; Burke v. Valentine, 53 id. 412. A general devise to executors in trust vests no estate in them, except for such of the declared purposes as require that the title be vested in them. Manice v. Manice, 43 N. Y. 303. And see supra.

A trustee takes whatever estate is necessary for the execution of his trust. Perpett v. Carlock 70 N. Y. 303.

Bennett v. Garlock, 79 N. Y. 302.

A gift for life of rents and income of real estate creates an estate therein, and if no duties are charged upon executors with respect to their application, no estate or trust is created in them in respect thereto. Matter of Goetschius, No. 1, 2 Misc. 278.

A devise of real estate in trust to hold the same during their minority "for the benefit of said children" creates an express trust to collect the rents thereof during such minority and entitles the trustee to possession of the premises for that purpose. Mullins v. Mullins, 79 Hun, 421.

Transfer by Creator of the Trust, Subject to the Trust.-"The preceding section shall not prevent any person creating a trust, from declaring to whom the lands to which the trust relates. shall belong in the event of the failure, or termination of the trust; nor shall it prevent him from granting or devising such lands, subject to the execution of the trust. Every such grantee or devisee shall have a legal estate in the lands, as against all persons, except the trustees and those lawfully claiming under them."

¹ R. S. 729, § 61; now Real Prop. Law, § 81. See Roberts v. Carey, 84 Hun, 328; Embury v. Sheldon, 68 N. Y. 227; Matter of Tienken, 131 id. 391; Tosey v. Stanley, 147 id. 560.

Reverter.—"Where an express trust is created, every estate and interest not embraced in the trust and not otherwise disposed of, shall remain in, or revert to, the person creating the trust, or his heirs, as a legal estate."

1 R. S. 729, § 62.

This provision of the law now reads:

"Where an express trust is created, every legal estate and interest not embraced in the trust, and not otherwise disposed of, shall remain in or revert to, the person creating the trust or his heirs."

Real Prop. Law, § 82; Gould v. Rutherford, 79 Hun, 280; Losey v. Stanley, 147 N. Y. 560.

Certain Devises in Trust Declared Powers.—"A devise of lands to executors or other trustees, to be sold or mortgaged, where the trustees are not also empowered to receive the rents and profits. shall vest no estate in the trustees; but the trust shall be valid as a power, and the lands shall descend to the heirs, or pass to the devisees of the testator, subject to the execution of the power."

1 R. S. 729, § 56. See now Real Prop. Law, § 77. A devise of land to executors in trust to sell the same and divide the proceeds and distribute them, while void as a trust because the executors are not authorized to receive rents and profits, is valid as a power. Reynolds v. Denslow, 80 Hun, 359.

Words of will held to create a trust and not a power merely. Potter v.

Hodgman, 81 App. Div. 233.

See more fully as to "Powers," infra, Chap. XII.

Trusts May Take Effect as Powers.—Powers in Trust.— "Where an express trust shall be created, for any purpose not enumerated in the preceding sections, no estate shall vest in the trustees; but the trust, if directing or authorizing the performance of any act which may be lawfully performed under a power, shall be valid as a power in trust, subject to the provisions in relation to such powers, contained in the third article of this title."

"In every case where the trust shall be valid as a power, the lands to which the trust relates, shall remain in, or descend to the person otherwise entitled, subject to the execution of the trust as a power,"

1 R. S. 729, §§ 58, 59.

These sections re-enacted in the Real Property Law read:

"Where an express trust relating to real property is created for any purpose not specified in the preceding sections of this article. no estate shall vest in the trustees; but the trust, if directing or authorizing the performance of any act which may be lawfully performed under a power, shall be valid as a power in trust, subject to the provisions of this chapter. Where a trust is valid as a power, the real property to which the trust relates shall remain in or descend to the persons otherwise entitled, subject to the execution of the trust as a power."

Real Prop. Law, § 79.

A power in trust is defined as a mere authority or right to limit a use, while a trust estate is an estate or interest in the subjectmatter of the trust. A trustee is invested with the legal estate, but this is not necessary with respect to the donee of the power. The definition by the statutes of a power in trust, and the characteristics of such powers, are fully given in a subsequent chapter treating of them. (Chap. XII.)

Heermans v. Robertson, 64 N. Y. 332; Henderson v. Henderson, 113 vd. 1; Hoepfner v. Sevestre, 10 N. Y. Supp. 51; Reynolds v. Denslow, 80 Hun, 359; Robinson v. Adams, 81 App. Div. 20.

An executor does not take by implication an estate in the lands of the testator, when all the duties enjoined upon him by the will in regard to the lands can be discharged under a power. Especially where by construing the will to give the executor an estate, the devise will be void, on account of its suspending for too long a period the power of alienation. Tucker v. Tucker, 5 N. Y. 608 5 N. Y. 408.

In the case of the Farmers' Loan & T. Co. v. Carroll, 5 Barb. 613, it is held that there can be no valid power in trust without an appointee or beneficiary designated other than the donee of the power.

benchciary designated other than the donee of the power.

Nor can an invalid trust be sustained as a power if the legal estate is necessary. Bailey v. Bailey, 28 Hun, 603.

So an attempted trust being unlawful, the power in trust was held equally so. Murray v. Miller, 78 N. Y. 316; Lewis v. Howe, 64 App. Div. 572.

The Superior Court of the city of New York, in 1852, whe ninvestigating the law of trusts in connection with statutory changes, in the case of Lang v. Ropke (5 Sandf. 363), held that the Revised Statutes have imposed no limitation whatever upon the creation of trusts, and that a valid trust may be now created for any and every nursose for which it might have been be now created for any and every purpose for which it might have been created before the Revised Statutes were adopted. That the only changes operated by the Revised Statutes were the abolition of passive trusts, and the limitation of express trusts, i. e., of trusts which pass an estate as well as grant an authority, but that these changes have neither abridged the real power of the owner of lands in the creation of trusts nor the jurisdiction of equity in compelling their execution.

Therefore, the court determined, that, where there is no illegal suspense of the power of alienation, the real intention of the party creating the trust will, in all cases, be carried into effect, and consequently, where the trust is active, the courts would construe it as a power in trust, if it could not take effect as an express trust. Where the trust is passive, however, the statute executes the intention of the party by giving to the cestui que trust a legal

The principles of this decision are based upon a view of the provisions of the Revised Statutes with relation to "Powers," in connection with those relative to trusts. It will be observed, from a perusal of Chapter XII, that no restriction whatever is imposed on the creation of powers in trust, and that a trustee may be authorized to perform any act in relation to lands, or the creation of estates therein, which the owner granting the power might himself lawfully perform. Therefore, although the attempted transfer of an estate in trust might not, under statutory provisions, be effectual, and the grant or devise, as passing an estate, might be void, the trust, in its substance and reality, may be preserved, and its execution enforced, by the same means, and with the same certainty as if the title to the lands had been vested in the trustee, as well as a power of disposition. The intention of the testator or grantor is thereby carried out, by the court considering the trust to be valid as a power in trust.

According to this principle of construction, the powers and duties of the trustee, and the rights and remedies of the cestui que trust (except the vesting of the estate), are considered the same as if the Revised Statutes relative to the trusts had not been passed, and courts of equity have the same powers in compelling the execution of trusts, when not against express

statutory provisions, as before the passage of the above statutes.

The views in the case of Lang v. Ropke, supra, were sustained in the subse-

quent case of Lang v. Wilbraham, 2 Duer, 171.

In the subsequent case of Selden v. Vermilyea, 3 N. Y. 525, also, the Court of Appeals holds that if an express trust is created for a purpose not enumerated in the statute, no estate vests in the trustees, but the power continues, and may be exercised in the performance of any act directed or authorized by the trust which may lawfully be performed under a power. See also N. Y. Dry Dock Co. v. Stillman, 30 N. Y. 174; Downing v. Marshall, 23 id

366; 37 id. 380; McGrath v. Stavoren, 8 Daly, 454.

It has been observed by Judge Comstock, on the subject of the virtual continuance of trusts under the name of powers beyond the restrictive classes of trusts enumerated by statute, that it would seem that the principal result of the statute restricting trusts is to withdraw from the trustee the legal estate, although expressly granted to him, in all cases except the specially permitted trusts, but leaving the limitation in full force as a power, if the purpose is lawful, and the laws of perpetuity are not transcended. The intended trustee may do under the power whatever he might have done if the statute had suffered the legal estate to vest in him, subject, in many cases, however, to the inconvenience of having an estate to manage or protect without the title, which remains in the author of the limitation, or descends to his heirs.

In the case of Downing v. Marshall, supra, the court also holds that while the provisions of the Revised Statutes wholly abrogated trust estates of a character purely passive, which might exist in various forms notwithstanding the statute of uses, and abolished all express trusts, i. e., legal etates impressed with trust duties and powers except those enumerated, there was no attempt to limit or define the acts which might be done under a trust power, and, in that respect, that the law, as it stood before the Revised Statutes.

was unchanged.

Under the views expressed as above, therefore, trust limitations, if active, although not belonging to the class of permitted trust estates, if not otherwise unlawful, may be effectual and take effect as powers in trust leaving the title in the donor or his heirs subject to the power. If of a passive character the use becomes executed by the vesting of the title in the

beneficiary.

Thus, the revision of the statutes in abrogating all active trusts, except a few particularly specified, has apparently reanimated them under the name of powers, which are left without restriction, provided the purpose of the limitation or power be in itself a lawful one. The statutes also enunciate a

the lawful occasion for creating a power.

To illustrate the above distinctions the following case may be cited: A trust for the use of infant children and their heirs and assigns forever, to be held for the benefit, and used and expended for the support, maintenance and education of such children, and every of them, was held void as an express trust, as not being within any of the permitted classes; but valid as a power in trust. It was determined that the legal title vested in the trustee only during the minority of the infants, and that the estate of the trustee ceased as to each cestui que trust upon his arriving at age. Stenicker v. Dickinson.

A trust also to sell lands and divide the proceeds among the cestuis que trustent, as beneficiary owners, and not as creditors, is void as a trust but valid as a power might be. Selden v. Vermilyea, 3 N. Y. 525 revg. 1 Barb.

In the case of Lang v. Ropke, 5 Sandf. 363, supra, it was held that it was no objection to a power in trust that it is granted for the same purpose for which an express trust is authorized.

In the earlier case of Hawley v. James, 16 Wend. 61, Judge Bronson, on the contrary, states that an express trust can be valid as a power in trust only when it is created for a purpose not enumerated as the proper subject of an express trust. See also Seldon v. Vermilyea, 3 N. Y. 525, supra.

Where a trust to executors to lease real estate of the testator, until it can be sold, would have the effect to suspend the power of alienation in such real estate beyond the time allowed by law, it is void. But the power in trust, in such a case, will still be valid. Haxtun v. Corse, 2 Barb. Ch. 506.

The re-enactment of the provisions of the Revised Statutes in the Real

Property Law makes the above reasoning still applicable. See also Garvey v. McDevitt, 72 N. Y. 556; Murray v. Miller, 178 id. 316, 323. See Chap XII on "Powers."

Powers in Trust Assignable.—Where an express trust is attempted to be created for purposes other than those above enumerated, the conveyance, if valid at all, is valid as a power in trusts only. It gives the cestui que trust no estate or interest in the land, but the land will be held and continued in whosesoever hands, otherwise entitled, it may come, subject to the execution of the trust as a power. His right is considered a vested right to enforce the execution of the trust in his favor in a court of equity. It is an assignable interest and the assignee can enforce the execution of the trust power in equity as could the person for whose benefit the power was created.

See Clark v. Crego, 47 Barb. 599, affd., 51 N. Y. 646; Hotchkiss v. Elting, 36 Barb. 38.

Further, as to assignments of powers in trust, vide infra, Tit. VI, and Chap. XII.

Law of Domicile as to Trusts.— The law of a testator's domicile governs the disposition of his personal property, and his real estate which is situate where he is domiciled. If, therefore, a testator was a resident of the State of New York at the time of his decease, and by his will directs his personal property and the proceeds of his real estate situate there, to be invested in real estate in the State of Ohio upon trusts which are invalid by the laws of New York, these devises in trust would be invalid, as inconsistent with the law of his domicile. As to estates in realty, instruments creating or

transferring them are to be construed according to the "lex loci," as has been fully considered in a preceding chapter.

Vide supra, Chap. IV, Tit. I, as to the regulation of the disposition of realty according to the lew loci.

Future or Contingent Interests in Trusts.— Future and contingent or shifting limitations of real estate, even in favor of unascertained persons, may still be created under the statutes in certain cases.

If the person primarily designated die during a trust term lawfully constituted, in respect to its duration, the use permits the trust to be shifted to some other beneficiary, and it is not necessary that such person should be in existence or known at the time of creating the trust.

Gilman v. Reddington 24 N. Y. 9; Harrison v. Harrison, 36 id. 543; Crooke v. County of Kings, 97 id. 421; Woodgate v. Fleet, 64 id. 566.

Trusts as Affecting Mortgages.— The statutes regulating trusts in real property have no application to a security by mortgage. A mortgage in fee of lands, therefore, made to a person in trust for the payment of several bonds of the mortgagor, held by different individuals, is not affected by these statutes, and is therefore valid. This view is based upon the fact that a mortgage is a lien upon, and not a title in or to lands, and the interest of the mortgagee is a mere chattel interest.

King v. The Merchts. Ex Ins. Co., 5 N. Y. 547.

Trusts Upheld in Part.—Although void limitations are embraced in a trust, it may be upheld as to others. The principle is now well settled that courts lean in favor of the preservation of all such valid parts of a trust, especially one created by will, as can be separated from those that are invalid, without defeating the general interest of the testator. By the more enlarged view recently taken of trusts also by the courts of this State, and their desire to carry out the legal doctrine that instruments and contracts are to be so construed, ut res magis valeat quam pereat, the above principle of upholding valid provisions of a trust is carried out, even if those which are valid and invalid are embraced in a single trust; and a single trust created for two purposes, one lawful and the other unlawful, will be held good for the lawful purpose, although void for the other.

In the case of Darling v. Rogers, 22 Wend. 482, the trust was single, i. e., to sell or mortgage the assigned estate for the benefit of creditors, and it was held to be a good and valid trust to sell but void as a trust to mortgage. The trust in Haxton v. Corse, was the case of a single trust for two purposes, viz., to lease and sell one lawful and the other unlawful, and the trust to sell was declared to be valid, while the other was held to be void. In Savage v. Burnham, 17 N. Y. 561, the trust was a single trust em-

bracing both lawful and unlawful purposes, and it was sustained as to the lawful purpose, while, for the unlawful purpose, it was adjudged void. And the same rule was recognized and applied in Gilman v. Reddington, 24 N. Y. 9; Post v. Hover, 33 id. 593, and Everett v. Everett, 29 id. 39. See also Schermerhorn v. Cotting, 131 id. 48; Cochrane v. Schell, 140 id. 516; Matter

of Ewen, 7 Misc. 619.

Regard must be had for the rule, which seems well established, that a trust estate will never be implied, where it will render a will illegal and void. Henderson v. Henderson, 113 N. Y. 1; Greene v. Greene, 125 id. 506; Hillyer v. Vandewater, 31 N. Y. St. Rep. 671, and especially is this rule applicable in cases where the duties conferred upon the executor or administrator may be executed under a trust power. Henderson v. Henderson, 113 N. Y. 1; Heermans v. Robertson, 64 N. Y. 332.

If, however, the valid trusts are so involved and dependent upon the illegal and void ones, that it is impossible to sustain the one without giving effect to the other; in short, if the whole scheme of the creator of the trust is indivisible, so that it must wholly stand or wholly fail, then the whole trust will fall.

Savage v. Burnham, 17 N. Y. 561; Buckley v. Depeyster, 26 Wend. 1; Gilman v. Reddington, 24 N. Y. 9; Post v. Hover, 33 id. 593; 30 Barb. 313; Gilman v. Reddington, 24 N. Y. 9; Post v. Hover, 33 id. 593; 30 Barb. 313; Gott v. Cook, 7 Paige, 521; 24 Wend. 641; DePeyster v. Clendening, 8 Paige, 295; Van Vechten v. Van Vechten. id. 120; Everett v. Everett, 29 N. Y. 39, 99; Amory v. Lord, 9 id. 403; Harrison v. Harrison, 36 id. 543; Tucker v. Tucker, 5 Barb. 99, affd., 5 N. Y. 408; Harris v. Clark, 7 N. Y. 242; Coster v. Lorillard, 14 Wend. 265; Manice v. Manice, 43 N. Y. 303; Levy v. Levy, 33 id. 97; Adams v. Perry, 43 id. 487; Van Schuyver v. Mulford, 59 id. 426; Matthews v. Studley, 17 App. Div. 303; Stevenson v. Leslie, 70 N. Y. 512; Wells v. Wells, 88 id. 323; Allen v. Allen, 149 id. 280; Hascall v. King, 162 id. 134; Kalish v. Kalish, 166 id. 368; Smith v. Chesebrough, 176 id. 317; Trunkey v. Van Sant, id. 535; Brown v. Quintard, 177 id. 75.

In certain cases bequests have been upheld where there is an illegal direction connected with them, the direction only being held void. Williams v. Villiams, 8 N. Y. 525; Darling v. Rogers, 22 Wend. 483, overruling 7 Paige, 272; Goodhue v. Berrien, 2 Sandf. Ch. 630.

The test is whether the upholding of one part and the rejection of another

The test is whether the upholding of one part and the rejection of another will defeat the presumed wishes of the owner, that is, whether to give effect to the valid part in a given contingency will be inconsistent with his intent; if not, the legal will be separated from the illegal provisions and the former will be carried into effect. Roberts v. Cary, 84 Hun, 328.

If any of the trusts in a deed are valid, the deed is not void; a single

good trust is sufficient to sustain it, and an estate is vested in the trustees to the extent of the valid trusts, leaving the residue of the estate in the grantor. Rogers v. Tilley, 20 Barb. 639; Woodgate v. Fleet, 44 in the grantor. N. Y. 1.

Where the trusts can be separated, a conveyance of real estate upon trusts, some of which are valid while others are inoperative, vests an interest in the trustees, to the extent of the valid trusts, leaving the residue of the estate in the grantor. Woodgate v. Fleet, 44 N. Y. 1.

In the case of Knox v. Jones, 47 N. Y. 389, it is held that a void trust

which is separable from other valid trusts, and is not an essential part of the general scheme, may be cut off, but where the trust is an entirety it cannot be sustained in part and avoided in part. Knox v. Jones, 47 N. Y.

389; Clemens v. Clemens, 60 Barb. 366.

The case of Manice v. Manice, 43 N. Y. 303, holds that a void trust which is separable from other valid trusts, may be cut off where the trust thus defeated is independent and not an essential part of the general scheme. See also Adams v. Perry, 43 N. Y. 487. But when its invalidity will affect the general scheme, none of the trusts will be carried out. Holmes v. Mead, 52 N. Y. 333; Brown v. Quintard, 177 id. 75.

Suspension of the Power of Alienation through Trusts.— The subject of trusts is so intimately connected with that of expectant estates that the provisions of the statutes relative to the latter will have to be continually referred to and applied in connection with trusts. See fully as to expectant estates and suspension of alienation, supra, Chap. IX.

TITLE V. IMPLIED AND RESULTING TRUSTS.

Apart from the trusts as above authorized, courts of equity will regard and enforce trusts arising and implied in law, in a variety of other cases, when substantial justice cannot be otherwise obtained, and the rights of third persons would be prejudiced or frauds would be perpetrated, in cases where no suitable redress could be obtained without equitable interposition. Such trusts are presumed and implied from the manifest intentions of the parties or the nature and justice of the case.

These trusts arise, not by deed, but by construction of law; and are, as it were, creatures of equity, and are raised without the statute requiring trusts to be in writing.

The establishment and enforcement of trusts of this description is one of the original and inherent powers of courts of equity. The number and character of such trusts are as varied and extensive as the phases of human dealing. Their consideration falls under the peculiar province of works treating of equity jurisprudence; and only those of a certain character, which are made the subject of statutory enactment, can be here reviewed.

Previous to the Revised Statutes, when land was purchased in the name of one, with the money of another, the law declared a trust, save in a few exceptional cases, in favor of the party paying the consideration. This was termed a resulting trust. The Revised Statutes, however, provided that, on a grant to one, for valuable consideration, paid by another, no use or trust results in favor of the latter.

1 R. S. 728, § 51.

The Real Property Law now provides as follows:

"A grant of real property for a valuable consideration, to one person, the consideration being paid by another, is presumed fraudulent as against the creditors, at that time, of the person paying the consideration, and, unless a fraudulent intent is disproved, a trust results in favor of such creditors, to an extent necessary to satisfy their just demands; but the title vests in the grantee, and no use or trust results from the payment to the person paying the consideration, or in his favor, unless the grantee either.

- I. Takes the same as an absolute conveyance, in his own name. without the consent or knowledge of the person paying the consideration, or,
- 2. In violation of some trust, purchases the property so conveyed with money or property belonging to another."

Real Property Law, L. 1896, Chap. 547, § 74. This was formerly 1 R. S.

728, §§ 51–53.

These provisions have no application to a case where an express trust has been created, or where equities have arisen by the agreement of the parties: they apply only to cases in which there exist no express trusts or equities, other than the payment of the consideration for the sale of real estate by

other than the payment of the consideration for the sale of real estate by a person who does not take the title thereto. Gage v. Gage, 83 Hun, 362. Section 74 of the Real Property Law must be read in connection with § 234 of the law which provides: "Nothing contained in this article abridges the powers of courts of equity to compel the specific performance of agreements in cases of part performance." Quinn v. Quinn, 69 App. Div. 598.

A conveyance by husband and wife to children with the exception that they will retain title for the benefit of husband, held to vest the children with

absolute ownership of the property. Booth v. Fordham, 100 App. Div. 115.

The Real Property Law further provides:

"An implied or resulting trust shall not be alleged or established, to defeat or prejudice the title of a purchaser for a valuable consideration without notice of the trust."

Real Prop. Law, § 75. Formerly 1 R. S. 728, § 54.

Although the purchase and conveyance were made with an actual intent to defraud, by the person paying the money, the trust in favor of his then creditors prevails over the title of one who takes a conveyance from the grantee, unless he obtain it for a valuable consideration, and without notice; and would prevail over a subsequent creditor of the person paying the purchase money who had obtained a mortgage on the land to secure a precedent debt. Wood v. Robinson, 22 N. Y. 564; Lounsbury v. Purdy, 16 Barb. 376; 18 N. Y. 515.

As to when a receiver, administrator, or simple contract creditor can avail himself of the trust, see Harvey v. McDonnell, 48 Hun, 409, revd., 113 N. Y. 526. As to who may sue to set aside the deed. Id. See also Chap. XXI, Tit. I,

Under the above provisions of the statutes, all trusts in land paid for by one person, where the conveyance is given to another, whether for the benefit of the party paying the money or for another, are abolished; and the title is vested in the alienee absolutely, excepting where the conveyance is so taken without the knowledge or consent of the party whose money is used, and excepting also the trusts in favor of creditors, which can only be enforced in equity.

Hoar v. Hoar, 48 Hun, 314, affd., 125 N. Y. 735; Gilbert v. Gilbert, 34 How. Pr. 142; Garfield v. Hatmaker, 15 N. Y. 475, overruling 4 Den. 475;

Wood v. Robinson, 22 N. Y. 564; Norton v. Stone, 8 Paige, 222; Moore v. Livingston, 14 How. Pr. 1.

Where a wife takes title to lands bought with joint funds of herself and

husband, no trust to him results. Schmidt v. Schmidt, 48 Super. 520.

Where husband took title in another name, held not to deprive wife of her

dower rights. Nichols v. Park, 38 Misc. 176.

The case of partners is also an exception. Fairchild v. Fairchild, 5 Hun, 407, affd., 64 N. Y. 471, infra.

The resulting trusts sought to be prohibited by the statutes, it is held, have reference to trusts created by acts of parties claiming to establish the trust, and the statute is applicable when the conveyance, with the consent or knowledge of the person paying the consideration, is taken in the name of another person.

The object of the Legislature was to prevent the creation of passive or formal trusts; and hence the provisions do not apply to cases where the alienee named in the conveyance shall have taken the same as an absolute conveyance in his own name, without the consent or knowledge of the person paying the consideration.

Such trusts arising or resulting by implication of law have been left untouched by the Legislature. They arise from the obvious intention of the parties though not expressed in the instrument with which they are connected, or they are forced upon the conscience of the courts by the manifest justice of the case.

Where the justice of the case demands it, also, in equity, parol evidence may be given to show the intention of parties to a deed; and then effect may be given to such intention as an implied trust. And when the plaintiff's case rests upon fraud, such fraud may always be proved by parol, even to avoid the Statute of Frauds.

Hosford v. Merwin, 5 Barb. 51; Reid v. Fitch, 11 id. 399; Botsford v. Burr, 2 Johns. Ch. 405; Voorhees v. Presbyterian Church, 8 Barb. 135; Willink v. Vanderveer, 1 id. 599; Buffalo, N. Y. & E. R. Co. v. Lansing, 47 id. 534; Safford v. Hynds, 39 id. 625; Jackson v. Mills, 13 Johns. 463; Lounsbury v. Purdy, 18 N. Y. 515; Boyd v. McLean, 1 Johns. Ch. 582; Foote v. Colvin, 3 Johns. 216; Cipperly v. Cipperly, 4 Supm. 342; Bitter v. Jones, 28 Hun, 492; Robbins v. Robbins, 89 N. Y. 251; Denike v. Denike, 13

These cases also maintain the principles relative to resulting trusts above set forth.

Where a deed, however, has been executed pursuant to a written agreement between the parties, parol evidence is inadmissable to show a resulting trust. St. John v. Benedict, 6 Johns. Ch. 111.

And see supra, p. 267, as to parol evidence.

When there is a resulting trust under a conveyance it must arise, if at all, at the time of the execution of the deed. Botsford v. Barr, 2 Johns.

Ch. 405; Jackson v. Seelye, 16 Johns. 197; Rogers v. Murray, id. 390. Where a partner takes lands for the firm in his own name there is a resulting trust. Fairchild v. Fairchild, 5 Hun, 407, affd., 64 N. Y. 471. Parol agreement to buy in property and convey when valid. Canda v. Totten, 157 N. Y. 281, revg. 87 Hun, 72; compare Merrill v Cooper, 65 Barb. 512.

Where one to whom land had been conveyed by another induced a woman to marry the other, representing that issue would take the lands, he was compelled to convey to such issue. Piper v. Hoard, 107 N. Y. 73.

No resulting trust is created by a conveyance to the wife of the person

paying the consideration, where there was at the time no agreement or understanding that she should hold the premises in trust for him. Scott v.

Calladine, 79 Hun, 79; 61 St. Rep. 172; 29 N. Y. Supp. 630.
Fraud includes all acts and omissions which involve a breach of legal duty injurious to others. Adamson v. Union R. R. Co., 74 Hun, 3. But it

will not be presumed. Yeoman v. Townsend, 74 Hun, 625.

When a person, through the influence of a confidential relation, acquires title to property, the court may impress upon the property an implied trust. Goldsmith v. Goldsmith, 145 N. Y. 313; also McCahill v. McCahill, 11 Misc. 258.

In general the statute cannot be used as an instrument of fraud. Wood v. Rabe, 96 N. Y. 414, 425; Smith v. Balcom, 24 App. Div. 437; Canda v. Totten, 157 N. Y. 281; Ahrens v. Jones, 169 id. 555. See also Real Prop. Law, § 234.

It is also held by our courts that the statutory regulations do not. even in cases not expressly excepted by them, entirely govern; but that, in many instances, based upon equitable and moral considerations, the common law rule as to a resulting trust in favor of him who pays the purchase-money on a conveyance made to another. will regulate the rights of the parties.

The language of the statute, accordingly, declaring that, where a grant for a valuable consideration shall be made to one person and the consideration therefor shall be paid by another, no use or trust shall result in favor of the person by whom such payment shall be made, is not necessarily prohibitory of a resulting trust for the benefit of a third person in whose favor, for family or other lawful and sufficient reasons, it is deemed proper to make some provision; nor where, for the benefit of a corporation, land has been taken in the name of a director thereof, without the direction or knowledge of the corporation. Wait v. Day, 4 Den. 439; Siemon v. Austin, 29 N. Y. 598, affg. 33 Barb. 9; The Buffalo, N. Y. & E. R. Co. v. Lampson, 47 id. 533; Morton v. Mallory, 63 N. Y. 434; Gilbert v. Gilbert, 2 Abb. App. Cas. 256.

Such was the construction of the old statute of uses. Cook v. Fountain,

3 Swan, 592; Kerly, Hist. Eq., 194, 195.

If a parent buy and pay for land, and has the deed thereof made to a child, the inference of law is that it is an advancement to the child, and not a resulting trust in favor of the father. It is always competent, however, to meet and repel such inference. See Scott v. Calladine, 79 Hun, 79. Such a conveyance if so intended, would be effectual and absolute as

between the parties, and could not be revoked by the grantor. If intended as a cover, in fraud of creditors, the conveyance would likewise be absolute as between the child and the father, and those claiming under him. Welton v. Divine, 20 Barb. 9; Proseus v. McIntyre, 5 id. 424; Shrader v. Banker, 65 id. 608.

The above decisions are contrary, however, to McGregor v. Buel, 1 Keyes,

153. And see Wood v. Mulock, 48 Super. 70.

The presumption that he who supplies the money to make a purchase, intends it for his own benefit, rather than for that of another, does not apply in cases like that of parent and child or husband and wife; where the purchase may fairly be deemed to have been made for another from motives of natural love and affection. The presumption in such cases is that the purchase is intended as an advancement, unless the contrary is established by proof. No resulting trust is created by a conveyance to the wife of the person paying the consideration, where there was at the time no agreemnt or understanding that she should hold the premises in trust for him. Scott v. Calladine, 79 Hun, 79.

Nor do the statutory regulations apply to a case where the deed is taken in the name of one acting merely as agent, without the consent of the person paying the consideration. A resulting trust still exists, the case being excepted out of the abolition of resulting trusts.

Roulston v. Roulston, 64 N. Y. 652, mem.; Anstice v. Brown, 6 Paige, 448; Safford v. Hynds, 39 Barb. 625; Loundsbury v. Purdy, 16 id. 376; 18 N. Y. 515; Reitz v. Reitz, 80 N. Y. 538, revg. 14 Hun, 536; Buffalo, N. Y. & E. R. R. Co. v. Lampson, 47 Barb. 533. But the trust so results only to the extent of the consideration actually furnished. Schierloh v. Schierloh, 148 N. Y. 103.

Miscellaneous.— The statute does not apply in cases of partnership. Marvin v. Marvin, 53 N. Y. 607; Fairchild v. Fairchild, 64 id. 471, affg. 5

The statute does not apply to an executory contract for the sale of land.

Hazewell v. Coursen, 36 Super. 459.

There is no resulting trust in favor of the husband, where he purchases lands and takes the deed in the name of his wife, but if the object is to place the property beyond the reach of the husband's then existing creditors, there will be a resulting trust, for their benefit, to the extent of their debts. Jencks v. Alexander, 11 Paige, 619; Garfield v. Hatmaker, 15 N. Y. 475; Tappan v. Butler, 7 Bos. 480; Wood v. Robinson, 22 N. Y. 564.

Cf. § 226, Real Prop. Law, under which in case of fraudulent conveyances, subsequent as well as existing creditors can impose the conveyance. Mead

subsequent as well as existing creditors can impeach the conveyance. Mead v. Gregg, 12 Barb. 653; Read v. Livingston, 3 Johns. Ch. 481.

A purchase of land before the Revised Statutes made with the money of

three persons in the name of one of them, created a resulting trust in the latter, in favor of the others, pro tanto. The Trustee, etc. v. Wheeler, 5 Lans. 160, affd., 61 N. Y. 88. But not so now. Stebbins v. Morris, 23 Blatch, 181.

Ejectment cannot be maintained by the beneficiary of a resulting trust; nor can the cestui que trust defend himself in an action brought by the trustee. Moore v. Spellman, 5 Den. 225.

A married woman against whom a resulting trust is established, cannot be required to account for a contract of the co

be required to account for rents, profits, etc. Higgins v. Higgins, 14 Abb. Ñ. C. 13.

Trusts ex maleficio discussed. Canda v. Totten, 87 Hun, 72, rvd., 157

The condemnation of resulting trusts does not apply to trusts arising ex maleficio. Ryan v. Dox, 34 N. Y. 307; Day v. Roth, 18 id. 448; Carr v. Carr, 52 id. 251, 261; Foote v. Foote, 58 Barb. 258; Ahrens v. Jones, 169 N. Y. 555.

A resulting trust arises in a grantee of land abutting on an elevated railway for damages recovered by him, where grantor reserved the right to same. Freund v. Biel, 114 App. Div. 400.

The Trust as affecting Creditors and Purchasers .- The trust in favor of existing creditors, created by the statute, would prevail over subsequent creditors, even if the latter had obtained a special transfer to them of the property; and would prevail over the title of any one taking a title from the grantee, unless he obtained it for a valuable consideration, and without notice of the fraud. Wood v. Robinson, 22 N. Y. 564; Arnold v. Patrick, 6 Paige, 310; Brewster v. Power, 10 id. 562.

Held, the trusts result in favor of those who were creditors of the person paying the consideration, at the time the conveyance was executed and consideration paid; and there is no resulting trust in favor of creditors whose debts eration paid; and there is no resulting trust in favor of creditors whose debts were subsequently contracted. Brewster v. Power, 10 Paige, 562. A judgment recovered by a creditor existing at the time would be a lien in equity, but could not be enforced by execution. To be an actual lien, the commencement of an action and filing of notice of lis pendens is necessary. Id. See also The Oecan Nat. Bank v. Olcott, 46 N. Y. 12; Watson v. Le Row, 6 Barb. 481; McCartney v. Bostwick, 31 id. 390; 32 N. Y. 53.

Where a grant is made to one one consideration and be seen to be a consideration and the contraction.

Where a grant is made to one on a consideration paid by another, it is held that the legal title is in the grantee, notwithstanding the conveyance is made for the purpose of defrauding the creditors of the grantor, and upon a parol trust in his favor. And so long as the grantee holds such title, the property is subject to the claims of his creditors, to the same extent as any other property to which he has title. But until such creditors have as any other property to which he has title. But until such creditors have acquired liens on it, they have no rights superior to those of the grantor; and if a reconveyance is made to him, such creditors cannot have the conveyance set aside as fraudulent. Davis v. Graves, 29 Barb. 480; Moore v. Livingston, 14 How. Pr. 1. See also Cropsey v. McKinney, 30 Barb. 47. If part only of the consideration is paid, the land will only be charged with the money advanced, pro tanto. Kline v. McDonnell, 16 N. Y. Supp.

649; s. c., 62 Hun, 177.

Any payment or advance of money after the purchase has been completed will not raise a resulting trust. Botsford v. Burr, 2 Johns. Ch. 405; Henderson v. Brooks, 3 Supm. (T. & C.) 445; Jackson v. Seelye, 16 Johns. 197; Rogers v. Murray, Id. 390.

The above provisions of the statute do not make the conveyance void in toto (as the Statute of Frauds does), but only pro tanto, to the extent that may be necessary to satisfy the just demands of creditors. Accordingly, a creditor of the person paying the consideration cannot obtain a judgment at law for an indebtedness, a part of which arose after the conveyance; and by a sale for the satisfaction of the whole judgment transfer the title of the whole of the premises embraced in the conveyance. On the contrary, the parties must seek their remedies in equity, where alone the rights of all parties can be properly adjusted. Wright v. Douglas, 3 Barb. 555, revd. on other grounds, 2 N. Y. 373.

The above provisions are held not to limit or restrict the right of creditors, either precedent or subsequent to the conveyance, to impeach it for fraud in fact, and to show it fraudulent by any proper evidence. Mead v. Gregg, 12 Barb. 653. See § 226 of the Real Prop. Law. as to conveyances with

intent to defraud; also Chap. XXI, infra.

A deed of real estate from a trustee individually to himself in his representative capacity as trustee, is a lawful grant in the nature of a declaration of trust in favor of the estate, and is not void in the absence of evidence that it was fraudulently made with intent to defraud creditors of the grantor. Howe v. Striker, 5 Misc. 309.

Secret Trusts.—When they will not be enforced against purchaser without notice. Doremus v. Doremus, 21 N. Y. Supp. 13; s. c., 66 Hun, 111.

TITLE VI. ASSIGNMENT AND TRANSFER OF TRUSTS, AND LIABILITY TO CREDITORS.

The Real Property Law, following the Revised Statutes, provides as follows:

"The right of a beneficiary of an express trust to receive rents and profits of real property and apply them to the use of any person, cannot be transferred by assignment or otherwise, but the right

and interest of the beneficiary of any other trust in real property .may be transferred."

Real Prop. Law, § 83, as amd. by L. 1903, Chap. 88.

As existing rights are preserved by this act of 1903, it is proper to review here the changes in this provision.

The Revised Statutes provided: "No person beneficially interested in a trust for the receipt of the rents and profits of lands, can assign or in any manner dispose of such interest; but the rights and interest of every person for whose benefit a trust for the payment of a sum in gross is created, are assignable."

1 R. S. 730, § 63; Radley v. Kuhn, 97 N. Y. 26.

This section held to have no application to a trust created prior to the

passage of the statute. Dyett v. Central Trust Co., 140 N. Y. 54.
Where the cestui que trust's interest, however, is in the fund, and not Where the cestur que trust's interest, however, is in the fund, and not in the income, his interest is assignable by him, and would pass to assignees under bankrupt and insolvent acts, and may be reached under proceedings similar to creditors' bills. Havens v. Healy, 15 Barb. 296; Horts Bros. v. Tiffany, 118 App. Div. 215; Williams v. Thom, 70 N. Y. 270; Tolles v. Wood, 99 N. Y. 616; Matter of Hoyt, 116 App. Div. 217.

Lands may be devised or granted by the creator of the trust, subject to the execution of the trust. 1 R. S. 729, § 61; Real Prop. Law, § 81.

It seems that where a trust is imposed upon an executor—estate for life or widowhood—the union of the interest of life tenant and remaindermen in

or widowhood—the union of the interest of life tenant and remaindermen in the widow does not terminate the trust. Raymond v. Rochester Trust, etc., Co., 75 Hun, 239.

By the Laws of 1893, Chap. 452, the above section 63 of the Revised Statutes was amended to the effect that, whenever the person beneficially interested in the income of any trust, shall become entitled in his or her own right, or through title derived as legatee. distributee or next of kin, or derived through the legal representatives of any deceased person, to the remainder, then, it shall and may be lawful for such person to convey or release to himself or the person presumptively entitled to the remainder or reversion upon the then termination of such trust estate all his or her right, title and interest in the income of such trust estate and thereupon the trust estate shall become forthwith merged in such remainder or reversion.

See L. 1893, Chap. 452 more fully for details.

And as so amended, the provisions of the Revised Statutes became the original § 83 of the Real Property Law.

This provision of the Real Property Law was in turn amended, as seen above by Chap. 88 of the Laws of 1903, and this act, which practically restores the provisions of the Revised Statutes as they originally were, is now the law on the subject. Vide supra.

Though common-law annuities were always assignable and have remained so since the Revised Statutes, the so-called annuities or sums payable annually by trustees for the benefit of so-called annuitants are not assignable.

Cochrane v. Schell, 140 N. Y. 516, overruling on this point Lang v. Ropke, 5 Sandf. 363. See also Rothschild v. Roux, 78 App. Div. 282; Matter of U. S. Trust Co., 80 id. 77; Butler v. Bandouine, 84 id. 215; Fowler's Real Prop. Law (2d ed.), 416.

The act of 1893 held not retroactive. Metcalfe v. Union Trust Co., 87 App. Div. 144. See for exhaustive treatment of these sections Fowler's Real Prop. Law (2d ed.), 413-419. See also supra, p. 287.

Liability to Creditors.—"Where a trust is created to receive the rents and profits of real property, and no valid direction for accumulation is given, the surplus of such rents and profits, beyond the sum necessary for the education and support of the beneficiary, shall be liable to the claims of his creditors in the same manner as other personal property, which cannot be reached by execution.

Real Prop. Law, § 78; 1 R. S. 729, § 57.

Pursuant to the above statutory provisions, where rents and profits are held to be applied for the use of designated persons under a valid trust, neither the estate of the trustees nor the interest of the beneficiaries can be assigned or disposed of, except that the surplus, beyond what is necessary for the education and maintenance of the *cestui que trust*, would be liable, in equity, to the claims of creditors, in the same manner as other personal property which cannot be reached by an execution at law.

LeRoy v. Rogers, 3 Paige, 234; DeGraw v. Clason, 11 id. 136; Craig v. Home, 2 Edw. Ch. 376; Id. 554; Williams v. Thorn, 70 N. Y. 270; Douglass v. Cruger, 80 id. 15; Herts Bros. v. Tiffany, 118 App. Div. 215; Tolles v. Wood, 99 N. Y. 616; Matter of Hoyt 116 App. Div. 217.

Surplus may be taken for alimony or support of children. Miller v. Miller, 1 Abb. N. C. 30.

An interest in an annuity, also, held in trust for a party's maintenance, etc., cannot be assigned or reached by creditors, except that his interest, beyond what is necessary for the support of himself and his family, may be reached by a creditor's bill or similar proceedings, and be applied to the payment of his debts. And what is necessary for the maintenance of the cestui que trust cannot be reached, although such cestui is able to and might support himself by his own labor and exertions.

L'Amoureux v. Van Rensselaer, 1 B. Ch. 34; Cruger v. Jones, 18 Barb. 467; Clute v. Bool, 8 Paige, 83; Sillick v. Mason, 2 Barb. Ch. 79; Stewart v. McMartin 5 Barb. 438; Graff v. Bonnet, 31 N. Y. 9; explained, 2 Keyes, 457; Rider v. Mason, 4 Sandf. Ch. 351; Craig v. Hone, 2 Edw. Ch. 554; Williams v. Thorn, 70 N. Y. 270; Stringer v. Young, 191 N. Y. 157.

However, if the debtor created the trust, his entire reserved interest is a fund to which his creditors may resort. Schenck v. Barnes, 156 N. Y. 316. See Real Property Law, §§ 226, 227; 2 R. S. 134, §§ 1, 2; 137, § 1. Such interest and any income in the trustees' hands cannot be reached

under proceedings supplementary to execution, but only through an action in which the judgment-debtor and the trustees are parties. Genet v. Foster, 18 How. Pr. 50; Campbell v. Foster, 35 N. Y. 361; Code Civ. Proc., § 2463. For rules see Tolles v. Wood, 99 N. Y. 616.

Where the interest of the beneficiary is a vested interest in remainder,

the income to be paid to him during the life of another, held an assignment of a portion of his share in the trust estate is valid, though an assignment of his share of the income was not valid. Stringer v. Young, 191 N. Y. 157.

In the case of Lang v. Ropke, it was held that a trust for the payment of an annuity, even when payable out of rent and profits, does not fall within subdivision 3, in section 55 of the Revised Statutes, supra. That subdivision applies to cases where the whole rents and profits are to be paid; but an annuity is a pecuniary legacy, and the trust for its payment must be referred to subdivision 2, of said section 55.

It was held, also, not subject to section 63 of the Revised Statutes, and that there was no restraint on alienation, as the annuitant may release to the persons entitled in remainder, or may unite with them in the conveyance

of an absolute fee. Lang v. Ropke, 5 Sandf. 303.

But the vesting of the remainder may be so suspended on annuities as to violate the statute. Hobson v. Hale, 95 N. Y. 588. See also Degraw v. Clason, 11 Paige, 136; Hallet v. Thompson, 5 id. 583; also Cruger v. Douglas, 4 Edw. 433, holding that a wife can assign to her husband, under certain circumstances, a portion of her income for his life, held under a trust.

It is held now, however, that annuities charged upon trust estates are with § 63 of the Revised Statutes (Real Property Law, § 83), on that point overruling Lang v. Ropke, 5 Sandf. 303, and similar decisions. Cochrane v. Schell, 140 N. Y. 516.

See Fowler's Real Property Law (2d ed.), 264, 265, 416.
In the case of Graff v. Bonnet, 31 N. Y. 9, 13, it is held that the law with reference to the inalienability of uses and trusts in lands, applies constructively, also, to trusts of personal property; overruling Kane v. Gott, 24 Wend. 641, and Grant v. Van Schoonhoven, 9 Paige, 255, in that particular.

This case also holds that courts of equity may reach, for the benefit of creditors, any surplus beyond what is necessary for the support of the bene-

ficiary in a trust created for his benefit by a third person.

This case must also be considered as overruling Titus v. Weeks, 37 Barb. 136, where it is held that the provisions of the statute forbidding the alienation, by a cestui qui trust, of his interest in an express trust, are not applicable to trusts or estates in personal property.

A power of appointment is not such an interest in the cestui qui trust as will render the fund liable to his creditors. Cutting v. Cutting, 86 N. Y.

522.

When a life estate is created by will with a general and beneficial power to the life tenant to devise the inheritance, such tenant for life may devise or sell the inheritance, or his creditors may cause it to be sold in satisfaction of his debts, even though future estates are limited on the inheritance, and if neither of these things are done upon the death of the life tenant intestate, any future estates, limited thereon, attach. Deegan v. Von Glahn, 75 Hun, 39; Deegan v. Wade, 144 N. Y. 573.

But where there is a trust estate and a power to devise generally given to a beneficiary of the trusts, such power is not within the rule of the preceding case, as the grantee of the power has no estate. Hume v. Randall, 141 N. Y. 499; Genet v. Hunt, 113 id. 158; Cutting v. Cutting, 86 id. 522.

See Real Property Law, § 132; 1 R. S. 733, § 84.

Assignments and Transfers to be in Writing.—Every grant or assignment of any trust or power, over or concerning real prop-

erty, unless the same shall be in writing, subscribed by the party making same, or by his lawful agent thereto authorized in writing. shall be void.

Real Property Law, § 207; 2 R. S. 134, § 6.

"Lands" as used in the Revised Statutes included lands, tenements and hereditaments. 2 R. S. 137, § 6.
See Fowler's Real Property Law, on the subject of the necessity of writing (2d ed.), 651 et seq.

Assignment of a Power in Trust.—Vide supra, Tit. IV.

Acts in Contravention of the Trust.—It is also provided, that where the trust is expressed in the instrument creating the estate. every sale, conveyance, or other act of the trustees, in contravention of the trust, shall be absolutely void. But the Supreme Court may, by order, on proper terms and conditions authorize the trustee to mortgage or sell, when it appears to its satisfaction that the trust property or part of it is so unproductive that it is for the best interests of such estate, or necessary or for the benefit of the estate to raise funds to preserve it by paying off incumbrances or to improve it by making improvements, or that for other peculiar reasons it is for the best interests of the estate; and if the interest of the trust estate is an undivided share in real property, the same may be sold if it appear to the court to be for the best interest of such estate.

Real Property Law, § 85, as amd. by L. 1897, Chap. 136. See formerly 1 R. S. 730, § 65, as amd. L. 1882, Chap. 275; L. 1884, Chap. 26; L. 1886, Chap. 257; L. 1891, Chap. 209; L. 1895, Chap. 886. This Act of 1882, allowing a mortgage to be made under direction of the

This Act of 1882, allowing a mortgage to be made under direction of the court in certain cases, is held not to be retroactive. U. S. Trust Co. v. Roche, 41 Hun, 549, revd., 116 N. Y. 120.

The Act of 1886 does not authorize any mortgage to bind the remainder. Goebel v. Iffla, 48 Hun, 21, affd., 111 N. Y. 170.

Mere advantage to tenant of the life estate not sufficient. In re Roe, 6 N. Y. Supp. 464, affd., 119 N. Y. 509.

Trustees may be repaid for advances made for improvements. Matter of Nesmith, 140 N. Y. 609.

For a statement as to the authority of courts of equity previous to statutory authority, see Cuthbert v. Chauvet, 136 N. Y. 326. Also for decisions bearing on the subject, see pp. 298, 299, infra.

Cestui que trust who had also become entitled to remainder held not entitled to abrogate the trust. Matter of Lewis, 3 Misc. 164.

A conveyance by trustees, with power of sale of all the trust property to one who conveys to the beneficiaries in the proportion of their respective interests and for considerations aggregating that expressed in the deed to

one who conveys to the beneficiaries in the proportion of their respective interests and for considerations aggregating that expressed in the deed to him is presumptively void. McPherson v. Smith, 49 Hun, 254.

But unless a conveyance by a trustee is shown to be in contravention of the trust it will be presumed good. People v. Stockbrokers' Building Co., 49 Hun, 349.

The above section 65 of the Revised Statutes (1 R. S. 730, § 65) has been held to apply merely to acts of the trustees, and it does not divest courts of equity of their power over the legal title when vested in infant trustees.

And where a fund is directed to be invested in a particular place or manner, the court, with the assent of all parties in interest, may allow a change to be made upon the same trusts; and the Supreme Court, as the general guardian of infants, may assent to such change in their behalf. Wood v. Wood, 5 Paige, 596; 38 Barb. 473.

A trustee has no general power of disposition, but must derive his power from the instrument creating the trust, or, when such power may be implied; but where there is in the instrument, a designation of the method in which the trust estate is to be sold, the trustee cannot convey except in the manner specified. O'Conor v. Waldo, 83 Hun, 489.

A provision in a clause creating a trust giving the trustee permission to apply such portion of the trust fund to his own use as he may find necessary does not create an abolition of the trust. Jones v. Newell, 78 Hun, 290.

The provision of the Revised Statutes (1 R. S. 730, § 63), providing that "no person beneficially interested in a trust for the receipt of rents and profits of lands can assign or in any manner dispose of that interest," held to have no application to a trust created prior to the passage of the statute. Dyett v. Central Trust Co., 140 N. Y. 54.

For a statement of the law, as it originally stood, that the court has

no power to order a sale of trust property if it be contrary to the provisions of the instrument creating the trust, and if the remaindermen are uncertain

of the instrument creating the trust, and if the remaindermen are uncertain and cannot be ascertained; see In re Turner, 10 Barb. 552; Douglas v. Cruger, 80 N. Y. 15; Thebaud v. Schermerhorn 10 Abb. N. C. 72.

As to necessity of notice to all beneficiaries of the trust, and remaindermen, see Duffy v. Durant Land Imp. Co., 78 Hun, 314. See now Real Property Law, \$ 87, as amd. by L. 1897, Chap. 136.

For cases where a mortgage executed by trustees on a trust estate was held void as an act contravening a trust to hold real estate, to receive rents and profits and new them over even when the previous secution of the court and profits and pay them over, even when the previous sanction of the court was obtained; see Cruger v. Jones, 18 Barb. 467; Briggs v. Davis, 20 N. Y. 15, as partially overruled, 21 id. 574; Rathbone v. Hooney, 58 id. 463.

However, where will provided for a use of principal where income was insufficient, held that a mortgage by trustees under order of the court was valid. Rogers v. Rogers, 111 N. Y. 228.

Held the court had authority to direct a sale where the trust estate embraced an undivided part of real estate. Matter of Asch, 75 App. Div. 486. See Matter of the City of New York (110th Street), 81 App. Div. 27.

Leases by Trustees.—"A trustee appointed to hold real property during the life of a beneficiary, and to pay or apply the rents. income and profits thereof to, or for, the use of any such beneficiary, may execute and deliver a lease of such real property for a term not exceeding five years, without application to the court. The Supreme Court may, by order, on such terms and conditions as seem just and proper, in respect of rentals and renewals, authorize such a trustee to lease such real property for a term exceeding five years, if it appears to the satisfaction of the court that it is for the best interest of the trust estate, and may authorize such trustee to covenant in the lease to pay at the end of the term, or renewed term, to the lessee the then fair and reasonable value of any building which may have been erected on the premises during such term.

If any such trustee has leased any such trust property before June fourth, eighteen hundred and ninety-five, for a longer term than five years, the Supreme Court, on the application of such

trustee, may, by order, confirm such lease, and such order, on entry thereof, shall be binding on all persons interested in the trust estate."

Real Property Law, § 86. See 1 R. S. 730, § 65, as amd. by L. 1895,

At common law the trustee's power to lease (in the absence of an express power), depended primarily on the quantity and quality of the trustee's estate; if a fee he might make leases of any duration. Naylor v. Arnitt, 1 Russ. & M. 501; Greason v. Keteltas, 17 N. Y. 491; Hedges v. Riker, 5 Johns. Ch. 163.

If, as seems likely, trustees under subd. 3 of § 76 of the Real Property Law, to which the above section apparently refers, take only an estate pur autre vie, then their leases may not extend beyond the lives of the cestuis, independently of this section (§ 86). Matter of City of New York (110th Street), 81 App. Div. 27; Matter of McCaffrey, 50 Hun, 371; Gomez v. Gomez, 147 N. Y. 195.

But under this section trustees pur autre vie, are authorized to make leases But under this section trustees pur autre vie, are authorized to make leases for five years, which will be good against the remaindermen. In the case however, where the trustee had a fee with general leasing powers, this section (§ 86) may be construed as simply for the protection of trustees. See, however, as to uncertainty of the powers of trustees under subd. 3, Real Property Law, § 76, to make leases of definite duration. Niederstein v. Cusick, 83 App. Div. 36; 178 N. Y. 543.

As to how far section 80 of the Real Property Law may be retroactive or unconstitutional, see discussion, Chapl. Exp. Trusts and Powers, § 462.

See also Fowler's Real Property Law (2d ed), for an exhaustive consideration of this section 428-431

tion of this section, 428-431.

For procedure under sections 85, 86, see Real Property Law, § 87, as amd. by L. 1897, Chap. 136. This section is new and regulates the practice on application to the courts under the preceding sections. See Matter of Asch, 75 App. Div. 486; New York Security & T. Co. v. Schoenberg, 87 id: 262, 267.

Abolishing the Trust.—Any reconveyance by a trustee to his grantor before the trusts are fully executed would be set aside.

And a purchaser is bound to ascertain, at his peril, the fact. although it were recited in the deed.

Where there is a valid trust, therefore, for the sale of land, the party creating the trust and those holding derivatively under him. have no rights, legal or equitable, until the purposes of the trust are satisfied.

Their interests are subject to the execution of the trusts absolutely; so that a subsequent grantee, from the creator of a trust, acquires no right in contravention of or hostile to the trust.

Any disposition of a trust estate also, under a power to dispose of it for the benefit of the trustee or others, without any benefit to the cestui que trust, would be deemed fraudulent as to the beneficiaries; and the trust will follow the land, in the hands of any person who has taken it with the notice of the trust.

As to the above principle, vide cases above cited, and Smith v. Bowen, 35 N. Y. 83.

A power to trustees to sell lands and reinvest the proceeds, and hold them reinvested on the same trusts, is not repugnant to a trust created by the deed to receive rents, etc., and apply them; nor would a conveyance by the trustees be in violation of the statute prohibiting the alienation of trust estates.

Real Property Law, §§ 83, 85 as amd. by L. 1897, Chap. 136; Belmont v. O'Brien, 12 N. Y. 395.

Extinguishment of Trusts.—The assent of trustee and cestus que trust may sometimes extinguish a trust.

Short v. Wilson, 13 Johns. 33; Brewster v. Brewster, 4 Sandf. Ch. 32; but see Cuthbert v. Chauvet, 136 N. Y. 326.

A trust for the life of a beneficiary is not destroyed by the fact that the beneficiary becomes vested with the remainder. Martin v. Pine, 79 Hun, 426. But see supra, p. 287, as to release under Real Property Law, § 83, when the cestui has also become entitled to the remainder.

No action or assent by an equitable life tenant of a trust fund can bind the remaindermen, and it is susceptible of grave doubt whether the beneficiary of the income of the trust fund, unassignable itself, can estop himself in respect thereto by his covenants or agreements. Bliven v. Robinson, 83 Hun, 208.

The creator of the trust, however, cannot extinguish it when it has arisen.

Smith v. Bowen, 35 N. Y. 83; Wright v. Miller, 8 id. 10. Compare Townsend v. Rockhan, 68 Hun, 231, distinguishing McPherson v. Rollins, 107 N. Y. 316; and see supra, p. 287, as to acts in contravention of the trust.

As to cessation of trusts in favor of married women under the Laws of

1849, 1860, 1862, vide supra, pp. 88, 89.

Any reconveyance of the trust estate until the trust is executed or accomplished, is void, and any fraudulent disposition of it by collusion between the trustees and tenants in possession, will be set aside. Wright v. Miller, 8 N. Y. 10; Briggs v. Davis, 20 id. 15.

A reconveyance not fraudulent held not forbidden if the beneficiaries join.

Dooper v. Noelke, 5 Daly, 413; see also 75 Am. Dec. 363.

Mortgage to secure annuities not a trust, and may be revoked, being in nature of a testamentary disposition. Beeman v. Beeman, 88 Hun, 14.

Acts of the Legislature.— As to the power of the Legislature to pass private acts varying the trust, vide infra, Tit. IX.

See also Powers v. Bergen, 6 N. Y. 358.

TITLE VII. THE TRUSTEE.

As regards making title under trust deeds, it is not only necessary to see that the trust is a valid one in law, and that the trust is not terminated by its terms, or by the cessation of the purposes of the trust, but it is important to ascertain whether the trustees nominated have still the right to act as such, or whether changes or substitutions have been made.

In the absence of proof to the contrary, a devisee or grantee of property in trust is presumed to accept the trust estate, but he cannot be vested with such an estate against his will; and where he declines to accept it, his disclaimer need not be in such form as to pass an estate in the property devised.

Burritt v. Silliman, 13 N. Y. 93; Armstrong v. Morrill, 14 Wall. 120.

Whenever a trust exists, either by the declaration of a party or by intendment or implication of law, and the party creating the trust has not appointed any trustee to execute it, equity will follow the legal estate, and direct the person in whom it is vested to execute the trust.

If the persons in whom the legal estates are vested are infants, the court will appoint some proper person to execute a conveyance, if necessary.

De Barante v. Gott, 6 Barb. 492; Burrill v. Shiel, 2 id. 457.

It is a principle, also, of courts of equity that they will never allow a trust to fail for want of a trustee; but will appoint a new trustee, or the court may execute the trust, and, by the provisions of the statutes, on the death of a surviving trustee of an express trust, the trust vests in the Supreme Court (formerly the Court of Chancery), which shall appoint some person to execute it, in the absence of a contrary direction on the part of the person creating the trust. (Real Property Law, § 91, amd. by L. 1902, Chap. 151; 1 R. S. 730, § 68.) The court may also accept a resignation and appoint a new trustee of an express trust, or remove one insolvent or unsuitable, on good cause shown, or one who has violated or threatened to violate his trust. These provisions do not apply to a trust arising by implication of law, nor where there are other provisions specially made by law.

Real Property Law, § 92. See 1 R. S. 730, §§ 69-72. People v. Norton, 9 N. Y. 176.

Removal of trustee vide Code Civ. Proc., §§ 2817, 2818; Matter of McGillivray, 138 N. Y. 308; Matter of Hecht, 71 Hun, 62. See also Bliss, Ann.

If one of several trustees die, and the others refuse to accept the trust, the trust devolves upon the court under the above provisions. McCosker v. Brady, 1 Barb. Chan. 329; Hawley v. Ross, 7 Paige, 103; Clark v. Crego 47 Barb. 599, affd., 51 N. Y. 646.

Upon the death of a trustee of an express trust, the trust vests, not in the personal representative of the deceased trustee, but in the Supreme Court, with all the powers and duties of the original trustee. Wilcox v. Gil-

christ, 85 Hun, 1.

The court may appoint a new trustee only on resignation or removal, not upon death of a testamentary trustee; in latter event it can only appoint a person to administer the trust under its direction. Brater v. Hopper, 77

Hun, 244; Jewett v. Schmidt, 83 App. Div. 276; Matter of Guental, 97 id.

Upon the death of a sole executor, engaged in the execution of a not fully executed express trust, imposed upon him by the will as a part of his duties as executor, a case is presented for the appointment of a successor trustee by the surrogate, under § 2818 of the Code of Civil Procedure. of Hecht, 71 Hun, 62.

Beneficiary cannot be trustee for himself. Losey v. Stanley, 83 Hun, 420.

See also supra, p. 269.

But he may be one of several trustees. Rogers v. Rogers, 111 N. Y. 228.

Formerly, under the common law, the trust devolved upon the heir of the trustee on the death of the latter, and such was the rule as to trusts created before the Revised Statutes of 1830; and the legal title of the trustee descended to his heirs, even if he died after the Revised Statutes.

Berrien v. McLane, Hoffman, Chan. 421; Jackson v. Delencey, 13 Johns.

537; Wood v. Mather, 38 Barb. 473.

An unsuitable or incapable trustee, or one who refuses to do his duty, may be removed by the court on petition; The People v. Norton, 9 N. Y. 176; and a new one appointed with all the other's powers. In re Mechanics' Bank, 2 Barb. 446; Leggett v. Hunter, 19 N. Y. 445.

The Court of Chancery had power by its general authority, independent of statute, to remove a trustee on good cause shown, and to substitute another.

The People v. Norton, 9 N. Y. 176.

Where there are several trustees, and one refuses to execute the trust, resigns or is discharged from office, the remaining trustees are vested with the entire estate, and any order to the contrary would be illegal. In re Crossman, 20 How. Pr. 350; King v. Donnelly, 5 Paige, 46; Burrill v. Shiel. 2 Barb. 457. See Code Civ. Proc., § 2818.

After entering on the trust, one cannot resign without the consent of the cestui que trust, or direction of the court. Shepperd v. McEvers, 4 Johns. Ch. 136; Wood v. Wood, 5 Paige, 596; Cruger v. Halliday, 11 id. 314; Gilchrist v. Stevenson, 9 Barb. 9; Thatcher v. Candee, 4 Abb. Ct. App.

Trustees of a corporation or religious society cannot take in trust for other societies for any purposes foreign to such corporation or society. Jackson v. Hartwell, 8 Johns. 422; Matter of Howe, 1 Page, 125; Wilson v. Lynt, 30 Barb. 124. See also infra, Chap. XVII, as to executors; Chaps. XII and XVII, "Powers of Executors," etc.

The Supreme Court may appoint, either on petition or by action. Real Property Law, § 92, subd. 1; Bronson v. Bronson, 48 How. Pr. 481; Clark v.

Crego, 51 N. Y. 646, affg. 47 Barb. 599.

A beneficiary may be one of several trustees. Rogers v. Rogers, 111 N. Y.

A trustee when appointed by the court is the successor of the court in the administration of the trust and will be bound by its prior judgments and directions in regard thereto. Kirk v. Kirk, 137 N. Y. 510.

As to powers of substituted trustee, see Marshal v. Kortright, 132 N. Y.

A person appointed by the court to administer a trust under its direction is properly designated a "substituted trustee." Matter of Guental, 97 App.

Div. 530; Real Property Law, § 91, as amd. by L. 1902, Chap. 151.

The new appointment might also be made by a decretal order, made in a cause where such new trustee was a proper party to carry into effect the decree of the court. It was held that the statutes, authorizing the court to remove a trustee, did not apply to implied or constructive trusts. Milbank v. Crane, 25 How. Pr. 193; King v. Donnelly, 5 Paige, 46; Leggett v. Hunter, 19 N. Y. 445; In re Livingston, 34 id. 555; Clark v. Crego, 47 Barb. 599, affd., 51 N. Y. 646; Matter of Cutting, 49 App. Div. 388, 391; Matter of Bates, 51 id. 491.

See infra, Tit. IX, as to the changes made by legislative enactment.

As to who may apply for the removal, vide In re Livingston, 34 N. Y. 555. See also Roome v. Philips, 27 id. 357.

Where a deed provides that in case of the decease of one trustee, the survivors might, with the consent of the cestui que trust, appoint a substitute, with the like powers and estate as the others, it is held that, on the decease of one, the survivors might act without appointing a successor. Belmont v. O'Brien, 12 N. Y. 395; Railroad Mortgages, vide Beadleson v. Knapp, 13 Abb. N. S. 335.

By § 2818 of the Code Civ. Proc. the surrogate may appoint a new trustee in place of a testamentary trustee who resigns, becomes incompetent, or is by that court removed, provided the trust has not been fully executed, where the will does not specifically direct otherwise, unless such trustee is one of several, and others competent to act remain. In the latter case the surrogate and the Supreme Court have concurrent jurisdiction to determine whether a new appointment is advisable; and, if none be made, the remaining trustees may continue to act. The proceedings for appointment are assimilated to those for the appointment of an administrator with the will annexed.

Executors as Trustees.—Although a court of equity cannot substitute new executors as such, for those named by the testator, yet when the duties of executors as such have ended, and they have become simply trustees, the power conferred by the statutes upon courts of equity, to compel the resignation of a trustee and to appoint another in his place, is applicable and may be executed, subject to the above provisions.

Deraismes v. Deraismes, 22 Hun, 86.

The Supreme Court has no power to appoint or to discharge an executor as such, so far as relates to his power to sue for and collect debts, or so far as his liability to creditors, next of kin, etc., but only so far as he is a trustee of an active trust under the will. In re Van Wyck, 1 Barb. Chan. 565; Greenland v. Waddell, 116 N. Y. 234, 243.

A devise to an executor in trust does not annex the trust to the office, and an administrator with the will annexed cannot act. Dunning v. Ocean Nat. Bk., 61 N. Y. 497.

The court may make substitution as well by action as by petition, making all persons in interest parties as by petition.

Vide infra, Chap. XVII, as to the appointment of executors; In re Bull, 31 How. 69; 45 Barb. 334; Leggett v. Hunter, 25 id. 82; 19 N. Y. 445. See Real Property Law, § 92. and Code Civ. Proc., §§ 2817. 2818.

Renunciation and Resignation by Trustees.—Where an executor renounces his office, the renunciation being followed by many years of total non-interference with the estate, he is deemed also to have renounced the trusts conferred by the will, which are personal and discretionary; and it is not necessaary that he be discharged by the court. The whole trust estate becomes vested in the executors who assume the execution of the trust.

In re Stevenson, 3 Paige, 420; Beekman v. Bonsor, 23 N. Y. 298; Matter of Robinson, 37 id. 261.

But a trustee cannot resign without the consent of the cestui que trust, or the order of the court, after he has accepted the trust. Cruger v. Halliday, 11 Paige, 314; Estate of Philips, 3 Month. L. Bul. 48; Defendorf v. Spraker, 10 N. Y. 246; Thatcher v. Candee, 4 Abb. App. Cas. 387. Heemay be discharged by the Surrogate's Court. Matter of Bernstein, 3 Redfield, 20.

A trustee may resign as to certain particular trusts in a will, and another may be appointed therefor, and the original trustee remain as to the general trusts, if they are separable; and a trustee may be removed as to some trusts and retained as to others.

Craig v. Craig, 3 Barb. Ch. 76; Wood v. Brown, 34 N. Y. 337. See Burt v. Burt, 41 id. 46.

Where there are infants or persons not in esse, a trustee can be discharged

only by order or decree. Cruger v. Halliday, 11 Page, 314.

Where a trustee renounces, he cannot afterward accept and execute the trust, except it be under a new appointment as trustee. The Revised Statutes were held only to authorize the Supreme Court to appoint a new trustee in place of the one who is removed by the court, or whose resignation is accepted, after he has assumed the trust; or in case of the death of a sole surviving trustee, so that there is no one left to execute the trust. In re Schoonhoven, 5 Paige, 559.

See contra, however, as to power of the Supreme Court to appoint in case of death. See 1 R. S. 730, §§ 68, 71. See Brater v. Hopper, 77 Hun, 244; Wilcox v. Gilchrist 85 id. 1.

The surrogate can, however, appoint a successor on the death of the sole testamentary trustee. Code Civ. Proc., § 2818.

A nonresident, whose presence is essential, cannot remain trustee. Hughes v. Chicago, etc., R. W. Co., 47 Super. 531.

As to "Renunciation by Executors," vide fully, infra, Chap. XVII.

Disclaimer by Trustee.—Where one of two trustees disclaimed acting as trustee, by an answer in chancery in another State, it was held that his subsequent death without ever assuming the trust, or claiming a right to act, made valid that disclaimer, and vested all the estate in the surviving trustee. Clemens v. Clemens, 60 Barb. 366.

Trustees as Joint Tenants.— Every estate vested in executors or trustees, as such, shall be held by them in joint tenancy.

Real Property Law, § 56. See 1 R. S. 727, § 44.

The power and interest of cotrustees being equal and undivided, and their duties being more or less those of confidence and discretion, they must act jointly unless in acts of a mere ministerial nature, unless the will authorizes a majority to act.

² Leading Cases in Equity, 11-306; Hill on Trustees (2d Am. ed.), 436; Lorillard v. Coster, 5 Paige, 172; 14 Wend. 267; Sinclair v. Jackson, 8 Cow. 543; Crane v. Decker, 22 Hun, 452; Rothschild v. Schiff, 188 N. Y. 327.

Their Joint Action.—They must join in receipts, conveyances, and releases. Ridgeley v. Johnson, 11 Barb. 527; and in releases or transfers of realty. Van Rensselaer v. Akin, 22 Wend. 549; Hertell v. Bogert, 3 Edw. 20; 9 Paige, 52, reversed on the ground that the executors acted as executors and not as trustees. 4 Hill, 492. They must unite in bringing actions. Thatcher v. Candee, 4 Abb. App. Cas. 387.

One may confirm and recognize the acts of the other, however. Van Rensselaer in the case of the other, however.

selaer v. Akin, 22 Wend. 549.

See also The Trustees, etc., v. Stewart, 27 Barb. 553. See also "Satisfaction of Mortgages," Chap. XXIII; also "Powers," Chap. XII; "Powers of Executors," etc., Chap. XVII.

One trustee may discharge a mortgage, where his cotrustee has long been absent abroad. People v. Sigel, 46 How. Pr. 151.

A surviving executor or administrator may satisfy a mortgage. People v. Keyser, 28 N. Y. 226; Matter of Wadsworth, 27 Misc. 264.

Delegation of Powers and Transfer of Trust.—A trustee cannot delegate his powers or transfer his trust; and the vested interest of a cestui que trust cannot be impaired or destroyed by the voluntary act of the trustee, but the trust will follow the land in the hands of the person to whom it has been conveyed, with knowledge of the trust.

One who deals with a trustee must take notice of the scope of his authority, and is not protected, as against the beneficiaries, although he acts in good faith and without notice, where the act is beyond the limits of such scope.

Kirsch v. Tozier, 143 N. Y. 390; Shepherd v. McEvers, 4 Johns. Ch. 136.

Dealings with Trust Property.— The trustee cannot purchase or deal in the trust property, in his own behalf, or for his own benefit directly or indirectly, even on a judicial sale under a title superior to that of the trust.

Sternicker v. Dickinson, 9 Barb. 516; Abbott v. American H. R. Co., 33 id. 579; Conger v. Ring, 11 id. 356; Ackerman v. Emott, 4 id. 626; Jewitt v. Miller, 10 N. Y. 402; Dodge v. Stevens, 94 id. 209; Hubbell v. Medbery, 53 id. 98; Hoyle v. P. & M. R. R. Co., 54 id. 314, limited, 58 Hun, 215; People v. Merchants' Bk., 35 id. 97; People v. Open Board, etc., 92 N. Y. 98; Munson v. S. G. & C. R. R. Co., 103 id. 58.

This rule applies to any fiduciary—as to president of a corporation. Rogers v. Pell, 89 Hun, 159.

Neither can agents or trustees of a corporation per its effects.

Neither can agents or trustees of a corporation, nor its officers, sell the property of the corporation to themselves. Abbott v. Am. Hard. Co., 33 Barb. 578.

Such a sale and conveyance to a trustee is capable of confirmation by the express act of the cestui que trust (if of age) by acquiescence, and by lapse of time; and a title acquired by a subsequent purchaser, in good faith and without notice, will be valid. Such sales are not void, but voidable only at the instance of the cestui que trust.

Johnson v. Bennett, 39 Barb. 237; Dodge v. Stevens, 94 N. Y. 209; Harrington v. Erie Co. Sav. Bk., 101 N. Y. 257.

Harrington v. Erie Co. Svgs. Bk., 101 N. Y. 257; Bostwick v. Atkins, 3 N. Y. 52; Bostwick v. Schenck, 41 N. Y. 183. The cestui must move within a reasonable time to avoid it. 66 Barb. 215.

Equity would set it aside even against a purchaser unless he could show

he had no notice. Woodruff v. Cook, 2 Edw. 259.

A transfer of trust property without consideration would be void. Wardens, etc., v. The Rector, etc., 45 Barb. 356.

A breach by trustees, solicited or acquiesced in by beneficiaries, cannot be questioned by them. Matter of Reed, 45 App. Div. 202; Woodbridge v. Bockes, 59 id. 503; Adair v. Brimmer, 74 N. Y. 539, 552; Matter of Hall, 164 id. 201; Birrell, Duties of Trustees, 118 et seq.; Harrington v. Erie County Savings Bank, 101 N. Y. 257; Vohmann v. Michel, 185 id. 420.

Outstanding Title.— A trustee will not be allowed to purchase an outstanding title for his own benefit. Kellogg v. Wood, 4 Paige, 578.

He will hold it in trust for beneficiaries and remaindermen. Gilman v.

Healy, 49 Hun, 274.

A trustee under a mortgage cannot take an assignment of a bid on foreclosure and a deed from the referee. Toole v. McKiernan, 48 Super. 163.

One holding an interest in property as trustee is chargeable with a profit realized by him upon a purchase and resale thereof. Reynolds v. Sisson, 78 Hun, 595.

The statute of limitation does not begin to run in favor of a trustee against the beneficiaries until he has refused to execute the trust. Govin v. De Miranda, 79 Hun, 329.

Sale by.— Where the trustee is directed by the courts to give a certain notice on selling, a sale without the notice would be valid as to the purchaser, but the trustee would be liable for any deficiency.

A trustee's deed would be good although made by him as an individual. Bradstreet v. Clark, 12 Wend. 602. See also Chap. XX, Tit. II.

Presumption is for validity. People v. Stockbrokers' Bldg. Co., 49 Hun, 349, affd., 112 N. Y. 670.

Trustees of a Power.—As to trustees of a power, vide infra, Chap. XII.

Those Sentenced to Imprisonment.— Forfeiture of trusts by, vide supra, p. 110.

Married Woman.—A married woman may act as trustee.

The People v. Webster, 10 Wend. 554.

Corporation.— One corporation may be trustee for another. Sheldon v. Chappell, 47 Hun, 59.

Alien Trustees.— See p. 107

Insane Trustees.— Their committee may be compelled to convey.

Code Civ. Proc., §§ 2345, 2351, superseding 2 R. S. 55, § 20, which was repealed by Laws 1880, Chap. 245.

Infant and Incompetent Trustees .- Vide infra, Chap. XXV .-Infants or incompetent persons holding lands as trustees or mortgagees may be compelled by the Supreme Court to convey them as directed, and the conveyance shall be valid.

Code Civ. Proc., § 2345; 1 R. L. 148; 2 R. S. 194; Anderson v. Mather, 44 N. Y. 279; Hayatt v. Seeley, 11 id. 52; Matter of Whittaker, 4 Johns. Ch. 378; 6 Barb. 499; 38 id. 480. Cf. Hunter v. Dashwood, 2 Edw. 415; Wurster v. Armfield, 175 N. Y. 256.

Enforcement of the Performance of Trusts.—A general power in trust, the execution or nonperformance of which does not depend on the mere volition of the trustees, is imperative in its nature. and imposes a duty, the performance of which may be compelled in equity.

Arnold v. Gilbert, 5 Barb. 190; and vide, Chap. XII, "Powers."

Change of Trustees and Execution of Trusts through Legislative Acts.—As to these, see fully infra. Title IX.

It is held that it is competent for the Legislature to dispose of the in-

terests of infants, and of persons not in esse, and to declare that a deed executed by a portion of the trustees named in a will shall be sufficient to convey the entire estate. In re Bull, 45 Barb. 334; 31 How. 69.

It was held in 1880 that a judicial sale only concludes the interests of persons not in being, when the judgment provides for and protects such interests by substituting the fund derived from the sale of the land in place of it and preserving the fund to the extent necessary to satisfy such interests. Monarque v. Monarque, 80 N. Y. 320; Wilson v. White, 109 id.

In a later case, however, in 1896, it was held that the Legislature had power by special act to authorize the sale of contingent interests of persons not in being. Ebling v. Dreyer, 149 N. Y. 460.

This was enacted into statutory law. Real Property Law, § 57.

See also Real Property Law, §§ 58, 59, 60, 61, as to procedure in such cases; also Code Civ. Proc., § 2348, as amd. by L. 1903, Chap. 432; also Gen. Ct. Rules, 55-59; and infra, Title IX, for a full statement on this subject.

TITLE VIII. TRUSTS FOR CHARITABLE USES.

The law with reference to uses and trusts created for purposes of a religious or charitable nature has been the subject of extended discussion in the legal tribunals of this State.

The courts have endeavored to uphold such trusts, even when opposed to statutory enactments; and the long range of cases on the subject exhibits a curious instance of varying opinion in the judicial mind.

It was for a long time considered, by the courts of this State, that the law relative to such trusts was of a special character, under a peculiar equitable cognizance and jurisdiction, and, as such, excepted from the general provisions of statute abolishing uses and trusts, except as specially provided.

It was also considered that, notwithstanding the statutory prohibition against devises of lands to corporations, a devise of a charity not directly to a corporation, but in trust for a charitable corporation, would be good.

According to the English law, based upon certain prerogatives of the Crown and the statute of 43 Elizabeth, Chap. 4, the Court of Chancery, in England, exercised a certain peculiar jurisdiction over charitable trusts, in determining and applying gifts to charity, where the donor had failed to define them, and in framing schemes of approximation near to or remote from the donor's true design. Where, therefore, there was a gift for a general and indefinite charitable purpose, either the king, under his sign manual, or the court representing him, disposed of the subject donated.

The statute of Elizabeth was repealed by the State Legislature in 1788, and the prerogative of the Crown had, of course, no effect in this State; but the powers and jurisdiction of the English Court of Chancery, as they existed in England at the time of the Revolution, were supposed to have followed and remained with courts of equity in this State; and the law of charities, it was claimed, independent of the statute of Elizabeth, was in force prior to that statute, and continued after its abolition.

In the consideration of this subject by the courts of this country, it was, however, determined that the English doctrine with respect to charitable trusts, as it existed at the time of the Revolution, according to the common law, irrespective of statutory enactment, was to be considered in force here only as far as it was applicable to our circumstances, and conformable to our institutions, and not repugnant to them.

Any abrogation or modification of the law relative to trusts growing out of our colonial jurisprudence or subsequent statutory enactment, would, of course, produce a corresponding change in the doctrine relative to charitable trusts, unless such trusts were either expressly, or by legal implication, excluded from the operation of such changes.

The principal earlier cases on the subject of charitable uses and trusts in this country, where the ancient abstruse learning on the subject will be found investigated and applied, are here noted for reference.

Coggeshall v. Pelton, 7 Johns. Ch. 292; McCarty v. The Orphan Asylum, 9 Cow. 437; Kniskern v. The Lutheran Churches, 1 Sandf. Ch. 439; Shotwell

v. Mott, 2 id. 46, overruled, 125 N. Y. 590; Bogardus v. Trinity Church, 4 Paige, 178, 198; Canal Commissioners v. The People, 5 Wend. 445; Ayres v. The Methodist Church, 3 Sandf. 368; Inglis v. Trustees of Sailors' Snug Harbor, 3 Pet. 99; The Baptist Assn. v. Hart's Ex'rs, 14 Wheat. 1; Vidal v. Girard's Ex'rs, 2 How. U. S. 227; Owens v. The Missionary Society, 14 N. Y. 380; Boehm v. Engle, 1 Dall. 15; Attorney-General v. Stewart, 2 Merivale, 162; Phila. Bap. Assn. v. Smith, 3 Pet. 484; Bap. Church v. Presb. Church, 18 B. Mon. 635; Fortaine v. Ravenel, 17 How. U. S. 369.

The above cases, as a general rule, sustain the doctrine above referred to, with relation to the peculiar jurisdiction and power inherent in courts of equity in this country, as successors of the English Court of Chancery, in acting upon trusts of the above character, by carrying out the intention of the creator of the trust as far as it was possible; or, where the purpose was indefinite or impossible, in executing the trust as nearly as possible, in accordance with his supposed intentions.

It was subsequently determined, in this State, under the views expressed in our highest courts, that charitable gifts, so far definite, both in their subject and purpose, as to be capable of being executed by the authority of the court, and made to a definite trustee, who was to receive the fund and apply it in the manner specified, would be maintained, although they might be void by the general rules of law, because the particular objects of the gift or persons to be benefited by it were not definitely designated.

In other respects than as above specified, the rules of law regulating charitable uses and trusts were considered within those which appertained to trusts in general. But, it was also held, that the provisions of the statutes relative to restriction on alienation generally, and to accumulations of personal property and of expectant estates, did not affect property given in perpetuity to religious or charitable institutions. These views were entertained in the following leading cases on the subject.

Williams v. Williams, 8 N. Y. 527; Owens v. The Missionary Society, 14 id. 380; Beekman v. Bonsor, 23 id. 298.

In the above case of Williams v. Williams, it was considered by the Court of Appeals that the law of charities was, at an early period in English judicial history, engrafted upon the common law, and that it existed irrespective of the declaratory statute of Elizabeth, which was afterward repealed. The proceedings under that statute were considered of an exceptional nature, applicable to existing gifts, and not to the exercise of the general jurisdiction of the courts over charitable gifts; which consequently remained unimpaired on the abolition of the statute.

It was also held by the Court of Appeals, in the above case of Beekman v. Bonsor (23 N. Y. 298), that, as a general rule, charitable trusts are subject to the rules which appertain to trusts in general; among others, that the trust must be capable of execution by a judicial decree, in affirmance of the gift as the donor made it; and consequently, that a charitable gift of a sum which is left uncertain, or which is left to the discretion of executors who have renounced the trust, especially where the objects to be benefited are not especially designated, was void.

The court further held that the English common law on the subject could only be considered as in force here so far as it is adapted to our political condition, and capable of administration in the exercise of strictly judicial power, inasmuch as our courts are clothed only with an expressed judicial authority, and do not act as exponents or ministrants of a governing power.

Therefore, it was determined that, in this State, the courts cannot entertain a jurisdiction commensurate with that claimed for equitable tribunals in England, inasmuch as it would involve the exercise of functions rather political than judicial.

The exercise of such jurisdiction and authority, therefore, was considered as unsuited to, and inconsistent with, our institutions; and the "cy pres" power of the English Court of Chancery was definitely held not to have any existence in the jurisprudence of this State. Holland v. Alcock, 108 N. Y. 312.

The court, however, in the main, coincides with the views expressed in Williams v. Williams (8 N. Y. 527), in holding that trusts for charitable purposes formed an established exception to the law against perpetuities, as it existed before the Revised Statutes; and that it was not the intention of the Legislature, in reversing the branch of the law relative to perpetuities, to abolish that feature of the law of charities which allowed the income of property to be perpetually devoted to charitable purposes.

To the same effect were Kniskern v. The Luthern Church, 1 Sandf. Chan. 439; Shotwell v. Mott, 2 Sandf. 46; The Trustees, etc., v. Kellogg, 16 N. Y. 83; Voorhees v. The Presbyterian Church, 8 Barb. 135; Leonard v. Burr, 18 N. Y. 96; Tucker v. St. Clement's Church, 8 id. 558; Boyce v. City of St. Louis, 29 Barb. 650; and others above referred to.

We shall now briefly review the series of decisions which are in opposition to the above cases sustaining the doctrine that trusts for charitable uses might be upheld, although contrary to the provisions of the revision of 1830, and although indefinite in their character. These decisions, persistently attacking the above doc-

trine, in time culminated in the important cases of Levy v. Levv and Bascom v. Albertson, below referred to.

In the case of Ayres v. The Methdoist E. Church (3 Sandf. 357, 371), it was held that the restrictions of the Revised Statutes as to trusts applied as well to those for pious and charitable purposes as to others.

The case of Yates v. Yates, 9 Barb. 324, was to the same effect.

To the same general effect also were The Baptist Assn. v. Hart's Ex'rs, 4

Wheat. 1, and Fontaine v. Ravenel, 17 How. (U. S.) 369.

The above views were also maintained in the Supreme Court, in King v. Rundle, 15 Barb. 139, where directions for the accumulation of moneys contrary to the Revised Statutes, and trusts of real estate suspending the absolute power of alienation, and for purposes not authorized by the Revised Statutes, although for charitable designs, were held void.

The case of Voorhees v. The Presbyterian Church, 17 Barb. 103, is to

the effect that the statute abolishing uses and trusts extends to every use and trust not therein excepted, and that there is no qualification or exception, express or implied, in favor of public trusts and charitable uses.

This case also holds that no trust can arise in favor of a religious so-

ciety, except in those cases where it could arise, be created or declared in favor of a private person; and, except when otherwise provided, the same rule as regards Uses and Trusts, the Statute of Frauds and the modes of acquiring real property applies to them as to others.

The same views were expressed in the case of McCaughal v. Ryan, 27

Barb. 376.

To the same effect is the decision in Rose v. Rose, 4 Abb. App. Cas. 108. It is to be observed that even in the above case of Williams v. Williams (8 N. Y. 527) the provisions of the Revised Statutes were held applicable to the bequest in question so far as rendering the directions for accumulating

beyond the statutory limit void.

The court, in McCaughal v. Ryan (27 Barb. 376), further comments on supposed inconsistencies in the opinion pronounced in Williams v. Williams (8 N. Y. 527), and holds that it will not extend the decisions of the Court of Appeals in that case beyond the exemption of donations for pious and charitable uses, from the laws to prevent perpetuities; and that the devise under consideration being of real and personal estate, in trust for the Roman Catholic Church of the State, was null and void, as not being a trust within the classes allowed by the Revised Statutes.

The court, in expressing its views on the case, takes the ground that the decision in Williams v. Williams has relation merely to trusts of personal property, and that the courts of this State would not be justified in assuming that the restrictions of the Revised Statutes upon trusts would not be held to apply to trusts of realty, in view of the explicit statutes

regulating them.

The case of Owens v. The Missionary Society of the Methodist Episcopal Church, 14 N. Y. 380, arose upon a bequest of proceeds of real and personal estate to a corporation, not entitled to take, by law, for a pious purpose. It was held that the trust could not be sustained as a charitable or religious use, inasmuch as there was no trustee named competent to take by law; and that, therefore, the court had no power to uphold the bequest, and that the trust was in any case invalid, the object being too general and indefinite, i. e., "to diffuse the blessings of Christianity, etc., through the United States." It was also held that a subsequent act authorizing the corporation to take as provided, would not validate the bequest.

The court, in reviewing prior cases on the subject, places its decision on the ground that the law of charitable uses, as it existed in England at the time of the American Revolution, is not in force in this State; and that the courts of this State have only such jurisdiction over trusts for charitable and religious purposes as was exercised by the Court of Chancery in England, independently of the prerogatives of the Crown and of the statute, 43 Eliz.

Chap. 4.

The case is held to be distinguishable from Williams v. Williams (8 N. Y. 525), inasmuch as in that case the fund was bequeathed to trustees competent to take in the first instance. The court intimates that its decision is not intended to deny the powers of the courts of equity in this State, to enforce the execution of trusts for public and charitable purposes where the fund is given to a trustee competent to take, and when the charitable use is so far defined as to be capable of being specifically executed by the authority of the court, although no certain beneficiary, other than the public at large, be designated.

The case of Sherwood v. The American Bible Society (1 Keyes, 561), also holds that there must be a body or trustee competent to take a fund

also holds that there must be a body or trustee competent to take a fund given for charitable purposes, so as to secure the appropriation to the purpose intended, and there can be no valid trust unless the title can vest in some person, natural or artificial, by favor of the gift. See also Downing v. Marshall, 23 N. Y. 366; 37 N. Y. 380.

In the case of Phelps v. Phelps, 28 Barb. 121, a bequest to found a college in Liberia, in such manner as the executors might select, was held void, on the ground that the object of the charity, the mode of applying than the time when it should take affect were so uncertain and indefiit, and the time when it should take effect, were so uncertain and indefinite that the trust could not be enforced by the court.

In the case of Wilson v. Lynt, 30 Barb. 124, the court determined that a trust to accumulate proceeds of real and personal property until a certain sum should be raised to erect a church was void.

sum should be raised to erect a church was void.

In the case of Goddard v. Pomeroy, 36 Barb. 547, a devise in trust to provide for the payment of the salary of a missionary to be employed in preaching the gospel in the west was held void, as too vague and uncertain. Such a trust, however, would be upheld, it was considered, as a charitable use, although there were no ascertained or ascertainable beneficiary, provided the charitable use were so clearly and certainly defined as to be capable of being specifically executed, as intended by the donor, through a judicial decree.

The case of Levy v. Levy (33 N. Y. 97, revg. 40 Barb. 585) determined, for the time, the law upon these trusts in this State, and has been substantially adhered to in succeeding cases in the Court of Appeals. This case arose upon the question of the validity of trusts with reference to lands in another State, the trusts being void by the laws of that State.

The trust in question was to the "People of the United States, or such persons as Congress shall appoint," to receive the fund for the purpose of the education of a certain class of children of naval officers. The trust was given, in case Congress should not accept. to the State of Virginia, as trustee, and in case of its nonacceptance, to certain Jewish synagogues to produce societies to be incorporated to hold the land for schools of certain children. The fund was to be accumulated by the executors until the trustees of the synagogues, in default of procuring the laws to be passsed, were prepared to take.

The court, in its decision, extensively reviewed preceding cases, and held that, at common law, the trust would be void for want of a certain donee or beneficiary of the use or trust whom the law could recognize; that it was uncertain which class of beneficiaries would be the parties in interest, and if the class were ascertainable, that the individuals thereof were indeterminate, and unascertainable, and there was no ascertained beneficiary in whose favor performance might be enforced. If the trusts were viewed as a charitable use, neither could be sustained, it was held: although such trusts had been upheld when of an uncertain and indefinite character, and without a definite beneficiary; a distinction having been created between such trusts and others known to the common law.

The court determined, that the law of charitable trusts as existing and enforced in England, being based upon the statute of Elizabeth, was abrogated and annulled, in this State, by the Act of 1788, which, by a general enactment, repealed the statute of Elizabeth (2 Greenl. 136, § 37); and that the Legislature by that act, intended to abrogate the entire system of indefinite trusts, which were understood at the time to be supported by that statute alone, as being opposed to the general policy of our Government and to the spirit of our institutions.

The cases of Williams v. Williams, and Beekman v. Bonsor, above given, were fully reviewed by the court and virtually overruled. The court also determined that the trustees named, i. e., The People of the United States, or of the State of Virginia, were incompetent to take as trustees, they being created for certain determinate political purposes, and having no other functions or existence. Nor could the Hebrew congregations, it was held, so act, as the trust was not within the acts or province of their incorporation; as the one in New York being incorporated under the Act of 1813, could take property only for its own use, and the foreign corporations could not take and act as trustees of lands in this State.

The court was further of the opinion that the whole of the peculiar system of English jurisprudence for supporting, regulating and enforcing public or charitable uses, is not the law of this State, when in conflict with our statutory prohibitions relative to uses and trusts.

It was further determined that the dispositions in question were void as in contravention of the Revised Statutes against perpetuities (vide supra, p. 234), the executors being directed to hold the fund for an indefinite time, not determinable by lives in being. In this particular also, does the court overrule the decision in Williams

v. Williams, and lavs down the rule that trusts for charitable and the like uses come within the prohibition of the Revised Statutes restricting alienation.

Neither, it was held, could the dispositions be upheld as powers in trust, because they did not authorize any act which might lawfully be performed under a power, and they were neither general nor special powers under our statutes, as they did not contemplate the alienation or disposition of land.

It is to be remarked, that the elaborate opinion of Judge Wright in pronouncing the decision of the court, was acquiesced in, with respect to its conclusions as to the law of charities in the State of New York, by two of his associates only. Three others of the justices put their decision on other grounds, and three others dissented entirely.

Following the case of Levy v. Levy, the subsequent case of Bascom v. Albertson (34 N. Y. 584) also holds that the English system of indefinite charitable uses has no existence in this State, and no place in our system of jurisprudence. The court, in this case also, determines that the law of English charities was codified by the statute of 43, Elizabeth, Chap. 4, and that those common law principles, not thus codified and sanctioned, fell; that the repeal of the statute of Elizabeth and the Mortmain Act of Geo. II, Chap. 36. by the Legislature of this State, in 1788, in fact abrogated, in this State, the law of indefinite charitable uses which must be administered according to the statutes of the State; and that all gifts for such uses are subject to the provisions of the Revised Statutes in relation to uses and trusts, perpetuities, and the limitation of future estates.

The case of Burrill v. Boardman (43 N. Y. 254) is the succeeding case in our higher courts on the subject. That case decided that an executory bequest limited to the use of a corporation, to be created within the period allowed for the vesting of future estates and interests is valid.

It was held further that the bequest was not void on account of the uncertainty of the beneficiary. But in Leonard v. Bell, 1 Supm. 608, affd., 58 N. Y. 676, a similar provision was held void because the time within which incorporation should be had was not limited. See also People v. Simonson, 126 N. Y. 299; Booth v. Bapt. Ch. 126 id. 215.

In Cruikshank v. Home for the Friendless (113 N. Y. 337), the trust was held void because it was limited on vacars.

held void because it was limited on years.

1 The case of Adams v. Perry, 43 N. Y. 487, also holds that the only power in charitable and educational corporations to hold property in perpetuity in trust, is in virtue of their charters and the acts of 1840 and 1841, as to which vide infra, and Tit. IX.

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In case of Inglis v. The Trustees, etc., 3 Pet. 99, it has been held that a subsequent act of the Legislature would give validity and effect to a devise for charitable uses, where trustees were not otherwise sufficient or competent to carry out the designated object.

See also Baptist Association v. Hart's Executors, 4 Wheat: 1.

In the case of White v. Howard (46 N. Y. 144), it is held, that a devise to an unincorporated charitable assication is void, and is not made valid by the incorporation of such association after the death of the testator, and that a subsequent amendment of its charter would impart no vitality to a devise to a corporation not authorized to take at the time of the devise.

But it is held that a devise directly to a corporation for the nurpose for which it was incorporated is valid, although the duration of the trust be unlimited. Wetmore v. Parker, 52 N. Y. 450.

But the payment cannot be unduly postponed, or vesting prevented for a fixed time. Garvey v. McDevitt, 72 N. Y. 556. See also Holland v. Alcock, 108 N. Y. 312, 337; Bird v. Merklee, 144 N. Y. 549.

A devise of land to trustees for public washin held roid in default of

A devise of land to trustees for public worship held void, in default of an act enabling any corporation to take the devise. Holmes v. Mead, 52 N. Y. 332.

Under the principle of the leading case cited above, a devise to testator's wife of a portion of his estate to be expended in charity as she should deem fit, was held void. Lefevre v. Lefevre, 2 Supm. 30, mod. 59 N. Y. 434; Tilden v. Green, 130 N. Y. 29; also p. 265, supra.

See, modifying somewhat the recent decisions as to the definiteness of the

beneficiary and giving power of selection to executors. Power v. Cassidy, 79 N. Y. 602; Kain v. Gibboney, 11 Otto, 362; O'Hara v. Dudley, 95 N. Y. 403; Holland v. Alcock, 108 id. 312.

As to foreign charities, see Chamberlain v. Chamberlain, 43 N. Y. 424, 432; Cruikshank v. Home, 18 Abb. N. C. 282.

It may be remarked that in the above case of Power v. Cassidy, a power given to executors to divide among a set of named classes to be selected by them was sustained, and in case of a failure by them to make the

selection it was held the court might do so.

We find, however, in Holland v. Alcock, 108 N. Y. 312, which contains a very elaborate review of the subject that the absence of a defined beneficiary entitled to enforce its execution is, as a general rule, a fatal objection to the validity of a testamentary trust; and a power given to executors to select the beneficiary, does not obviate the objection unless the parties from whom the selection is to be made are positively defined. This case also holds distinctly that the English law of Trusts for Charitable uses, as distinguished from private trusts governed by the general rules of law, and the doctrine "cy pres" do not prevail in this State.

It is also held that a devise with private instructions to executors as to certain parties incapable of taking, would not be upheld; but where the gift is to several as joint tenants; with a promise to carry out the intentions of the testator by one of them, the trust would be carried out. v. Dudley, 95 N. Y. 403. In the Matter of Keleman (126 N. Y. 73), this case was commented upon, and only agreed with as to the question of fraud and a

trust ex maleficio.

It appears that the law of charitable trusts was by no means clearly settled by the courts under the above various and somewhat conflicting and obscure decisions, which have been given as above, somewhat fully, because the diversity of the facts in each case deprived it of authority as a precedent for others, and it is impossible to formulate distinct rules or prin-

ciples in this branch of law.

The case of Tilden v. Green, 130 N. Y. 29, shows that no prior adjudications were sufficient to guide into legal channels the minds even of those of long experience in the profession. That case holds, that a corporation devisee in futuro, must be created within the legal period, and that although there may be a selection of beneficiaries, it must be within a designated class, who might come into court and enforce it. The case also condemns the doctrine of cy pres.

The case of People v. Powers, 147 N. Y. 104, holds that failure to design

nate specific beneficiaries rendered the devise void.

For more exhaustive treatment of this subject and the historical development of the law pertaining to it, see Fowler's Charitable Uses, Trusts and Donations; also Fowler's Real Property Law (2d ed.), 347, 348, 448-454, et passim.

Legislative Enactments.—The trend of decisions as appears from the above seems to be that,

Courts of equity had no cy pres powers;

That gifts to individuals as trustees in perpetuity;

To unincorporated associations;

To corporations not expressly authorized by charter or statute to take:

Or for uncertain, undefined or indefinite uses;

Or for the use of undefined or indeterminate beneficiaries and not limited take effect within the statutory period;—all were invalid.

The doubtful state of the law as exemplified in the above cases, as to the uncertainty of the beneficiary and trustee, has been to a certain extent sought to be remedied as follows:

Laws of 1893, Chap. 701.—This provides that no gift, grant, bequest or devise to religious, educational, charitable or benevolent uses, which shall, in other respects, be valid, shall be deemed invalid by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries thereunder, in the instrument creating the gift. If a trustee is designated the legal title to the land or property is vested in such trustee; if none is named then the title shall vest in the Supreme Court. The court is also to have control over all gifts, grants, bequests and devises above named; and the Attorney-General shall represent the beneficiaries in all such cases and enforce the trusts. (Rothschild v. Schiff, 188 N. Y. 327.)

Real Property Law, § 93.—"A conveyance or devise of real property for religious, educational, charitable or benevolent uses, which is in other respects valid, is not to be deemed invalid by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries thereunder in the instrument making such conveyance or devise. If in such instrument, a trustee is named to execute the same, the legal title to the real property granted or devised shall vest in such trustee. If no person is named as trustee, the title to such real property vests in the Supreme Court, and such court shall have control thereof. The Attorney-General shall represent the beneficiaries in such cases and enforce such trusts by proper proceedings."

These two enactments remain side by side as the law, the Real Property Law not having repealed L. 1893, Chap. 701.

See Real Property Law, § 302.

Laws of 1901, Chap. 291.— This amended the second section of L. 1893, Chap. 701, giving the Supreme Court control, and provided that whenever it should appear to the court that circumstances had so changed since the execution of the trust instrument as to render impracticable or impossible a literal compliance with its terms, the court may upon the application of the trustee or the person or corporation having the custody of the property, on notice, make an order directing administration in such manner as in the judgment of the court will most effectually accomplish the general purpose of the instrument, without regard to and free from any specific restriction, limitation or direction contained therein (not, however, until twenty-five years after the execution of the instrument or without donor's consent, if he be living).

The Law of 1893 was construed and explained and recent abovementioned cases reviewed in Dammert v. Osborn, 140 N. Y. 30, and it was held there that the law showed an intention, on the part of the Legislature, to enforce and uphold such gifts which had not theretofore been recognized as valid.

Prior to the Act of 1893, the cy pres doctrine was held not to be a part of the State law of charities, as seen above, but after that act the tendency was to hold the other way.

Allen v. Stevens, 161 N. Y. 122; Racine v. Gillet, N. Y. L. J., March 30, 1901; 1 Col. Law Rev. 400, 402.

Finally, however, L. 1901, Chap. 291, supra, set the matter at rest, and, after twenty-five years elapsed, revived the cy pres doctrine in this State, in connection with charitable uses.

See L. 1901, Chap. 291; 2 Col. Law Rev. 10, for a discussion of this act.

L. 1893, Chap. 701, has been held to relieve future charitable uses from the operation of the rule against perpetuities.

Spencer v. Hay Lib. Assn., 36 Misc. 393; Allen v. Stevens, 161 N. Y. 122; Matter of Griffin, 167 id. 71, 81; Smith v. Chesebrough, 176 id. 317, 321; sed of. Hall v. Pearson, 36 App. Div. 237.

The Laws of 1893 and 1901 have been held, however, not to be retroactive.

Dammert v. Osborn, 140 N. Y. 43; Butler v. Trustees, 92 Hun, 96; People v. Powers, 147 N. Y. 104; Murray v. Miller, 85 App. Div. 414, affd., 178 N. Y. 316:

Doctrine of cy pres is under these statutes applicable to powers in trust to appoint to charitable or religious uses.

Kelly v. Hoey, 35 App. Div. 273.

These statutes probably restore the charitable uses of the common law, as distinguished from those under the Statute of Charitable uses (43 Eliz. Chap. 4), the former being much more extensive and embracing "pious." "public" and "charitable" uses.

Fowler's Real Property Law (2d ed.), 449, 450. See Fowler's Law of Charitable Donations, 104, et seq.

Devises to Religious Corporations under the Act of 1813.— The provisions in the Revised Statutes relative to trusts and perpetuities, have been supposed not to affect the powers of religious corporations incorporated under the general Act of 1813 (Laws of 1813, Chap. 60; 3 R. S. 292; Religious Corporation Law, G. L., Chap. XLII, L. 1895, Chap. 723), nor to apply to transfers of lands made to such corporations, which are within the authority conferred upon them by that act.

The above Act of 1813 was not repealed by the general repealing Act of 1828; and the general provisions of the Act of 1813, which allow corporaof 1828; and the general provisions of the Act of 1813, which allow corporations created under it to purchase and hold real estate for "pious uses," within certain limits, were supposed to control subsequent statutes of a general nature. Nearly every conveyance to a "pious use," it was contended, contemplates or creates a perpetuity, and implies a trust of some character which cannot be referred to any class of those cases which alone are authorized by the Revised Statutes. Tucker v. The Rector, etc., 2 Sand. 242; Williams v. Williams, 8 N. Y. 525; McCaughal v. Ryan, 27 Barb. 376. In Levy v. Levy, 33 N. Y. 97, supra, there is a dictum that religious societies incorporated under the Law of 1813, if they could take by devise, could take only for their own use. The point, however, was not directly in question as to their exception from the provisions of the statutes relative to trusts.

to trusts.

In the case of Wilson v. Lynt, 30 Barb. 124, it is held that trustees of religious societies have not the capacity to take property devised or bequeathed to them in trust for other societies.

The case of Goddard v. Pomeroy, 36 Barb. 546, held, further, that where a religious corporation has not the specific power to take by devise, for any purpose, a devise and trust founded upon it would be void.

In that case, also, the court determined with respect to religious societies In that case, also, the court determined with respect to religious societies incorporated under the Act of 1813, that they are not expressly or impliedly authorized to take lands by devise for any purpose whatever; such societies being within the restrictions of the Revised Statutes. 2 R. S. 57, § 3, declaring "that no devise to a corporation shall be valid, unless such corporation be expressly authorized by its charter, or by statute, to take by devise." Such corporations, under the Law of 1813, it was therefore held, could take only by conveyance. See also Theological Seminary v. Childs, 4 Paige, 419; Ayres v. The Methodist Episcopal Church, 3 Sandf. 351; King v. Rundle, 15 Park 130. 15 Barb. 139.

Within the views taken by the courts in the cases of Levy v. Levy, 33 N. Y. 97, and Adams v. Perry, 43 id. 487, and subsequent cases referred to in the above pages, it is to be supposed that no trusts, even in favor of corporations created under the Law of 1813, for "pious purposes," whether created by grant or will, would be now held valid, if in conflict with the express provisions of subsequent statutes restricting the creation of trusts or the suspension of alienation, or with any other general prohibitory or restrictive

See O'Hara v. Dudley, 95 N. Y. 403, revg. 64 How. Pr. 340, and cases cited therein; Gilman v. McArdle, 99 id. 451, as to trusts for saying mass. But see, as to this, Harris v. Am. Bapt. Home Miss. Soc., 33 Hun, 411.

This Act of 1813 was amended, Laws of 1867, Chap. 656; 1890, Chap. 66 (vide also Gen. Corp. Law, L. 1892, Chap. 687); and was repealed by "The Religious Corporations Law," Gen. Laws, Chap. XLII; L. 1895, Chap. 723.

Ape. 123.

See also amendments to The Religious Corporations Law, viz.: L. 1895, Chap. 723; L. 1896, Chaps. 35, 56, 190, 308, 336, 525; L. 1897, Chap. 621; L. 1898, Chap. 358; L. 1900, Chap. 521; L. 1901, Chap. 222; L. 1902, Chaps. 97, 208, 365; L. 1904, Chaps. 85, 344; L. 1905, Chaps. 46, 193, 314, 324, relating to the various denominations.

Vide, also Chap. XV, Tit. X, "Devises to Corporations."

Law of 1860, as to Devises to Corporations .- By Law of April 13, 1860, Chap. 360, no person having a husband, wife, child or parent, shall, by his or her last will and testament, devise or bequeath to any benevolent, charitable, literary, scientific, religious, or missionary society, association or corporation, in trust or otherwise, more than one-half part of his or her estate, after the payment of his or her debts (and such devise or bequest shall be valid to the extent of one-half and no more).

All inconsistent acts, or parts of acts, are repealed.

See infra, Chap. XV, Tit. X, as to devises to such societies as above, under the Laws of 1848, Chap. 319, as amended by Law of 1853, Chap. 487. The latter law allowed a devise of not more than a fourth of an estate, after payment of debts, by a wife, child or parent, provided the will was executed two months before decease of the testator. Stephenson v. Short, 92 N. Y. 433.

Under the Statute of 1860, the widow's dower and debts are to be first deducted before the half is estimated; and the testator cannot give to two or more corporations, in the aggregate, more than he can give to a single object. Chamberlain v. Chamberlain, 43 N. Y. 424.

Where widow has elected to accept a testamentary provision in lieu of dower, then dower is not deducted. Lord v. Lord, 44 Misc. 530.

Devise of all testator's real estate to charities held invalid. Devise sustained only to extent of one-half of testator's estate, after payment of his debts and widow's dower, remaining one-half going to heirs at law. Jones v. Kelly, 170 N. Y. 401.

This statute, it is held, can be invoked for the benefit of any parties who would, if the decedent had died intestate, take the decedent's property in connection with any of the relatives named in the statute. Matter of Stilson, 85 App. Div. 132, practically overruling Frazer v. Hoguet, 65 id. 92.

Devises in Trust for Religious Purposes .- An act was passed April 9, 1855, relative to devises to religious corporations, in trust or otherwise, which was repealed by Law of 1862, Chap. 147.

Act of 1840. Trusts for Colleges and Literary Institutions, for Cities, etc., for Certain Purposes, and for Common Schools.— By Act of May 14, 1840, Chap. 318, real and personal property may be conveyed to incorporated colleges and literary incorporated institutions in the State, to be held in trust for either of the following purposes:

"1. To establish and maintain an observatory.

[&]quot;2. To found and maintain professorships and scholarships.

"3. To provide and keep in repair a place for the burial of the dead; or

"4. For any other specific purposes comprehended in the general objects

authorized by their respective charters. The said trusts may be created, subject to such conditions and visitations as may be prescribed by the grantor or donor, and agreed to by said trustees, and all property which shall hereafter be granted to any incorporated college or other literary incorporated institution in trust for either of the aforesaid purposes, may be held by such college or institution upon such trusts, and subject to such conditions

and visitations as may be prescribed and agreed to as aforesaid.

"§ 2. Real and personal estate may be granted and conveyed to the corporation of any city or village of this State, to be held in trust for any purpose of education, or the diffusion of knowledge, or for the relief of distress, or for parks, gardens, or other ornamental grounds, or grounds for the purposes of military parades and exercises, or health or recreation, within or near such incorporated city or village, upon such conditions as may be prescribed by the grantor or donor, and agreed to by such corporation; and all real estate so granted or conveyed to such corporation, may be held by the same, subject to such conditions as may be prescribed and agreed to as aforesaid.

"§ 3. Real and personal estate may be granted to commissioners of common schools of any town, and the trustees of any school district, in trust for the benefit of the common schools of such town, or for the benefit of the

schools of such district.

" § 4. The trusts authorized by this act may continue for such time as may be necessary to accomplish the purposes for which they may be created."

By Law of May 26, 1841, Chap. 261, devises and bequests of real and personal property in trust, for any of the purposes for which such trusts are authorized under the "act authorizing certain trusts, passed May 14, 1840," and to such trustees as are therein authorized, shall be valid in like manner as if such property had been granted and conveyed according to the provisions of the aforesaid act.

§ 36; Matter of McGraw, 111 N. Y. 66. 1 R. S. 460, § 36 is now repealed; L. 1892, Chap. 378, The University Law. See § 34, subd. 5, as amd. by L. 1901, Chap. 592. Held, neither of these acts affects the limitation as to amount. 1 R. S. 460,

As to the interpretations of the above trusts in a certain special case,

vide Adams v. Perry, 43 N. Y. 487; also Yates v. Yates, 9 Barb. 324.

By Law of April 21, 1846, Chap. 74, "the income arising from any real or personal property granted or conveyed, devised or bequeathed in trust to any incorporated college or other incorporated literary institution, for any of the purposes specified in the "act authorizing certain trusts," passed May 14, 1840, or for the purpose of providing for the support of any teacher in a grammar school or institute, may be permitted to accumulate till the same shall amount to a sum sufficient, in the opinion of the regents of the university, to carry into effect either of the purposes aforesaid, designated in said trust."

By Act of April 13, 1855, Chap. 432, if any principal, as allowed by the above acts, becomes diminished, it may be made up by the accumulation of the interest or income of principal of such trust fund, in accordance with the directions, if any, contained in the grant, etc., devise or bequest of said trust fund, and if there are no such directions, it may be made up in whole or in part by such accumulation, in the discretion of the trustees of such trust fund; the accumulation is not to increase beyond the original trust fund, less liens, incumbrances, and expenses incurred in obtaining the same.

See Betts v. Betts, 4 Abb. N. C. 317, 409.

Trusts for Common Schools .- Real and personal estate may be granted, conveyed, devised, bequeathed, and given in trust and in perpetuity or otherwise, to the State or to the Superintendent of Public Instruction, for the support or benefit of common schools. The trusts are not to be invalid for want of a trustee or donee.

Consolidated School Law, Title II, Art. 3, §§ 19, 20. See formerly Law of May 2, 1864, Chap. 555, Tit. III, §§ 15-17.

Various other school acts have been passed with respect to different por-

tions of the State, which may have to be specially considered.

Trusts for benefit of "Friends," see Laws of 1878, Chap. 209, amdg. Laws of 1839, Chap. 184, § 3. Also Laws 1880, Chap. 337; amdg. Laws 184, § 2. See now Religious Corporations Law, L. 1895, Chap. 723, §§ 92, 93. Vide supra, Laws of 1840.

Gifts and Trusts to Advance Learning, Arts and Sciences by a grant during life of founder, or grantor.

See Laws 1892, Chap. 516, amd. L. 1905, Chap. 303.

Trust for Public Parks.—Vide Laws of 1890, Chap. 160.

Parks and Libraries.— Laws 1892, Chap. 25.

TITLE IX. MISCELLANEOUS PROVISIONS AS TO TRUSTS.

There are many complex principles of law and equity arising out of the peculiar nature of trust estates, the relation of trustees to the cestui que trust and the obligations of those parties to third persons. which cannot be inquired into in a treatise of this general nature. The establishment and enforcement of trusts arising from or through fraud, the intent of parties, fiduciary relations, equitable liens, voluntary dispositions, and other conditions and causes, offer a wide field for review.

They fall, as a general rule, under the peculiar cognizance of courts of equity, and few new conditions that will arise will allow of the precise reapplication of equitable principles as controlling antecedent cases. Such trusts only as have been the peculiar subjects of statutory provisions have been considered in this chapter.

As regards others of a more recondite character that arise under principles of equity jurisprudence, and call for relief from purely equitable tribunals, they have been subjects of learned and extensive research in works treating particularly of trusts of such a nature.

The terms "Real Estate" and "Lands."—By the Statutes it is provided that the terms "real estate," "real property" and "lands," as applied in them to trusts, shall be construed as coextensive in meaning with lands, tenements and hereditaments.

1 R. S. 750, § 10; Real Property Law; L. 1896, Chap. 547, § 1.

Descent of Trusts.— Real estate held in trust for any other person, if not devised by the person for whose use it was held, descends to his heirs according to the provisions of the statute of descents.

1 R. L. 74; 1 R. S. 754; Real Property Law, § 280.

Result of Failure of Object of the Trust.— In these cases a trust results to the original owner, if they are active trusts, but not if they are conveyances to uses, and a consideration has been paid.

Vandervolgen v. Yates, 9 N. Y. 219.

Violation and Diversion of Trusts.— No violation or diversion of trusts upon which property was conveyed, works a forfeiture, and it cannot have the effect to revest either the legal or equitable title in the heirs of the original grantor.

R. P. D. Church v. Mott, 7 Paige, 77; vide supra, as to acts in contravention of trust, page 290.

Trustees may convey an expectant estate and execute the trust even during the life of the life tenant. Rothschild v. Schiff, 188 N. Y. 327.

Misapplication of Moneys, etc., by Trustees.—"A person who shall actually and in good faith pay a sum of money to a trustee, which the trustee as such is authorized to receive, shall not be responsible for the proper application of the money, according to the trust; and any right or title derived by him from the trustee in consideration of the payment shall not be impeached or called in question in consequence of a misapplication by the trustee of the money paid."

Real Property Law, § 88; see 1 R. S. 730, § 66. Champlain v. Haight, 10 Paige, 274; Field v. Schieffelin, 7 Johns. Chan. 150. See also Wilson v. Lynt, 30 Barb. 124; Griswold v. Perry, 7 Lans. 98. Unless the purchaser knew that the trustee intended to misapply the money, or had sufficient information thereof; and in such case he would be liable.

Knowledge of the Trust .- Where a party has knowledge of facts sufficient to put him upon inquiry as to the existence or conditions of a trust, he purchases subject to all legal or equitable rights under it, and must ascertain at his peril whether precedent conditions have been fulfilled.

Voorhees v. The Presbyterian Church, 8 Barb. 135. See also supra, p. 290. Mere recital of performance will not protect. Griswold v. Perry, 7 Lans. 98. Even the Court of Chancery cannot direct a disposition of the trust property contrary to the trust. Douglas v. Cruger, 80 N. Y. 15. See, however, Real Property Law, § 85, as amended by L. 1897, Chap. 136; also p. 286, supra, and the discussion of the law with reference to sales

authorized in contravention to the trust, under the statute; also infra.

Legislative Acts as to Sale of Property in Trust.—It is held that the Legislature (except in cases of necessity arising from the infancy, insanity or other incompetency of those in whose behalf it acts) has no power to authorize, by special act, the sale of private

property held in trust, for other than public purposes, without the consent of all interested in the property.

Powers v. Bergen, 6 N. Y. 358.

In the subsequent case of Leggett v. Hunter, 19 N. Y. 445, it was held that a public or private act of the Legislature would be valid which authorized, upon the petition of the cestui que trust, a sale of the trust estate, so as to operate for the benefit of infants and others under disability, who had either vested or contingent interests; and that the power might be exercised as well in respect to the rights of persons in esse as to the contingent interests of persons yet to be born. See also Brevoort v. Grace, infra.

An act of the Legislature by which the legal title of a mere naked trustee is declared to be transferred to and vested in the cestui que trust, who previously had the power to compel such transfer through the courts, is held constitutional and valid. The Reformed P. D. Church v. Mott, 7 Paige, 77.

It is also held that the Legislature may provide for the disposal of the interests of infants and persons not in esse, but not of adults, and declare that a deed executed by a portion of the trustees named in a will shall be sufficient to convey the entire estate. Matter of Bull, 45 Barb. 334; Brevoort v. Grace, 53 N. Y. 245; In re Field et al., 131 N. Y. 184. Acquiescence of adults by appearance. Id.

In relation to the power of the Legislature of the State to pass acts relative to changes of trustees and the disposition of trust estates under a will conferring a trust estate, with power over the realty, the history of the adjudications relative to the will of Mary Clark, in the various courts of this State and in the Federal courts, is of interest. A review of the various decisions relative thereto is here given.

 $\it Vide\ infra$, as to statutes passed to settle the questions arising in these decisions.

The will was made in 1802, devising lands in New York City to trustees, in trust to receive the rents, to pay the same to testatrix's grandson, Thomas B. Clarke, during life, and upon his decease to convey the lands to his lawful issue then living, in fee; in default of which, remainder over. It appeared that the land was unproductive and comparatively useless for income.

In 1814, T. B. Clarke, then being living, with two children (one other being born subsequently), an act was passed by the Legislature, on the request of the then trustees, providing that the Court of Chancery, on Clarke's application, might appoint one or more trustees, to perform the acts specified in the will, in place of the testamentary trustees, who were by the act discharged from said trusts. The new trustees were directed to partition the lots into two portions, one moiety thereof to be held by them under the uses and trusts declared by the will, and the remaining moiety to be sold within a convenient time not exceeding six months, unless otherwise requested by Clarke, the proceeds to be invested, the interest to be paid, except a certain portion, to Clarke, and the principal to be reserved for the trusts of the will.

On March 24, 1815, a supplementary act was passed authorizing Clarke to execute and perform every act in relation to the real estate, with like effect that the trustees duly appointed under the will might have done, and to apply the whole of the interest and income of the said property to the maintenance and support of his family, etc. The act further provided that no sale of any part should be made by Clarke until he obtained assent of the chancellor as to the sale and as to the vesting of the principal of the proceeds in the trustees; the interest to be applied by Clarke for his use and

the maintenance and education of his children.

On July 3, 1815, the chancellor made an order authorizing Clarke to sell the eastern moiety, to be divided by a line specified.

On March 29, 1816, a third act was passed, authorizing Clarke, under said order, or any subsequent order, either to sell or mortgage premises which the Chancellor had permitted or might permit him to sell, and to

on March 15, 1817, the chancellor authorized Clarke to sell the southern moiety, instead of the eastern moiety, or mortgage any part thereof; also, to convey any portion of the southern moiety, in satisfaction of any debts due by him, or a valuation agreed upon by him and his creditors; each sale or mortgage to be approved by a master; and power was given him to

sale or mortgage to be approved by a master; and power was given him to invest the surplus in such manner as was proper to yield an income as above. In 1818, lots in the south moiety, and also the west moiety, were conveyed to creditors of Clarke, in consideration of his indebtedness and of cash paid. Other sales, also, were made under the above acts and orders, and questions arose as to the validity of the titles passed.

Questions touching the validity of the before-mentioned acts of the Legislature of the State were first considered judicially in the case of Sinclair v. Jackson, 8 Cow. 543, 579; but the decision turned upon another point, and Jackson, 8 Cow. 543, 579; but the decision turned upon another point, and the court avoided expressing any opinion as to their validity. The next case was Cochran v. Van Surlay, 15 Wend. 439, decided originally in the Supreme Court. Statement of the court in that case was that when the first act was passed all the parties interested in the trust estate, who were capable of acting for themselves, were before the Legislature, and were applicants for the law. Besides Clarke, the tenant for life, in his own right, and the natural guardian of his children, to whom the remainder was limited, there were Clement C. Moore, the contingent remainderman in fee, and the trustees named in the will, who had the whole legal estate, and represented the minors as fully as they could be represented in any form. The decision of the court was that the Court of Chancery, without an act of the Legislature, could have discharged the trustees named in the will and might have appointed others in their place, and that the act of the Legislature was not an act beyond its constitutional power, as the mere substitution of a new trustee could neither defeat the trust nor divest the rights of those beneficially interested in the property. It was also deterrights of those beneficially interested in the property. It was also determined that the several acts were valid and constitutional, although they did not extend to other cases of like character. Objections were also taken that the orders of the chancellor were not made in pursuance of the acts of the Legislature; but those objections were overruled as unsupported in fact, or as entirely unavailing, unless presented in some direct proceeding, as by appeal, or by application to the chancellor for new orders and directions in the premises. The conclusions of the court were, first, that the acts of the Legislature authorizing the sale of the property for the support and maintenance of the tenant for life, and of his family, and the education of his children, were fully warranted by the State Constitution, and that they did not in any manner conflict with the Constitution of the United States; second, that the orders of the chancellor, in carrying those provisions into effect, were regular and proper, and that the deeds of conveyance were sufficient to convey the title to the estate to the grantees. The plaintiff sued out a writ of error, and removed tne cause into the Court for the Correction of Errors, where the questions were again fully argued, but the judgment of the Supreme Court of the State was in all things affirmed. Cochran v. Van Surlay, 20 Wend. 365, 371. Pending that litigation, certain suits were commenced in the Circuit Court of the United States for the Southern District of New York, and the justices of that court being opposed in opinion in respect to the principal questions involved in the controversy, they were certified into the Supreme Court of the United States, and the majority of the court adopted in substance and effect the views of the miniority of the Court for the Correction of Errors. Williamsson v. Berry, 8 How. 495. The same questions in respect to the same estate were subsequently presented to the Superior Court of the city of New York, and the court adopting the State decisions, held that those acts of the Legislature were not inhibited by the State Constitution, nor by that

clause of the Constitution of the United States which declares that no State shall pass any law impairing the obligation of contracts. Towle v. Forney, 4 Duer, 164. Judgment was for the plaintiff, and the defendant appealed to the Court of Appeals that the questions might be re-examined. The express decision of the Court of Appeals was, that the judgment of the Court of Errors in Cochran v. Van Surlay, was a final determination of the court of last resort in the State, not only upon all questions of law in the case, but upon the identical title in controversy, and that they ought not to re-examine the grounds of that decision. They also held that, as between judgments of their own courts and those of the Federal government, where there is a conflict between them, they ought to follow their own decisions, except in cases arising under the Constitution and laws of the Union. Towle v. Forney, 14 N. Y. 423, 428. Subsequently, the case of Williamson v. Suydam was decided in the Circuit Court of the United States, So. District of New York, in favor of the plaintiff, but the defendant removed the cause into the Supreme Court of the United States, by writ of error, where it was affirmed, because there was no bill of exceptions. Suydam v. Williamson, 20 How. 429. By consent a bill of exceptions was subsequently allowed, and the cause brought up on a second writ of error, and the court came to the unanimous conclusion that the decision of the Court of Errors, sanctioned by the subsequent decision of the Courts of Appeals, established a rule of property in the State of New York, which it was the duty of the court to follow in questions of real property situated in that State. Suydam v. Williamson, 24 How. 427.

The same questions were again brought before the United States Supreme Court on appeal; and in the case of Williamson v. Suydam 6 Wall 723

The same questions were again brought before the United States Supreme Court on appeal; and in the case of Williamson v. Suydam, 6 Wall. 723, the court reaffirmed the decisions in the Court of Appeals, and of Suydam v. Williamson, 24 How. 427. Question also arose in the case of Williamson v. Suydam, touching the construction of the second section of the Act of April 1, 1814, which authorized the trustees to divide the estate into two equal parts for the purposes above mentioned. Authority to partition was conceded, but the argument was, that when the estate was divided into that the chancellor had power to make the order of March 29, 1816, as construed in connection with the preceding acts to which it was supplemental, and that the chancellor's orders were valid, as established in the cases of Towle v. Forney, 14 N. Y. 426, and Clarke v. Van Surlay, 15 Wend. 439, supra. Another question presented to the court in the last case, of Williamson v. Suydam, 6 Wall. 723, was whether the discharge of the trustees named in the will, by the Legislature was in contravention of the Constitution of the United States, which declares that no State shall pass any law impairing the obligation of contracts.

The court held, that, inasmuch as all persons who were capable of acting for themselves, were applicants to the Legislature for the passage of the acts, including the trustees, and inasmuch as the chancellor had power to appoint new trustees, even without application to the Legislature, and as the mere substitution of a new trustee could neither defeat the trust nor divert the rights of those interested, that the validity of the appointment of the new trustees or trustee was not to be questioned; and that no question of contract arose in the matter, the trustees having no beneficial interest. See also Leggett v. Hunter, 19 N. Y. 446; Brevoort v. Grace, 53 id. 245.

By the acts of 1882, 1884, 1886, 1891, 1895, and finally Real Property Law, § 85, as amended by L. 1896, Chap. 136, before adverted to, p. 200, many questions passed upon in these cases are now sought to be settled in this State.

See further as to sale of infants' estates under special statutes, Chap. XXV, Tit. III.

Trusts Liable to Judgments, Executions, etc.—" Real property. held by one person, in trust or for the use of another, is liable to levy and sale by virtue of an execution, issued upon a judgment recovered against the person, to whose use it is so held, in a case where it is prescribed by law, that by reason of the invalidity of the trust, an estate vests in the beneficiary; but special provision is not otherwise made by law, for the mode of subjecting it to his debts."

Code Civ. Proc., § 1431; see formerly 2 R. S. 368, § 26.

The beneficial interest of a cestui que trust in lands, however, cannot be sold on a judgment and execution at law. Nor a resulting trust. Wright v. Douglas, 3 Barb. 555, revd., 7 N. Y. 564; Garfield v. Hatmaker, 15 id. 475, overruling 4 Den. 439; see supra, p. 288.

A conveyance to judgment-debtor's wife, he paying consideration, may be attacked, even when judgment is more than ten years old. Scoville v. Halliday, 16 Abb. N. C. 43.

A receiver in supplementary proceedings cannot reach surplus of trust. Only the creditor can do so. Levey v. Bull, 47 Hun, 350.

See also Real Property Law, § 78 (1 R. S. 729, § 57), as to reacting of surplus in trust rents and profits by creditors.

A judgment and execution returned unsatisfied must be shown. Dittmar v. Gould, 60 App. Div. 94, containing a full discussion of the principles of law involved.

Brown v. Barker, 68 App. Div. 592; Keeney v. Morse, 71 id. 104.
An action to recover the surplus cannot be maintained by a trustee in bankruptcy, as this remedy is available only to judgment creditors who have exhausted their remedies at law. Butler v. Baudouine, 84 App. Div. 215.

Trusts in Escheated Lands.—Lands escheated to the State for failure of heirs shall be held subject to the same trusts and encumbrances to which they would have been subject if they had descended.

Public Lands Law, G. L., Chap. XI, L. 1894, Chap. 317, § 68. See 1 R. S. 718, § 2. This applied to all escheated lands and gave the Court of Chancery power to direct the Attorney-General to convey such lands to the parties equitably entitled.

Trustees of Insolvent Debtors.—As to these, vide infra, Chap. XXXI.

Trustees may Impeach Assignments, etc.-An executor, administrator, receiver, assignee or trustee, may disaffirm, treat as void, and resist all acts done, or transfer or agreement made in fraud of the rights of creditors, including himself, interested in such estate or property.

Personal Property Law, G. L., Chap. XLVII, L. 1897, Chap. 417, § 7. See formerly L. 1858, Chap. 314, § 3, of this act being repealed by L. 1880, and replaced by Code Civ. Proc., § 1916. By Laws of 1889, Chap. 487, this Act of 1858 was much extended.

Trusts for Aliens .- Vide supra, p. 107.

Responsibility of Trustees, Guardians, etc., as Stockholders .- Vide Law of July 1, 1882, Chap. 409, and amendments; particularly the Banking Law, G. L., Chap. XXXVII, L. 1892, Chap. 689, § 54, as amd. by L. 1897, Chap. 441. See also the Stock Corporation Law, G. L., Chap. XXXVI, L. 1890, Chap. 564, § 54, as amd. by L. 1892, Chap. 68, and L. 1901, Chap. 354.

Trustees of Academies.-Vide Law of April 20, 1835, Chap. 123; University Law, L. 1892, Chap. 378 (repealing §§ 2 and 3 of the Law of 1835), as amended.

Trustees of Idiots, Lunatics, Drunkards, etc .- See Code of Civil Procedure, Chap. 17, Tit. 6, §§ 2320-2344, superseding § 25, Tit. II, Chap. V, part II, of Revised Statutes, as amended by L. 1865, Chap. 724, and by Law of April 28, 1845, Chap. 112, which contained the former law and were repealed by L. 1880, Chap. 245. And see Lunatics, etc., Chap. XXV.

Trusts Relative to Shaking Quakers.—Vide The Religious Corporations Law, G. L., XLII, L. 1895, Chap. 723, as amd. superseding acts of April 15, 1839, Chap. 174; April 11, 1849, Chap. 373. See also Laws of 1852, Chap. 203; all of which acts were repealed by the said General Law.

Trusts Relative to "Friends" or "Quakers."-Vide The Religious Corporations Law, superseding and repealing Laws of April 17, 1839, Chap. 184; amd. Laws 1878, Chap. 209; Laws of 1880, Chap. 337.

Trusts of Personal Estate.— See Personal Property Law, G. L., Chap. XLVII, L. 1897, Chap. 417, as amd. It is considered by the courts that a trust of personalty is not within the statute of uses and trusts, and may be created for any purpose not forbidden by law. No prohibition or restriction seems to be imposed on them by statute, except as to the limitation of future contingent interests therein.

But unless charitable they must be certain, capable of being enforced, etc. Holland v. Alcock, 108 N. Y. 312.

A trust of personal estate for the use or benefit of the grantor or donor is raid, and vests the legal title in the trustee, unless the purposes of the trust are unlawful. Brown v. Harris, 25 Barb. 134; Gott v. Cook, 7 Paige, 521; Foster v. Coe, 4 Lans. 53; Bucklin v. Bucklin, 1 Keyes, 141, but compare Holland v. Alcock, 108 N. Y. 312.

See also Holmes v. Mead, 52 N. Y. 332; Owens v. Missionary Soc., 14 id. 380; Beekman v. Bonsor, 23 id. 298; Trustees, etc., v. Kellogg, 6 id. 83.

See Underwood v. Curtis, 127 N. Y. 523, 537.

Release of Sureties of Trustees .- See Laws 1881, Chap. 654.

Trusts Causa Mortis.—As to trusts and gifts causa mortis, see Bliss v. Fosdick, 86 Hun, 162.

CHAPTER XI.

JOINT INTERESTS IN LAND.

TITLE I.— JOINT TENANTS.
II.— TENANTS IN COMMON.
III.— PARTNERSHIP LANDS.

A joint interest may be had, either in the title or possession of land. As regards the title, the tenancy may be as joint tenants (formerly, also, under the common law, as coparceners), or in the possession, as tenants in common.

Tenancy as coparceners which existed in England between coheirs who inherited equally by descent (e. g., females), is not recognized as such by our statutes; the Revised Statutes provided that such estates are held "in common." (IR. S. 753; Real Property Law, § 293.) The Revised Statutes divided estates as to ownership into those held in severalty, in joint tenancy and in common; their nature and properties to continue the same as theretofore established by law, except as modified by Chap. I, Part II, of the Revised Statutes. IR. S. 726, § 43. And the Real Property Law continued this division of estates as to ownership. Real Property Law, § 55.

TITLE I. JOINT TENANTS.

Joint tenants hold lands by a joint title. As a general rule, the tenancy must be created at the same time, and must be of the same duration or nature and quantity of interest. The estate is never created by descent, but only through deed or by devise, and generally by one and the same deed or will.

See, however, Colson v. Baker, 42 Miss. 407.

Joint tenants are said to be seized per my et per tout, and each has the entire possession, as well of every parcel as of the whole, but alienation or forfeiture would only affect the individual interests.

The doctrine of *survivorship*, or *jus accrescendi*, is the distinguishing feature of *joint tenancy*; and on the death of any one of the joint tenants, his share, at common law, went to the survivors; and such is still the rule.

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The last survivor took an estate of inheritance absolutely, free from any liens or charges created by the others or their interests.

A joint tenant, therefore, could not devise his interest, and the widow had no dower therein. He could, however, alienate his undivided interest by deed, and it was subject to forfeiture, and to any liens created by him in case he survived the others.

Hubbard v. Gilbert, 25 Hun, 596.

Changes by N. Y. Statutes.—As early as 1782 and 1786, estates by joint tenancy were abolished, except in the case of executors and other trustees, or unless the estate was expressly declared in the deed or will to pass in joint tenancy. And any estate (with the following exception as to executors, etc.), passing by any grant, devise, or conveyance, was to be deemed a tenancy in common, unless otherwise expressly declared.

Law of July 12, 1782, Chap. 2; Law of Feb. 23, 1786, Chap. 12: 1 R. L. 54, §§ 6, 7.

The Revised Statutes provided that every estate vested in executors or trustees, as such, shall be held in joint tenancy. Every other estate granted or devised to two or more persons in their own right was to be a tenancy in common, unless expressly declared to be in joint tenancy. This provision is to apply to estates theretofore created, as well as to those to be thereafter granted or devised.

1 R. S. 727, § 44.

These provisions were re-enacted in the Real Property Law. Real Property

Any words imputing intent are requisite to create an estate in joint tenancy. Purdy v. Hayt, 92 N. Y. 446, 453; Coster v. Lorillard, 14 Wend.

Construction of a devise "to two persons and the survivors," as a tenancy in common. Mott v. Ackerman, 92 N. Y. 539.

A devise to several for life with remainder over is held to constitute a tenancy in common. Gage v. Gage, 43 Hun, 501, affd., 112 N. Y. 667. See also Purdy v. Hayt, 92 N. Y. 446.

A devise to testator's two sisters of a lot of land held to be a devise to

them as individuals, not as a class. McoDnald v. McDonald, 71 App. Div. 116. See Matter of Russell, 168 N. Y. 169; Jones v. Hand, 78 App. Div. 56; Moffett v. Elmendorf, 152 N. Y. 475.

Partners hold as tenants in common. Levine v. Goldsmith, 83 App. Div. 399. This is the general rule.

Same rule in case of personalty. Matter of De Rycke, 99 App. Div. 596. See also McPhillips v. Fitzgerald, 76 App. Div. 15; Manhattan Real Estate Assn. v. Cudlipp, 80 id. 532; Colson v. Baker, 42 Misc. 407; Waller v. Ham, 68 App. Div. 381.

Estates by the Entirety.—A conveyance to husband and wife, as seen above, however, p. 81, by reason of the legal unity of husband and wife, vests them both with the entirety. It creates not

strictly a joint tenancy, but a conveyance as to one person, and on the death of one, the whole title survives to the other. Neither can transfer the title without the other uniting. In such a case the wife has no separate estate; but is seized with her husband of the whole. They hold thus not as joint tenants, nor as tenants in common; and the same words of conveyance which will make other persons tenants in common, will make husband and wife tenants of the entirety.

This is an exception under the statute and was early held. Jackson v. Stevens, 16 Johns. 109, 116; Wright v. Sadler, 20 N. Y. 230. It applies also to terms of years. Preston, 2 Abst. Tit. 39; Goelet v. Gori, 31 Barb. 314. At common law where lands were granted to husband and wife as tenants in common they hold by moieties, as other distinct and individual persons did. Hunt v. Blackburn, 128 N. Y. 464.

And the words of the grant or devise may provide that they hold as tenants in common or joint tenants. Ward v. Crum, 54 How. Pr. 95; Miner v. Brown, 133 N. Y. 308; Joos v. Fey, 129 id. 117.

The above doctrine was at one time supposed not to be applicable since the acts in relation to married women, from a dictum in Meeker v. Wright, 76 N. Y. 262; but has been since fully re-established in Bertles v. Nunan, 92 id. 152.

Therefore the recent statutes of 1848-9, and 1860, relating to the lands of married women, have no effect upon real estate conveyed to husband and wife jointly. The Farmers' Bank, etc., v. Gregory, 49 Barb. 155; and see

supra, p. 94.

But it is only by a conveyance to husband and wife that they take as tenants by the entirety. A conveyance to the wife alone by the husband's cotenant does not create such an estate. Banzer v. Banzer, 10 Misc. 24.

Lands held in joint tenancy, tenancy in common, or by the entirety by husband and wife, may be divided by a sealed instrument of partition, inter sees. Domestic Relations Law, G. L., Chap. XLVIII, L. 1896, Chap. 272, § 26;

L. 1880, Chap. 472.

This does not authorize a conveyance by either to a third party. Zorntlein v. Bram, 100 N. Y. 12; Bram v. Bram, 34 Hun, 487.

Both may join and convey though the property be exempt on execution. See Code Civ. Proc., § 1404.

Upon the death of either the whole descends to the survivor. Matter of Fox, 9 Misc. 661. Tenancy by the entirety converted into tenancy in common by divorce. Stetz v. Schreck, 128 N. Y. 263.

Tenants by the entirety share rents equally. Hiles v. Fisher, 144 N. Y.

Conveyance to husband and wife and a third person simpliciter gives moiety to latter. Burton, Compend., § 757; Litt., § 291; Smith, Compend. Law R. & P. Prop. 177; Miner v. Brown, 133 N. Y. 308; Reynolds v. Strong, 82 Hun, 202; Dickinson v. Codwise, 1 Sandf. Ch. 214; Rogers v. Benson, 15 Like Ch. 214; Rogers v. Benson, 21 15 Johns. Ch. 431; and see cases cited supra, p. 81.

Effect of Alienation.— If a joint interest be conveyed by deed by one of the tenants, the alienee takes in common, as the tenants would then hold through different sources. The tenancy may also be severed through partition. See supra, p. 95. The proper conveyance between joint tenants is a release.

Where two persons were joint tenants of a lake with right of piscary it has been held that either could alien his share so as to give the right over the whole lake. Menzies v. Macdonald, 36 Eng. L. and E. 20.

TITLE II. TENANTS IN COMMON.

These hold by unity of possession, and may hold by several and distinct titles or by one derived at the same time and from the same source. There need be neither unity of tenure nor unity of estate. Unity of right of possession is all that is required. In this State, it may be created by descent, as well as by deed or will, the statutes no longer recognizing tenancy in coparceny. Tenants in common are considered to have several and distinct freeholds. Each tenant is considered to be solely or severally seized of his share, and may convey his estate, but cannot convey any specific part of the lands. Tenants in common may convey to each other as if to a stranger; but by the common law could not convey to each other by release, as there was no privity of estate. And one tenant in common has no power to convey the land or interest of his cotenant.

As to the provision of the statutes relative to the presumption of a tenancy being in common, vide supra, p. 322; see also Blood v. Goodrich, 9 Wend. 68.

Nor can he convey a specific portion of the lands. But such a conveyance regarded in a partition suit as conveying the equitable interest. Hunt v. Crowell, 2 Edm. Sel. Cas. 385.

One tenant in common may sue to remove cloud upon title. O'Donnell v. McIntyre, 37 Hun, 615.

Tenants in common may also have partition inter se. Code Civ. Proc.,

One or more may bring ejectment. Code Civ. Proc., § 1500.
One tenant in common may not bind his cotenant by estoppel or otherwise. Ryder v. Coburn, 47 App. Div. 182; Crippen v. Morse, 49 N. Y. 63; Palmer v. Palmer, 150 id. 139.
Nor charge him for collecting rents of the estate in absence of agreement. Myers v. Bolton, 157 N. Y. 393.

Possession.—The possession of one tenant in common is the possession of the others, though, if one is ousted by another, he may bring ejectment.

Actual ouster must be shown. Code Civ. Proc., § 1515; 2 R. S. 306, § 27. A demand of a deed from one tenant in common is sufficient, and binds the others. Blood v. Goodrich, 9 Wend. 68.

A widow is not a tenant in common with the heir. See "Adverse Possession," infra, Chap. XXXIV.

Shares in Crops .- Parties farming on shares are tenants in common of the crops, and even of the stubble or straw left.

Fobes v. Shattuck, 22 Barb. 568; Tripp v. Riley, 15 id. 333.

One tenant in common is sole owner of a crop which he sows and reaps, and of hay which he cuts. Le Barren v. Babcock, 122 N. Y. 153.

One tenant in common must account to cotenant for property sold by him off the estate. Gedney v. Gedney, 160 N. Y. 471; Cosgriff v. Dewey, 164 id. 1; Ferris v. Nelson, 60 App. Div. 430.

Improvements and Repairs.—One tenant cannot charge the others for improvements and buildings put upon the land, as a general rule.

Bowen v. Kaughran, 1 N. Y. State Rep. 121; Coakley v. Maher, 36 Hun, 157. Tenants in common are jointly liable for work done on the estate if authorized by them. Matter of Robinson, 40 App. Div. 23.

They may be so bound by implication or acquiescence. Valentine v. Healy, 158 N. Y. 369; Pretzfelder v. Strobel, 17 Misc. 152.
But not by mere knowledge. Cosgriff v. Foss, 152 N. Y. 104.

See 126 ast 660.

On partition, however, it seems that any tenant in common who has made improvements would be entitled to that part on which the improvements were made, or to compensation on the general accounting. His grantee would have the same rights.

Robinson v. McDonald, 11 Texas 385; Green v. Putnam, 1 Barb. 500; Ford v. Knapp, 102 N. Y. 135. See Chap. XXX, infra.

One tenant in common, also, might charge the others for necessary repairs, if he first requested his cotenant to unite with him in making the repairs. He cannot make others liable, however, for expensive and valuable improvements, not necessary to preserve the premises from dilapidation and ruin, without an express or implied agreement, or a promise to repay him.

But, in general, he has no lien except by express agreement; and if such lien were held to exist, it would not take effect as against creditors who had received the legal title without notice.

Taylor v. Baldwin, 10 Barb. 582; also, id. 628; Wright v. Putnam, 2 Supm.

455; Grannis v. Cook, 3 id. 299.

Tenants in common are obliged to repair a mill and its appurtenances,

used jointly. Denman v. Prince, 40 Barb. 213.

As to repairs under a lease executed by both, see Prentice v. Janssen, 79 N. Y. 478, affg. 14 Hun, 548.

Waste. Tenants in common are liable to each other for waste; and they are bound to account to each other for due profits of the estate. Hall v. Fisher, 20 Barb. 441.

An action for waste may be maintained by one cotenant against another and treble damages or partition adjudged. Code Civ. Proc., § 1656; 2 R. S.

334, §§ 3, 11.

Rents, etc .- A tenant in common, who denies his cotenant's rights, and

Rents, etc.—A tenant in common, who denies his cotenant's rights, and claims adversely is, if unsuccessful, bound to account for rents and profits within six years. Taggart v. Hurlburt, 66 Barb. 553.

One of several cotenants in possession is not chargeable with rent, but must pay taxes, interest and ordinary repairs. McAlear v. Delaney, 19 Week. Dig. 252; Zapp v. Miller, 23 id. 378, 109 N. Y. 51.

But rents collected must be accounted for. Kingsland v. Chetwood, 39 Hun, 602. See also Gedney v. Gedney, 160 N. Y. 471; Cosgriff v. Dewey, 164 id. 1; Knope v. Nunn, 151 id. 506; Ferris v. Nelson, 60 App. Div. 430.

A tenant in common may recover for use and occupation against a general programment and occupation against a general common may recover for use and occupation against a general common may recover for use and occupation against a general common may recover for use and occupation against a general common may recover for use and occupation against a general common may recover for use and occupation against a general common may recover for use and occupation against a general common may recover for use and occupation against a general common may recover for use and occupation against a general common may recover for use and occupation against a general common may recover for use and occupation against a general common may recover for use and occupation against a general common may recover for use and occupation against a general common may recover for use and occupation against a general common may recover for use and occupation against a general common may recover for use against a general common may recover fo A tenant in common may recover for use and occupation against a co-

tenant who excludes him. Muldowney v. Morris & Essex R. Co., 42 Hun, 444.

Use and Occupation.— The mere occupation of the lands held in common by one joint tenant or tenant in common, would not of itself, at common law, have entitled his cotenant to call him to account for use and occupation. He must have stood in the light of bailiff or receiver in order to be rendered responsible. And such seems to be the law at the present day where there is no agreement.

Co. Litt., 200b.; 4 Kent, 406; Woolever v. Knapp, 18 Barb. 265; Hill & Denio, 181; Joslyn v. Joslyn, 9 Hun, 388; Roseboom v. Roseboom, 15 id. 309, affd., 81 N. Y. 356.

For cases of liability, see Collins v. Collins, 8 App. Div. 502; Mott v. Underwood, 148 N. Y. 463; Valentine v. Healey, 178 id. 391; Willes v. Loomis, 94 App. Div. 67; Allen v. Arkenburgh, 2 id. 452.

Tenant in common in possession is absolute owner of crops raised and garnered by him while in peaceable possession. LeBarron v. Babcock, 122 N. Y. 153; Mott v. Underwood, 73 Hun, 509, affd., 148 N. Y. 463.

It has also been determined that if one tenant in common takes a lease of his cotenant's undivided portion, for a specified term, subject to a specified rent, and continues in possession of the premises after he expiration of his term, he will not be considered as holding over under the lease, and thus liable to an action for use and occupation; the presumption of law being that he is in possession under his own title. And such presumption will prevail, unless there be evidence that he holds as tenant to his cotenant.

Dresser v. Dresser, 40 Barb. 300.

A tenant in common may in opposition to his cotenant permit a firm of which he is a member to continue in possession after the expiration of a lease, without subjecting the firm to the liabilities of holding over. Valentine v. Healey, 178 N. Y. 391.

Use by one may be subject to an accounting for rents or profits. Matter of Lucy, 4 Misc. 349; Code Civ. Proc., § 1666; 1 R. S. 750, § 9.

Trespass, etc.— One tenant in common cannot bring an action of trespass against another for entry upon and enjoyment of the common property; nor sue him to recover the documents relative to the joint estate. If, however, one tenant occupies one part of the premises by agreement, and his cotenant disturbs him in his occupation, the latter becomes a trespasser.

Keay v. Goodwin, 16 Mass. 1; Wait v. Richardson, 33 Vermont 190; Clowes v. Hawley, 12 Johns. 484; 4 Kent, 370; Decker v. Decker, 17 Hun, 13.

Acts of One Tenant as Affecting Others.—As a general rule, one tenant in common ,or co-lessee, cannot purchase an outstanding title or get an extension of a lease for his exclusive benefit, and use it against his cotenant. Thus, where two devisees hold in common, under an imperfect title, one cannot buy up an outstanding or adverse title, to disseize or expel his co-tenant; but such purchase will inure to the common benefit, subject to an equal contribution of the expense.

Collins v. Collins, 13 N. Y. Supp. 28, affd., 131 N. Y. 648; Carpenter v.

Carpenter, 131 N. Y. 101.

Van Horne v. Fonda, 5 Johns. 388, 407; distinguished in Streeter v. Shultz, 45 Hun, 406, holding that one may buy for himself on foreclosure of a mortgage covering the whole; but see Carpenter v. Carpenter, supra. Burrell v. Bull, 3 Sandf. Ch. 15; Phelan v. Kelly, 25 Wend. 389; Graham v. Ludington, 19 Hun, 246, 251 n.

One is not liable for trespass of the other on adjoining lands. Bowman v.

Travis, 54 N. Y. 640.

They may join in a real action or bring several actions for their several shares or interests. Malcolm v. Rogers, 5 Cow. 188; Code Civ. Proc., § 1500;

Deering v. Reilly, 167 N. Y. 184; Rhoades v. Freeman, 9 App. Div. 20.

Held that § 1500 of the Code Civ. Proc. does not apply to property bought with partnership funds where there has been no accounting. Eisner v. Eisner,

5 App. Div. 117.

They may unite in an action for use and occupation. Cobb v. Kidd, 19 Blatch. 560.

Where mortgage back, on sale of land by tenants in common, is taken to one only, remedy of the other. Knope v. Nunn, 81 Hun, 349; 151 N. Y. 506. Rights acquired by one when they inure to the benefit of the others. Koke v. Backen, 73 Hun, 145; Knope v. Nunn, 81 Hun, 349; 151 N. Y. 506. The acts of one tenant in common cannot amount to the dedication of part

of the common property, as a public highway, or create an easement against the other tenants. Scott v. State, 1 Sneed (Tenn.) 629; Crippen v. Morse, 49 N. Y. 63.

Remedies of Joint Tenants and Tenants in Common Against each Other .- Right to Share .- A joint tenant or tenant in common, or his executor or administrator, may maintain an action to recover his just proportion against his cotenant who has received more than his own just proportion; and the like action may be maintained by him against the executor or administrator of such cotenant. Code Civ. Proc., § 1666.

1 R. L. 90; 1 R. S. 750, § 9; Hall v. Fisher, 20 Barb. 441.

Voluntary payment of a mortgage by one tenant in common -- his grantee cannot demand contribution from the cotenant. Cambreling v. Cambreling, 84 Hun, 550.

A claimant of an undivided interest in certain real estate, which he is not proved to own, who voluntarily redeems the entire property from a tax sale, is without redress against the co-tenants. Koehler v. Hughes, 73 Hun,

Joint Mortgage.- On a joint mortgage by tenants in common, equity will not decree, at the request of one tenant, a sale of the undivided moieties separately, for the respective halves of the debt. Foot v. Bevins, 3 Sand. Ch. 188.

See also Littlejohn v. Leffingwell, 40 App. Div. 13.

Waste. - An action for waste may also be maintained by a joint tenant or tenant in common, against his cotenant, who commits waste upon the real property held in joint tenancy or in common. Code Civ. Proc., § 1656.

The court may authorize partition in such instances in lieu of treble damages. Id.; Code Civ. Proc., §§ 1657, 1532.

Ejectment.— Joint tenants or tenants in common may maintain this action against each other. Code Civ. Proc., §§ 1500, 1515.

But they must prove an actual ouster. Code Civ. Proc., § 1515.

A claim of title and possession in an answer, held sufficient to constitute ouster. Peterson v. De Baum, 36 App. Div. 259. See Deering v. Reilly, 167 N. Y. 184.

Ouster of Cotenants.— Where one of several tenants in common conveys the entire premises held in common, and the grantee enters into possession under the conveyance, claiming title to the whole premises, such possession is an ouster of, and adverse to the cotenants of the grantor, and at the expiration of the period of limitation, their right will be barred.

Bogardus v. Trinity Church, 4 Paige, 178; Town of Needham, 3 id. 545; see also Clark v. Crego, 47 Barb. 600, affd., 51 N. Y. 646.

The possession, if not under express notice, must be hostile and notorious.

Culver v. Rhodes, 87 N. Y. 348.

Adverse possession of twenty-one years held sufficient. Abrams v. Rhoner,

44 Hun, 507.

It is ouster to get possession under a deed obtained by fraud and undue influence from a co-tenant and maintain it. Zapp v. Miller, 109 N. Y. 51. Vide infra, Adverse Possession, Chap. XXXIV.

TITLE III. PARTNERSHIP LANDS.

When real estate is held by partners for the purposes of the partnership, they do not hold it as partners, but as tenants in common, and the rules relative to partnership property do not apply in regard to it. Therefore, one partner can only sell his individual interest in the land, and when both partners join in a sale and conveyance, and one only receives the purchase money, the other partner may maintain an action against him for his proportion.

Coles v. Coles, 15 Johns. 159; Fowler's Real Prop. Law (2d ed), 335, 336. As to what constitutes partnership in real estate, see MacFarlane v. MacFarlane, 82 Hun, 238; Dawson v. Parsons, 10 Misc. 428.

It is also a principle as to partnership property, that where real estate is purchased with partnership funds on partnership account, and for partnership purposes, the property will be deemed, virtually, to be partnership property, no matter in whose name the purchase may have been made or the conveyance taken. Let the legal title be vested in whom it may, in equity it belongs to the partnership, and the partners are deemed cestuis que trustent thereof, for partnership purposes.

Tarbel v. Bradley, 7 Abb. N. C. 273, affd. in effect, 86 N. Y. 280; Martin v. Wagner, 1 Supm. 509; Sugd. on Vend. Chap. 15, § 1, pp. 127, 607;

Story's Eq., § 1206; Lake v. Gibson, 1 Eq. Abridge. 290; Rigden v. Vallier, 2 Ves. R. 258; Leary v. Boggs, 1 N. Y. State Rep. 571; Rank v. Grote, 50 Super. 275, affd., 110 N. Y. 12; Hiscock v. Phelps, 49 N. Y. 97; Fairchild v. Fairchild, 64 id. 471.

Partnership creditors are entitled to prior payment out of it. Menagh v. Whitwell, 52 N. Y. 146.

Waiver or release of rights in partnership land when beyond powers of one partner. White v. Man. R. Co., 139 N. Y. 19.

Therefore real estate acquired with partnership effects, although so conveyed as to make the partners tenants in common, at law. is, in equity, considered as converted into personalty, for the purpose of subjecting it to the debts of the firm in preference to those of the individual partners. The partner's interest in the land descends to his heirs, however, where the real estate is bought with partnership funds, and there is no right of survivorship.

Fairchild v. Fairchild, 64 N. Y. 471; Buckley v. Buckley, 11 Barb. 43; Parker v. Parker, 65 id. 206; Smith v. Jackson, 2 Edw. 28; Buchan v. Sumner, 2 Barb. Ch. 165; Collumb v. Read, 24 N. Y. 505; Haynes v. Brooks, 8 Civ. Pro R. 106; Tarbel v. Bradley, 7 Abb. N. C. 273, affd., 86 N. Y. 280; Greenwood v. Marvin, 111 N. Y. 423.

If the partnership trade is merely ancillary to the land, as in the case of selling the produce of the land, e. g., stone out of a quarry, the land would still be considered as realty; otherwise, if the land is ancillary to the trade. This is the distinction drawn in the English courts and would doubtless be deemed the law here. Stewart v. Blakeway, Eng. Eq. Cases, 1868, 32 Vic. 479.

Property bought for the firm in one partner's name is lighle to execution.

Property bought for the firm in one partner's name is liable to execution

Property bought for the firm in one partner's name is liable to execution sale for his individual debt while standing in his name. Moore v. Williams, 55 Super. 116, affd., 115 N. Y. 586.

A sale on execution against all the partners, though not for a firm debt, is good. Davis v. Pres., etc., of D. & H. Can. Co., 109 N. Y. 47.

As to protection of bona fide purchasers from partners, see Tarbell v. West, 86 N. Y. 280.

In equity the relation of partners is considered one of trust and confidence, and hence a lease by one partner of the partnership premises inures to the firm's benefit. See cases collected in Mitchell v. Read, 61 N. Y. 123. But it must appear that such lease was treated and intended as a partnership matter. Chamberlain v. Chamberlain. 44 Super. 116.

ship matter. Chamberlain v. Chamberlain, 44 Super. 116.
Although at common law a conveyance to partners for the business of Although at common law a conveyance to partners for the business of the firm might make them joint tenants, under the decisions of this State the several partners to whom such conveyance was made, would become tenants in common of the legal title; and upon the death of either, the undivided portion of the legal title, thus vested in the deceased partner, would descend to his heirs at law, without reference to the equitable rights of the several partners in the land as part of the property of the firm. Buchan v. Sumner, 2 Barb. Ch. 165.

In equity, however, the rule was otherwise and partnership realty was never subject to survivorship; and such no doubt would have become the law never subject to survivorship; and such no doubt would have become the law in this State, in regard to partnership realty, irrespective of statute. See Story Eq. J., § 1207; 2 Spence, Eq. J. 399; Smith, Compend. Real & Pers. Prop. 172; Fairchild v. Fairchild, 64 N. Y. 471, 477; Lake v. Gibson, 1 Eq. Cas. Abr. 294; s. c., 1 White and Tudor, Lead. Cas. in Eq. 215; Lake v. Craddock, 3 P. Wms. 158.

There are instances, however, of lands held for partnership purposes, which

will be considered in equity as personalty, and be applied accordingly. Thus it may be agreed by the parties themselves to be so considered, and this agreement will work the change; and the same will go as personalty on the

death of one partner. But if a purchase be made and a conveyance be taken to partners as tenants in common, without any agreement to consider it as stock, although it be paid out of their joint funds, and to be used for partnership purposes, it will be deemed real estate. Whether it is considered as realty or personalty, however, it is liable for the partnership debts. But it will not be considered as partnership property liable to copartnership debt (preferentially) by the mere taking a deed in the joint name of two persons who are partners. It must be done by some express act or understanding. Smith v. Jackson, 2 Edw. 28.

standing. Smith v. Jackson, 2 Edw. 28.

It is held that a conveyance by one partner, having legal title to an undivided half of real estate, the whole of which, in equity, is partnership property, to a creditor of the firm in payment of a partnership debt, vests good title in such undivided half to his grantee, notwithstanding it is executed without the knowledge or consent of the other partner. Its effect is to give a preference to the grantee. Van Brunt v. Applegate, 44 N. Y. 544.

And a bona fide purchaser or mortgagee who obtains the legal title to

partnership lands, or to an undivided portion thereof from the person who holds such legal title, and without notice of the equitable rights of others in the property, as a part of the funds of the copartnership, is entitled to protection in courts of equity, as well as in courts of law. Buchan v. Sumner, 2 Barb. Ch. 165; Tarbell v. West, 86 N. Y. 280.

For the purpose of paying debts, etc., and discharging the claims and equities of partners, real estate belonging to the firm is treated as personal property, although the title stands in the name of one of the partners only. Fairchild v. Fairchild, 64 N. Y. 471, affg. 5 Hun, 407. Compare Bennett v.

Crain, 41 Hun, 183.

A mortgage to a partner to secure debts due and to become due to a firm cannot, after a partner's death, inure to the benefit of succeeding firm. Taylor v. Post, 30 Hun, 446. But what then remains resumes its original character and descends to the heir of the partners. Id.

Real estate purchased by partners held first for payment of partnership

debts, and secondarily subject to creditors of individual partners.

v. Schepmoes, 6 Hun, 479.

A partner taking a deed in his own name for convenience is not within the rule abolishing resulting trusts, even though the consideration was furnished by the other partners. Fairchild v. Fairchild, 64 N. Y. 471.

Partnership dealings in realty are not within the Statute of Frauds. Traphagen v. Burt, 67 N. Y. 30; Hollister v. Simonson, 36 App. Div. 63; Sanger v. French, 157 N. Y. 213, 235; Smith v. Smith, 125 id. 224; Bailey v. Weed, 36 App. Div. 611; Smith v. Kissel, 92 id. 235.

One Partner cannot Bind the Other by Deed .-- Although one partner may, in general, bind his copartner by acts within the scope of their mutual business, it is considered that he cannot bind him by a deed, or so convey his interest in partnership lands.

But he may contract for the sale thereof. Sage v. Sherman, 2 N. Y. 417; and see Bank v. Scriven, 18 N. Y. Supp. 277.

The Partnership Contract. Under a parol contract to be partners in lands, one partner may make an executory contract to convey the joint interest, and partners in real estate are liable where other partners are. Chester v. Dickenson, 45 How. 326, affd., 54 N. Y. 1.

Where the purchase of real estate is within the scope of a partnership business, which one of two copartners is permitted by the other to manage and transact in his own name, and the latter borrows money or procures indorsements on the credit of the firm to make such a purchase, it will be bound by the act, although he took title in his own name. Rumsey v. Briggs, 139 N. Y. 323. See also cases cited, supra.

Dower.—A widow of a deceased partner has been held entitled to dower in a moiety of partnership lands held by two in common.

Smith v. Jackson, 2 Ed. 23. This case has not been overruled in this State, but is disapproved in Story's "Partnership" and Kent's Commentaries, as well as by the courts of Missouri. The dower right would probably be held subject to the claims of creditors in certain cases. Vide Collumb v. Read, 24 N. Y. 505.

The following cases hold that no dower exists absolutely in such lands.

Riddell v. Riddell, 85 Hun, 482; Dawson v. Parsons, 10 Misc. 428.

But it is admitted that the wife's right would attach to proceeds in case of a sale to pay debts, after payment of same. Dawson v. Parsons, 10 Misc. 428.

CHAPTER XII.

POWERS.

TITLE

I.—POWERS GENERALLY.
II.— POWERS UNDER THE STATUTES.
III.— CREATION OF POWERS.

IV .- SPECIAL PROVISIONS OF STATUTE.

V .- BY WHOM EXECUTED.

VI .- VALID EXECUTION.

VII.— REVOCATION OF POWERS.

VIII .- EXTINGUISHMENT OF POWERS.

TITLE I. POWERS GENERALLY.

A power is defined by Sugden as "an authority enabling a person to dispose, through the medium of the Statute of Uses, of an interest vested either in himself or in another person."

Powers were introduced in connection with uses and trusts. so that appointments and dispositions in the settlement of landed estates might be made according to the intention of parties, thereby avoiding the effect, in many instances, of the strict rules of the common law. Through them there might be a revocation reserved on a feoffment, an entry reserved, on condition broken, to a stranger, the disposal of a fee without words of inheritance, and other variations from strict common law principles.

By means of powers the owner was enabled either to reserve to himself a qualified species of dominion, distinct from the legal estate, or to delegate that dominion to strangers, and withdraw the legal estate out of the trustee, or give it a new direction by limitation to new uses and revoking others.

Before the statutory changes in this State, Powers might be created to an apparently unlimited extent. They were made the instruments of great abuses, and enabled a person, through a power of revocation retained in a conveyance, to place his lands beyond the reach of his own creditors or of those of his alienee, and to defraud purchasers.

The English law respecting powers, as has been remarked, is one of the most intricate labyrinths of jurisprudence. vised Statutes brought them into harmony with the general system of our laws as modified from the English code, and they have emerged into the light and simplicity of prescribed and intelligible rules.

In reviewing the subject of *Powers* the abstruse and obsolete learning of the common law, and the subtle distinctions that have arisen in the application of its rules, will not be more than referred to.

In the chapter on *Powers* of the Revised Statutes, were digested and codified all such rules as were retained as part of our legal system, and their existence made positive and distinct, freed from the uncertainty and various interpretation with which the common law and its many commentators had involved the subject. And the Real Property Law succeeding sought to preserve and continue in general these rules.

The doctrine of settlements, as Chancellor Kent remarks, under the complicated machinery of uses and powers, became in England an abstruse science, which was in a great degree monopolized by a select body of conveyancers, who, by reason of their technical and verbose provisions, reaching to distant contingencies, rendered themselves almost inaccessible to the skill and curiosity of the profession at large.

Settlements, with their springing and shifting uses, obeying, at a remote period, the original impulse, and varying their phases with the change of persons and circumstances, and with the magic wand of powers, proved to be complicated contrivances; and, as the Chancellor remarks, often, from the want of skill in the artist, became potent engines of mischief planted in the heart of great landed estates, and operating to their destruction.

The revisers of our statutes in 1830, also in their notes, speak of the law of Powers, as then existing, as pre-eminently abounding in useless distinctions and refinements, difficult to be understood and difficult to be applied, by which the subject, in its own nature, free from embarrassment, was exceedingly perplexed and darkened.

"Nor is it merely," they state, "because it is mysterious and complex, that a reform in this part of the law is desirable. It is liable to still more serious objections, since it affords a ready means of evading the most salutary provisions of the statute law. It avoids all the formalities wisely required in the execution of deeds and wills, frustrates the protection meant to be given to creditors and purchasers, and eludes nearly all the checks by which secrecy and fraud in the alienation of lands are sought to be prevented."

The revisers also express themselves as follows, in their review of the system of real estate law, as existing at the time of the

revision of 1830: "It is not a uniform and consistent system, complex only from the multitude of its rules and the variety of its details; but it embraces two sets of distinct and opposite maxims, different in origin and hostile in principle. We have first, the rules of the common law, connected throughout with the doctrine of tenures, and meant and adapted to maintain the feudal system, in all its rigor; and we have, next, an elaborate system of expedients, very artificial and ingenious, devised, in the course of ages, by courts and lawyers, with some aid from the legislature, for the express purpose of evading the rules of the common law, both in respect to the qualities and the alienation of estates, and to introduce modifications of property before prohibited or unknown. It is the conflict continued through centuries, between these hostile systems, that has generated that infinity of subtleties and refinements with which this branch of our jurisprudence is overloaded."

"It is this conflict which seems to have involved the law of real property in inextricable doubt, whilst, nearly in every case, as it arises, the uncertainty is, whether the strict rules of ancient law, or the doctrines of modern liberality, are to prevail; whether effect is to be given to the intention, or a technical and arbitrary construction is to triumph over reason and common sense."

The learned Chancellor whose remarks relative to the obscurity of the law of real estate prior to the revision, are above quoted, and whose understanding of the mischiefs of the older system was so keen and appreciative, elsewhere utters a lament, in his valued Commentaries, over the abolition of that mysterious and complex machinery that prevailed, under the common law, for the holding and movement of realty, through the medium of uses and powers.

"They seem," he says, "to be inseparable, in opulent communities, to the convenient and safe distribution of large masses of property, and to the discreet discharge of various duties flowing from the domestic ties; and the evils are, after all, greatly exaggerated by the zeal and the philippics of the English political and legal reformers."

Brought up in all the "learning of the Egyptians," and familiar with the profundities and labyrinths of the common law, in the interpretation of which he had become eminent, it was natural that the great commentator should express a regret over the fall of that system venerable with age and sacred through historic associations, which, in 1830, succumbed, in this State, under the sturdy blows of the revisers; encouraged, as they were, by the awakening intelligence of a community that could not only throw off civil bonds,

but emerge from the slavery of traditional usage and cumbersome form.

Former Classification of Powers.—The usual classification of powers by the common law writers, was: 1. Powers appendant or appurtenant; which enabled a party to create an estate, which attached in whole or in part on his own interest; as, for example, if a power were given to a tenant for life to make leases in possession, every lease which he executed under the power must take effect out of his life estate. 2. Powers collateral or in gross; which enabled a party to create an estate independent of his own; e. g., as a power to a life tenant to appoint the estate after his death, by disposing of the reversion. 3. Powers simply collateral; which are given to a stranger or a person who has no interest or estate in the land, as, for example, a power given to a stranger to revoke a settlement, and appoint new uses to other persons designated in the deed.

See for a discussion of the subject of Powers, generally, Fowler's Real Property Law (2d ed.), Art. IV, 457-557.

TITLE II. POWERS UNDER THE STATUTES.

Powers, as they existed both by common law and under the Statute of Uses (except a simple delegated power to act as attorney), were abolished by the Revised Statutes of 1830, and their creation, construction, and execution are now governed by the provisions of those statutes, as re-enacted by the Real Property Law of 1896, which relieve powers from many restrictions merely technical and oppressive. The Real Property Law, Art. IV (R. S., Part II, Chap. I, Tit. II, Art. III, I R. S. 731), will therefore, have to be attentively perused, if the validity of the creation or execution of a power is in question; as it is therein declared that powers as they existed on the 21st day of December, 1829, have been abolished (R. P. L., § 110; I R. S. 732, § 73), and that no beneficial power, general or special, except as therein allowed, shall be valid (R. P. L., § 116; I R. S. 733, § 92).

See Cutting v. Cutting, 86 N. Y. 522, partly affirming and partly reversing, 20 Hun, 360.

See also for comments on this section and its effect. Fowler's Real Property Law (2d ed.), 465.

As defined by statute, a Power is "an authority to do an act in relation to real property, or to the creation or revocation of an estate therein, or a charge thereon, which the owner, granting or reserving the power, might himself lawfully perform."

Real Property Law, § 111; 1 R. S. 732, § 74.

This section applies also to personal property. Matter of Wilkin, 90 App.

See for comments on this section, Fowler's Real Prop. Law (2d ed.). 467-469.

Division.— They are classified into: General or Special, and Beneficial or in Trust.

Real Property Law, § 113; 1 R. S. 732, § 76.

A power is:

- I. General, when a transfer or encumbrance of a fee is authorized to any person, by means of a conveyance, will, or charge of the property.
- 2. Special, where the persons or class of persons to whom the disposition of the property under the power is to be made are designated, or the transfer or encumbrance of a lesser estate than a fee is authorized.
- 3. A power is beneficial (whether general or special), when the grantee alone is interested in the execution, according to the terms of its creation.

A beneficial power other than one of those specified in this article [Art. IV, R. P. L.] is void.

Real Property Law, §§ 114, 115, 116; 1 R. S. 732, §§ 77, 78, 79. See Jennings v. Conboy, 73 N. Y. 230; Syracuse Savings Bank v. Porter,

Where a grantee of a life estate takes also by his deed a power to alien where a grantee of a life estate takes also by his deed a power to alien in fee to any person by means of a will, and no person other than the grantee of the power has, by terms of its creation, any interest in its execution, the power is a general beneficial one. Hume v. Randall, 141 N. Y. 499, revg. 65 Hun, 437; Cutting v. Cutting, 86 N. Y. 522; Crooke v. County of Kings, 97 id. 421; Genet v. Hunt, 113 id. 158, distinguished.

See also Real Property Law, §§ 129-132; 1 R. S. 732, §§ 81-84. See also Ward v. Stanard, 82 App. Div. 386; also Fowler's Real Property Law (2d ed.), 471-476.

Powers in Trust.—A general power is in trust, when any person or class of persons, other than the grantee of the power, is designated as entitled to the proceeds, or any portion of the proceeds, or other benefit to result from its execution.

Real Property Law, § 117; 1 R. S. 734, § 94. Both a power and a trust are necessary to constitute a power in trust. Sweeney v. Warren, 127 N. Y. 426, at p. 434; Delaney v. McCormack, 88 id. 174, 181. See also Farmers' Loan & T. Co. v. Carroll, 5 Barb. 613; Towler v. Towler, 142 N. Y. 371.

A special power is in trust where either:

- I. The disposition or charge which it authorizes is limited to be made to a person or class of persons, other than the grantee of the power: or
- 2. A person or class of persons, other than the grantee, is designated as entitled to any benefit, from the disposition or charge authorized by the power.

Real Property Law, § 118; 1 R. S. 734, § 95, as amd. by L. 1830, Chap. 320. Dana v. Murray, 122 N. Y. 604; Smith v. Floyd, 140 N. Y. 337.

The distinction between trusts and powers in trust is at times difficult of determination. A power in trust is to be understood in contradistinction to an estate in trust. The former is a mere authority or right to limit a use, while the latter involves an estate or interest in the subject of the trust. A trustee is invested with the legal estate, but this is not necessary with respect to the donee of a power. In the case of a power in trust, there is always a person other than the donee or grantee of the power, which person is called the appointee, answering to the cestui que trust in a simple trust. A beneficiary is considered as necessary an ingredient in the case of a power in trust as a cestui que trust is in the case of a conveyance or devise in trust. A power in trust involves the idea of a trust as much as a trust estate. In both cases a confidence is implied. The difference is in the mode of effecting the object. In one case it is done through the conveyance or devise of an estate in trust, by which the grantee or devisee becomes seized of the legal estate in the land; in the other, by the creation or grant of a power by which the donee is invested with an authority with relation to the future use or disposition of the land.

Farmer's L. & T. Co. v. Carroll, 5 Barb. 613; Towler v. Towler, 142 N. Y. 371.

See also as to above distinctions, supra, p. 275.
Powers in trust may be created for any lawful purpose by any language which indicates an intention to bestow them and to do any act which the grantor might lawfully perform himself. Reynolds v. Denslow, 80 Hun, 359.
See Tilden v. Green, 130 N. Y. 29.

Parties to a Power .- In creating a power, the parties concerned in it are the donor who confers the power, the donee or appointor who executes, and the appointee in whose favor it is executed.

The Statutes provide that the term "grantor" is used as designating the person by whom a power is created, whether by grant or devise; and the term "grantee" is so used as designating the person in whom a power is vested, whether by grant, devise or reservation.

Real Property Law, § 112; 1 R. S. 738, § 135. See also Powers in Trust, Chap. X, supra.

TITLE III. CREATION OF POWERS.

How Powers to be granted.—By the statutes a power may be granted either:

- 1. By a suitable clause, contained in an instrument sufficient to pass an estate in the real property, to which the power relates; or.
 - 2. By a devise contained in a will.

Real Property Law, § 120; 1 R. S. 735, § 106. The power need no longer be contained in an actual conveyance, as required formerly under the Revised Statutes, but merely in "an instrument sufficient to pass an estate in the real property; and since the abolition of seals, this instrument need not be a deed." See Real Property Law, § 208.

No formal set of words is necessary to create or reserve a Power. It may be created, as seen above, by a deed conveying some estate in the land, or by will; and the intention of the grantor mainly regulates the interpretation and execution of the power, and the courts will often modify the direct language to suit the apparent intention.

Dorland v. Dorland, 2 Barb. 63; Hubbard v. Gilbert, 25 Hun, 596.

They may be implied. Messenger v. Casey, 18 Week. Dig. 71. A devise to widow for life with remainder "should there be any left" to children carries implied power of sale. Thomas v. Wolford, 49 Hun, 145.

See also on the general proposition, Tobias v. Ketchum, 32 N. Y. 319;

Morse v. Morse, 85 id. 53; Felter v. Ackerson, 35 App. Div. 282, 283;

Staple v. Hawes, 39 id. 548, 552.

To be in Writing.— The statutes provide that no power over or concerning real property or in any manner relating thereto, shall be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by his lawful agent authorized by writing. Declarations of trusts, implied trusts, and wills, are excepted, as more fully set forth, supra, p. 263.

Real Property Law, § 207; 2 R. S. 134, § 6; 135, § 7, as amd. L. 1860, Chap. 322.

Who may Create.— The statutes also provide that a person is not capable of granting a power, who is not, at the same time, capable of transferring an interest in the property to which the power relates, and that the grantor in a conveyance may reserve to himself any power, beneficial or in trust, which he might lawfully grant to another; and a power thus reversed shall be subject to the provisions of the article, in the same manner as if granted to another.

Real Property Law, §§ 119, 124; 1 R. S. 732, § 75; 735, § 105.

The grantor of a power must have the necessary legal dominion over the property to be affected, and also the legal right to delegate an authority in respect to such dominion. Selden v. Vermilyea, 3 N. Y. 525, 536; Boasberg v. Cronan, 30 N. Y. St. Rep. 438.

Quære as to the right of an alien who cannot hold as against the State

before office found.

As to the law concerning powers of revocation and for comments on R. P. L., § 124, supra, see Fowler's Real Property Law (2d ed.), 494-496.

R. P. L., § 124, supra, see Fowler's Real Property Law (2d ed.), 494-496.

Grantee.—The statutes further provide that the power may be vested in any person capable in law of holding, but cannot be exercised by a person not capable of transferring real property.

Real Property Law, § 121; formerly 1 R. S. 735, § 109. See also Real Property Law, § 122; and infra, Tit. IV.

It is indispensable to the creation of a trust or a power in trust that authority to perform the required act should be delegated to the trustees by the owner of the estate, or all having authority to dispose of it, or some interest therein. Selden v. Vermilya, 3 N. Y. 525.

Quære as to whether an infant may be said to be a person not capable of transferring real property. See Fowler's Real Property Law (2d ed.), 486, 487.

486, 487.

A person not capable of transferring particular real property may be estopped from subsequently transferring it, when empowered so to do. Real Property Law, § 231.

TITLE IV. SPECIAL PROVISIONS OF STATUTES.

The following important provisions relative to powers are also to be noticed.

Suspension of Alienation.— The period during which the absolute right of alienation may be suspended, by an instrument in execution of a power, must be computed, not from the date of such instrument, but from the time of the creation of the power.

Real Property Law, § 158; 1 R. S. 737, § 28. See also Chap. IX, Tit. IV.

This rule did not at common law apply to general powers. 1 Challis, 156. It is a fictio juris and will not be upheld to advance a wrong. Jackson v. Davenport, 20 Johns. 537, 546; Matter of Stewart, 131 N. Y. 274, 281.

The doctrine always applied however and applies still under this section for the purposes of preventing suspension of alienation. Henry v. Davis, 7 Johns. Ch. 40; Fargo v. Squiers, 154 N. Y. 250; Hillen v. Iselin, 144 id. 365, 378; Dana v. Murray, 122 id. 604; Genet v. Hunt, 113 id. 158; Crooke v. County of Kings, 97 id. 421, 445; Beardsley v. Hotchkiss, 96 id. 201, 214; Conkling v. N. Y. El. R. R. Co., 76 Hun. 420; Matter of Harbeck, 161 N. Y. 211, revsg. 43 App. Div. 188.

Also Chapl. Ex. Trusts & Powers, § 679.

Though the appointer's title verts only at time of appointment and increase in the content of the second cont

Though the appointee's title vests only at time of appointment, yet it relates back and is acquired under the instrument creating the power. Matter of Stewart, 131 N. Y. 274; Matter of Harbeck, 161 id. 211; revg. 43 App. Div. 188.

The Estate Given.—"An estate or interest cannot be given or limited to any person, by an instrument in execution of a power, unless it would have been valid, if given or limited at the time of the creation of the power.

Real Property Law, § 159; 1 R. S. 737, § 129.

This provision carries out the common law principle that the appointee, under the power, derives his title not from the person exercising the power, but from the instrument by which the power of appointment was created. The uses declared in the execution of the power must be such as would have been good if limited in the original deed; and if they would have been void, as being too remote or tending to a perpetuity, in the one case, they would be void in the other.

A party who takes under the execution of a power takes under the

A party who takes under the execution of a power, takes under the authority of, and under the grantor of the power, in like manner as if the power and the instrument executing the power had been incorporated in one instrument. Roach v. Wadham, 6 East, 289; Co. Litt. 113, a; Bradish v. Gibbs, 3 Johns. Ch. 523, 550; Doolittle v. Lewis, 7 id. 45; Jackson v. Davenport, 20 Johns. 537; Murray v. Miller, 85 App. Div. 414, affd., 178 N. Y. 316.

See also cases, supra.

Unless there are words in the grant of power expressly or impliedly excluding such disposition a general power to dispose of property includes the right to dispose of it by will. Matter of Gardner, 140 N. Y. 122.

Where a will gives the life tenant full power to devise, but not to grant or convey the land, and in case of his death intestate gives the remainder to his heirs, the life tenant takes an absolute power of disposition. Deegan v. Van Glahn, 75 Hun, 39.

Married Women.—A general and beneficial power may be given to a married woman, to dispose, during her marriage, and without concurrence of her husband, of real property conveyed or devised to her in fee.

Real Property Law, § 122; 1 R. S. 732, § 80.

A married woman may have a special and beneficial power granted to her to dispose, during the marriage, and without the concurrence of her husband, of any estate less than a fee, belonging to her in the lands to which the power relates.

Real Property Law, § 123; 1 R. S. 733, § 87.

This has been held an enabling, and not a restrictive provision. It was designed to enable the grantor to give the fee to a married woman, with an absolute power of disposition during coverture. Wright v. Tallmadge, 15 N. Y. 307.

A deed of appointment by a feme covert had to be acknowledged in like manner as other conveyances executed by femes covert. Jackson v. Edwards,

T Paige, 386, affd., 22 Wend. 498.

Where the power of appointment by the married woman is to be executed by a deed or will, a master's deed, in partition, will not cut off contingent interests dependent upon her nonexecution of the power. Jackson v. Edwards, supra.

At common law by means of a power a woman could convey an estate in the same manner as her principal, because the conveyance was considered the deed of the principal, and not of the attorney. 1 Sugd. Pow. 181. It is said the object of 1 R. S. 732, § 80 was to prevent the husband's

common-law curtesy from attaching on an absolute conveyance in fee to the wife. Wright v. Tallmadge, 15 N. Y. 307, 313.

A feme covert could not at common law lease real property, unless a power to do so was given her by the settlement. 2 Roper. Husb. & W. 182; Cruise, Dig. Tit. 32, Chap. 5, § 73; Tit. 32, §§ 34, 35; Cf. Macqueen, Husb. & W. 33, 295.

The power to devise real and personal property given to married women by the Act of 1849 is general, and not limited to property acquired subsequently to the passage of the act. Van Wert v. Benedict, 1 Brad. 114.

A married woman may execute a mortgage of her own estate, under a power reserved by her in a marriage settlement executed previous to the marriage, and she may execute a mortgage to secure her husband's debt. Leavitt v. Pell, 27 Barb. 322, affd., 25 N. Y. 474; see also Wright v. Tallmadge, 15 N. Y. 307.

A power general or special beneficial or in trust may be recovered to a

madge, 15 N. Y. 307.

A power, general or special, beneficial or in trust, may be reserved to a married woman by a marriage settlement, by which the entire legal estate is vested in trustees. Wright v. Tallmadge, 15 N. Y. 307.

A power may be given to a feme covert to convey a future as well as a present estate in land for her own benefit and support during coverture. Jackson v. Edwards, 7 Paige, 386, affd., 22 Wend. 498.

As a married woman could not formerly convey real estate directly to her bushond, she could not by uniting with him in a deed of real estate to a

As a married woman could not formerly convey real estate directly to her husband, she could not, by uniting with him in a deed of real estate to a trustee, reserve a valid power to appoint it to his use, or one by which she could by last will and testament devise to him. A will by a married woman, in pursuance and in execution of a power so reserved, by which she devised her real estate to her husband, was inoperative and void. Such a power might be created by an ante nuptial settlement, however. Dempsey v. Tyler, 3 Duer, 74. But see changes in the law, supra, p. 85.

Reference may also be made to 1 R. S. 735, §§ 110, 111; 736, § 117 and 737, § 130, omitted in the Real Property Law, as obsolete.

As to mortgages by a married woman under a power, see infra.

At the present time, a married woman stands in the same position as a feme sole in respect of her ability to take or execute "powers."

Power to Sell in a Mortgage.— Where a power to sell real property is given to a mortgagee, or to the grantee in any conveyance intended to secure the payment of money, the power is deemed a part of the security, and vests in, and may be executed by any person who, by assignment or otherwise, becomes entitled to the money so secured to be paid.

Real Property Law, § 126; 1 R. S. 737, § 133.

At common law, unless the power of sale in a mortgage was limited to a mortgagee, his heirs and assigns, it was doubtful whether the transferee might exercise it, though an assignment would carry the power of sale in equity. Cf. 1 Jones, Mort., § 826.

And see infra as to wantsmasse by life teachts and magnific assignment.

And see infra, as to mortgagees by life-tenants and married women.

Rights of Creditors.—A special and beneficial power is liable to the claims of creditors in the same manner as other interests that cannot be reached by execution; and the execution of the power may be adjudged for the benefit of the creditors entitled.

Real Property Law, § 139; 1 R. S. 734, § 93. Cutting v. Cutting, 86 N. Y. 522; Kinnan v. Guernsey, 64 How. Pr. 253; Sayles v. Best, 140 N. Y. 368. Cf. Harvey v. Brisbin, 143 id. 151.

The execution, wholly or partly, of a trust power may be adjudged for the benefit of the creditors or assignees of a person entitled as a beneficiary of the trust, to compel its execution, where his interest is assignable.

Real Property Law, § 142; 1 R. S. 735, & 103. See Code Civ. Proc.,

A creditor's claim must be one established by law, and not one in contention, in order to fall under this section. Marvin v. Smith, 56 Barb. 607;

Harvey v. Brisbin, 143 N. Y. 151.

Where a judgment is rendered and docketed against a devisee, who by the devise, takes a fee in an undivided part of the land, subject to a power of sale, the judgment creditor acquires a lien upon the devisee's interest in the land before a sale under the power, which lien follows and attaches to the devisee's interest in the proceeds. Sayles v. Best, 140 N. Y. 368.

Absolute Power of Disposition. - Where an absolute power of disposition, not accompanied by a trust, is given to the owner of a particular estate for life or for years, such estate is changed into a fee absolute in respect to the rights of creditors, purchasers, and encumbrancers, but subject to any future estates limited thereon, in case the power of absolute disposition is not executed, and the property is not sold for the satisfaction of debts.

Real Property Law, § 129; 1 R. S. 732, § 81. The rule before the Revised Statutes was that the devise of an estate generally, with power of disposition, carried a fee, but not if the estate were given for life merely. 4 Kent, 319, 327. It will only carry a fee, however, when the grantee has the right of disposal for his own benefit of the whole which the gratter has the light of disposal for his own behind of the whole estate, and not merely of a residue. Ladd v. Ladd, 18 How. (U. S.) 10; Waldron v. Chasteney, 2 Blatch. C. C. 62; Scott v. Perkins, 28 Me. 22; Denson v. Mitchell, 26 Ala. 360; Ward v. Amory, 1 Curtis' C. C. 419; Sugden on Powers, 96, 101; Germond v. Jones, 2 Hill, 69. As to the former rule, see Jackson v. Robbins, 16 Johns. 537.

As to when creditors cannot come in, see Rose v. Hatch, 125 N. Y. 427. As to when their rights can be cut off by a power of sale attached to the life

estate. Id.

The above section applies to a limitation whereby a grantee has a legal estate in lands, but not to a mere power to dispose by will of a trust estate vested in trustees. Cutting v. Cutting, 86 N. Y. 522, 532; Hume v. Randall, 141 id. 499; Genet v. Hunt, 113 id. 158; Higgins v. Downs, 101 App. Div. 119. See also Deegan v. Wade, 144 N. Y. 573; Van Horne v. Campbell, 100 id. 278.

But the power of disposition must be absolute, not qualified. Waring v. Waring, 17 Barb. 555; Jackson v. Edwards, 7 Paige, 386; Ackerman v. Gorton, 67 N. Y. 63; Crooke v. County of Kings, 97 id. 421; Coleman v. Beach, id. 545; Simmons v. Taylor, 19 App. Div. 499; Matter of Fernbacher, 17 Abb. N. C. 339; Swarthout v. Ranier, 143 N. Y. 499; Rose v. Hatch, 125 id. 427; Brown v. Perry, 51 App. Div. 11; Terry v. Wiggins, 47 N. Y. 512; Dodsworth v. Dane, 38 Misc. 684.

In case such an absolute power of disposition is not executed and not

In case such an absolute power of disposition is not executed, and not involuntarily subjected to the claims of creditors of the grantee of the power, the original limitations by way of remainder take effect after the grantee's

estate expires.

A limitation over, after a devise or bequest in fee, where the primary taker has the absolute power of disposition, is void. Jackson v. Robins, 16 Johns. 537; Campbell v. Beaumont, 91 N. Y. 464; Van Horne v. Campbell, 100 id. 287; Crozier v. Bray, 120 id. 366.

But if the jus disponendi of such first taker is partial or qualified, then

the limitation over is not void, even though the enjoyment in possession of the remainder may be defeated by such first taker's exercise of the power.

Real Property Law, § 47; Rose v. Hatch, 125 N. Y. 427; Matter of Cager, 111 id. 343; Cole v. Gourlay, 9 Hun, 453; Bell v. Warn, 4 Hun, 406; Greyston

v. Clark, 41 Hun, 125; Matter of Westcott, 16 N. Y. St. Rep. 286; Owens v. Owens, 64 App. Div. 212; Minges v. Mathewson, 66 id. 379; Swarthout v. Ranier, 143 N. Y. 409; Van Axte v. Fisher, 117 id. 401; Matter of Gardner, 140 id. 122; Terry v. Wiggins, 47 id. 512; Terry v. kector of St. Stephen's Church, 79 App. Div. 527.

This section does not apply to a beneficiary of the rents and profits. Woodbridge v. Bockes, 59 App. Div. 503, 514. See also Ward v. Stanard, 82 id.

386; Higgins v. Downs, 101 id. 119.

"Where a like power of disposition is given to a person to whom no particular estate is limited, such person also takes a fee, subject to any future estates that may be limited thereon, but absolute in respect to creditors, purchasers and encumbrancers."

Real Property Law, § 130; 1 R. S. 732, § 82. Jennings v. Conboy, 73 N. Y. 230.

"Where such a power of disposition is given, and no remainder is limited on the estate of the grantee of the power, such grantee is entitled to an absolute fee."

Real Property Law, § 131; 1 R. S. 733, § 83.

Section 129 provides for a case where the grantee of the power has an estate in the lands; section 130 provides for a case where the grantee of the power has no estate in the lands; section 131 provides for a case where there is no special grant of an estate to the donee of such power, and no grant of a remainder. In such a case an estate might result to the grantor of the power at common law. But the statute now passes the fee to the donee of the power and it is a fee not only as to creditors, purchasers and incumbrancers, but as to all the world.

Sir E. Clere's Case, Co. Litt. 111b, 271b; Jennings v. Conboy, 73 N. Y. 230; Taggart v. Murray, 53 id. 233; Ward v. Stanard, 82 App. Div. 386; Matter of Moehring, 154 N. Y. 423.

Under a general and beneficial power of appointment, the grantee may appoint to himself or to any one he pleases. Hubbard v. Gilbert, 25 Hun, 596; Matter of Moehring, 154 N. Y. 423.

"Where a general and beneficial power to devise the inheritance is given to a tenant for life, or for years, such tenant is deemed to possess an absolute power of disposition within the meaning and subject to the provisions of the last three sections."

Real Property Law, § 132; 1 R. S. 733, § 84; Tallmadge v. Sill, 21 Barb. 34.

Where there was a devise to one for life with a general power to devise, but not to convey, it was held the devisee took an absolute fee under this section. Deegan v. Van Glahn, 75 Hun, 39; Deegan v. Wade, 144 N. Y. 573. Cf. Taggart v. Murray, 53 id. 233.

"Every power of disposition by means of which the grantee is enabled, in his life time, to dispose of the entire fee for his own benefit, is deemed absolute."

Real Property Law, § 133; 1 R. S. 733, § 85.

This section goes one step farther than the preceding section and provides that every beneficial power to dispose of a fee shall be deemed to pass a fee

to the grantee of the power, whether he takes an express estate in the lands

A gift of the general power of disposition or appointment by last will of the trust estate to a beneficiary of the trust is not within this section. Cutting v. Cutting, 86 N. Y. 522; Genet v. Hunt, 113 id. 158; Hume v. Randall, 141 id. 499.

"A general and beneficial power may be created subject to a condition precedent or subsequent, and until the power became absolutely vested it is not subject to any provision of the last four sections."

Real Property Law, § 134 (new; no corresponding section in the Revised

Although new, the revisers intended no change in the pre-existing laws. and such is undoubtedly the fact. Comrs' note to this section, citing Taggart v. Murray, 53 N. Y. 238; Wright v. Tallmadge, 15 id. 309. See also Van

Axte v. Fisher, 117 id. 401.

The existence of a power of appointment does not prevent estates limited to take effect, in default of the exercise of the power, from vesting, if they are such as apart from the existence of the power would be vested estates. Fearne, Conting. Rem. 226 et seq.

"Where the grantor in a conveyance reserves to himself for his own benefit, an absolute power of revocation, he is to be still deemed the absolute owner of the estate conveyed, so far as the rights of creditors and purchasers are concerned."

Real Property Law, § 125; 1 R. S. 733, § 86.

Such an instrument, reserving or creating an absolute power of revocation to the settlor may be valid inter partes, and void as to the State, and other creditors and purchasers prejudiced. Conkling v. Davies, 14 Abb. N. C. 499; Belmont v. O'Brien, 12 N. Y. 394; Van Cott v. Prentice, 104 id. 45; Von Hesse v. MacKaye, 136 id. 114; Locke v. F., L. & T. Co., 140 id. 135; Cilman v. Mackaye, 136 id. 114; Locke v. F., L. Gilman v. McArdle, 99 id. 451.

Such power of revocation is often regarded as most appropriate, and its omission will be remedied at the suit of the settlor. Conkling v. Davies, 14 Abb. N. C. 499; Barnard v. Gautz, 140 N. Y. 249. Cf. Gibbs v. N. Y. L. Ins. Co., 14 Abb. N. C. 1; Schreyer v. Schreyer, 43 Misc. 520.

As to the mode in which creditors may take advantage of the power of revocation, see Real Property Law, § 139; and as to its effect against subsequent purchasers, see Real Property Law, § 231.

Tenants for Life. - May have a special and beneficial power given them to make leases for not over twenty-one years, to commence in possession during the tenant's life, and such a power is valid to authorize a lease for that period, but is void as to the excess.

Real Property Law, § 123; 1 R. S. 733, § 87.

Root v. Stuyvesant, 18 Wend. 257, partially overruled, 5 Sandf. 372; 20

Wend. 569; 22 id. 496.

Without statutory authority or the grant of power tenants for life could not bind the estates in remainder or reversion. Smith, R. & P. Prop, 528; Taylor, Landl. & Ten., § 113; Mulligan v. Cox, 26 Misc. 709.

Before the Revised Statutes leases by life-tenant beyond twenty-one years were void in toto. Root v. Stuyvesant, 18 Wend. 257; Cf. Matter of Mc-Caffrey, 50 Hun, 371.

Under the Constitution rental leases of agricultural land cannot be made for a longer period than twelve years. Const. 1894, Art. I, § 13.

"The power of a tenant for life to make leases is not assignable as a separate interest, but is annexed to his estate, and passes by a grant of such estate unless especially excepted. If so excepted, it is extinguished. Such a power may be released by the tenant to a person entitled to an expectant estate in the property, and shall thereupon be extinguished."

Real Property Law, § 135; 1 R. S. 733, §§ 88, 89.

At common law a power simply collateral could not be extinguished or suspended by any act of the donee. Farw. Pow. (1st ed.), 10.

All assignments must be by deed, subscribed by the party assigning or his agent, authorized by writing, unless it be by will, declaration of trust, or the arising or extinguishment of trusts by implication or operation of law.

Real Property Law, § 207; 2 R. S. 134, § 6; 2 R. S. 135, § 7, as amd. L. 1860, Chap. 322.

Mortgages by Life Tenants and Married Women.—"A mortgage executed by a tenant for life, having a power to make leases, does not extinguish or suspend the power; but the power is bound by the mortgage in the same manner as the real property embraced therein, and the effects on the power of such lien by mortgage are:

- 1. That the mortgagee is entitled to an execution of the power so far as the satisfaction of his debt requires; and,
- 2. That any subsequent estate, created by the owner, in execution of the power, becomes subject to the mortgage as if in terms embraced therein."

Real Property Law, § 136; 1 R. S. 733, §§ 90, 91.

See note to the original article on powers by the original revisers of the Revised Statutes in explanation of the object of this legislation. It was their opinion, following a statement in an old edition of Sugden on Powers, that a mortgage operated to distinguish a leasing power. Sugden afterward altered this statement. 2 Chance, Pow. 599.

This section refers to beneficial powers only. Real Property Law, § 116;

56 Barb. 605.

The doctrines relating to the extinguishment of powers was formerly carried to an unreasonable extent, but at present the courts are inclined

to be more liberal in their construction of powers given to life tenants. 2 Chance, Pow. 598; Swarthout v. Ranier, 143 N. Y. 499.

Where a will devises all of testator's property to his wife, "to have and to hold for her comfort and support all of the above-named property if she needs the same during her natural lifetime," and gives a legacy "if there is

enough of my property left at the death of my wife," the widow takes a life estate with power to convert to her use so much of the corpus of the estate as she may need for her comfort and support, and has a right to mortgage the property for that purpose.

Swarthout v. Ranier, 143 N. Y. 499.

See also as to a power to sell in a mortgage, supra, p. 341.

Provisions Relative to Trusts to Apply.—" Sections ninety-one to ninety-three of this chapter, both inclusive, in relation to express trust estates, and the trustee thereof, apply equally to trust powers. however created, and to the grantees of such powers."

Real Property Law, § 162; 1 R. S. 734, § 102.

The prior sections which are thus made applicable to powers in trust relate (1) to the devolution of a trust on the death of a last surviving trustee (Real Property Law, § 91); (2) to the resignation or removal of a trustee (Real Property Law, § 92); (3) to charitable, religious, educational and benevolent uses (Real Property Law, § 93).

(1) Crocheron v. Jacques, 3 Edw. Ch. 207; Clark v. Crego, 51 N. Y. 646; Delaney v. McCormack, 88 id. 174; Cooke v. Platt, 98 id. 35; Chapl. Ex. Trusts & Pow., §§ 604, 726.

(2) Farrar v. McCue, 89 N. Y. 139; Cooke v. Platt, 98 id. 35, 39; Oliver v. Frisbie, 3 Dem. 22; Fleet v. Simmons, id. 542.

(3) Downing v. Marshall, 23 N. Y. 366; Adams v. Pérry, 43 id. 487; Cottman v. Grace, 112 id. 299; Erwin v. Hurd, 13 Abb. N. C. 91; Kelley v. Hoey, 35 App. Div. 273.

If the trust is purely personal or discretionary it will not devolve; delegatus non potest delegare.

Chapl. Ex. Trusts & Pow., §§ 604, 726; Greenland v. Waddell, 116 N. Y. 234.

Otherwise if it is peremptory and imperative involving no discretion. Mott v. Ackerman, 92 N. Y. 539; Clifford v. Morrell, 22 App. Div. 470; Carpenter v. Bonner, 26 id. 462; Merritt v. Merritt, 32 id. 442; Scott v. Douglass, 39 Misc. 555.

See supra, pp. 261, 296, 314.

Assignment of Powers.-As a general rule, when a power coupled with an interest is given, it will pass by assignment.

"A beneficial power, and the interest of every person entitled to compel the execution of a trust power, shall pass, respectively, to a trustee or committee of the estate of the person in whom the power or interest is vested, or an assignee for the benefit of creditors."

Real Property Law, § 144; 1 R. S. 735, § 104.

"The power of a tenant for life to make leases is not assignable as a separate interest, but is annexed to his estate, and passes by a grant of such estate unless specially excepted. If so excepted, it is extinguished. Such a power may be released by the tenant to a person entitled to an expectant estate in the property, and shall thereupon be extinguished."

Real Property Law, § 135; 1 R. S. 733, § 88, 89. See supra, p. 345.

When a Lien or Charge.—"A power is a lien or charge on the real property which it embraces, as against creditors, purchasers and encumbrancers in good faith and without notice, of or from a person having an estate in the property, only from the time the instrument containing the power is duly recorded. As against all other persons, the power is a lien from the time the instrument in which it is contained takes effect."

Real Property Law, § 127; 1 R. S. 735, § 107.

The recording cannot revive an extinguished power. Prentice v. Jansen.

A naked power cannot lie dormant so as to prevail against the purchaser for value without notice. Jackson v. Davenport, 20 Johns. 537.

Certain Estates to be Advancements.—" * An estate or interest given by a parent to a descendant by virtue of a beneficial power, or of a power in trust, with a right of selection, is an advancement."

Real Property Law, § 295; 1 R. S. 737, § 127.

Powers of Attorney.— The provisions of the article relative to powers (Real Property Law, Art. IV), do not extend to a simple power of attorney to convey real property in the name and for the benefit of the owner.

Real Property Law, § 110; 1 R. S. 738, § 134.

See comments on § 110 in Fowler's Real Property Law (2d ed.), 458-466.

A power of attorney made by one as executrix and sole legatee is good, though the official character be not added to the signature. Myers v. Mut. Life Ins. Co., 99 N. Y. 1.

As to Powers of Attorney, vide infra, Chap. XIII.

Record of Powers.— Every instrument in execution of a power, except a will, including powers of revocation, is deemed a conveyance, so as to be subject to the provisions of Real Property Law, Art. VIII, relative to the record of instruments affecting real property.

Real Property Law, § 240; 1 R. S. 736, § 114. See Jackson v. Edwards, 7 Paige, 386; Belmont v. O'Brien, 12 N. Y. 394; Belden v. Meeker, 47 id. 307; Decker v. Boice, 83 id. 215; Frear v. Sweet, 118 id, 454.

A recorded power of attorney to convey lands remains in force as to a purchaser in good faith without notice from the attorney, though the grantor meanwhile conveys the lands by unrecorded deed. Gratz v. Land & River Imp. Co., 82 Fed. Rep. 381; Real Prop. Law, § 273; Williams v. Birbeck, Hoff. Ch. 359.

Alien Women.—As to powers of alien women under marriage settlements, vide supra, "Aliens," p. 103.

Powers to Executors to Sell Real Estate.—As to these, vide infra. Chap. XVII, Tit. III.

TITLE V. BY WHOM EXECUTED.

A power may be executed by femes coverts and infants also (when simply collateral), by the common law. By the common law a feme covert might execute any kind of power, whether simply collateral, appendant, or in gross; and it was immaterial whether it was given to her while sole or married. The concurrence of the husband was in no case necessary.

Sugden, 148, 155; 4 Kent, 394. See also infra, p. 361.

As to who may execute under the Statutes, it is provided as follows:

By Persons Capable of Aliening Lands.—A power may be vested in any person capable in law of holding, but cannot be exercised by a person not capable of transferring real property.

Real Property Law, § 121; 1 R. S. 735, § 109.

Personal Trust and Confidence.— When personal trust, discretion and confidence are implied, the power cannot be executed by attorney, nor delegated; nor does it descend to representatives, nor can it be renewed by others.

Berger v. Duff, 4 Johns. Ch. 368; Beekman v. Bonsor, 23 N. Y. 298; Powell v. Tuttle, 3 id. 396; Newton v. Bronson, 13 id. 587; Greenland v. Waddell, 116 id. 234; Chapl. Ex. Trusts & Pow., §§ 604, 726; Fowler's Real Property Law (2d ed.), 469.

A power of disposition by will may be delegated, and is sufficiently executed by the execution of a will creating trusts and giving a power of disposition to the cestui que trust. Frear v. Pugsley, 9 Misc. 316.

When Powers Survive.—As a general rule, by the common law, a naked authority, without interest, given to several, as to executors, by name, does not survive, unless by express words. But where it is given to several generally as a class, as to my sons, or my executors, it survives so long as the plural remains. The power survives also when there is any vested legal or equitable interest in the estate, or where the donees are charged with a trust relative to the estate, and the execution of the power is necessary to carry out the trust.

Fish v. Coster, 28 Hun, 64, affd., 92 N. Y. 627.

As a general rule, also, a naked authority expires with the life of the person who gave it; but a power coupled with an interest is not revoked by the death of the grantor; such as an interest present or future in land, or a power to sell in a mortgage; nor where there is a trust created.

In a preceding chapter, the subjects of a resignation, renunciation, and substitution of trustees have been fully investigated (Chap. X, Tit. VII); in a succeeding chapter (XVII), the appointment, renunciation, removal, and survivorship of executors will also be considered; and reference is made to those chapters as to the survivorship of powers connected with trust estates or trusts.

Who Must Execute.—By the Real Property Law it is provided: "Where a power is vested in two or more persons, all must unite in its execution; but if before its execution, one or more of such persons dies, the power may be executed by the survivor or survivors."

Real Property Law, § 146; 1 R. S. 735, § 112. This is held to apply even to the case of discretionary powers. Taylor v. Morris, 1 N. Y. 341; Leggett v. Hunter, 19 N. Y. 445.

As to a special case where provisions were made in a will for substitutions. vide Ogden v. Smith, 2 Paige, 195, 197.

As a general rule, where an authority is confided to several for a private purpose, all must unite and concur in its exercise, unless it is otherwise provided.

Green v. Miller, 6 Johns. 39; Perry v. Tynen, 22 Barb. 137; Gildersleeve v. The Board of Education, 17 Abb. 201; The People v. Walker, 23 Barb. 304; Sinclair v. Jackson, 8 Cow. 543; Wilder v. Ranney, 95 N. Y. 7. And the one not meeting cannot subsequently ratify the acts of others. When one executor fails to qualify, the other may execute, unless in the grant of power it is otherwise expressly provided. Code Civ. Proc., § 2642; 2 R. S. 109, § 55; Taylor v. Morris, 1 N. Y. 341; House v. King, 3 Hun, 44; Kerr v. McAneny, 2 Daily Trans., May 17, 1883; Ogden v. Smith, 2 Paige, 197; Bunner v. Storm, 1 Sandf. Ch. 358; Sharp v. Pratt, 15 Wend. 610; Dominick v. Michael, 4 Sandf. 374; Meakings v. Cromwell, 2 id. 512, affd., 5 N. Y. 136; Leggett v. Hunter, 19 id. 445; Berger v. Duff, 2 Johns. Ch. 368; Wilder v. Ranney, 95 N. Y. 7; Fleming v. Burnham, 100 id. 1. A trustee of a testamentary power may execute, although he may not be an executor. Green v. Green, 4 Redf. 357.

Powers Conferred by Law.—" Whenever three or more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of all such persons or officers at a meeting duly held at a time fixed by law. or by any by-law duly adopted by such board or body, or at any duly adjourned meeting of such meeting, or at any meeting duly held upon reasonable notice to all of them, may perform and exercise such power, authority or duty, and if one or more of such persons or officers shall have died or have become mentally incapable of acting, or shall refuse or neglect to attend any such meeting, a majority of the whole number of such persons or officers shall be a quorum of such board or body, and a majority of a quorum, if not less than a majority of the whole number of such persons or officers may perform and exercise all such power, authority or duty. Any such meeting may be adjourned by a less number than a quorum. A recital in any order, resolution or other record of any proceeding of such a meeting that such meeting had been so held or adjourned, or that it had been held upon such notice to the members, shall be presumptive evidence thereof."

Statutory Construction Law, Gen. Laws, Chap. I, L. 1892, Chap. 677, § 19. 2 R. S. 5555, § 27; L. 1874, Chap. 321; 1 R. S. 525, § 125; L. 1842, Chap. 130, Tit. 8, § 2; L. 1886, Chap. 21, § 20.

This section materially changes some parts of the law as it existed previous to the Statutory Construction Law of 1892.

The above rule would apply to cases of assessors of taxes; a majority may act upon a meeting of all. The People v. Supervisors Chenango Co., 11 N. Y. 563.

Also to jurors for appraising damage under the law of 1847, Chap. 31. Cruger v. Hud. R. R., 12 N. Y. 191.

It would also apply to a board of town auditors. The People v. Supervisors, 1 Hill, 195.

Also to commissioners to receive subscriptions for stock of a railroad

company. Croker v. Crane, 21 Wend. 211.

Also to commissioners of assessments of street extension in New York city, if all had notice. In re Church Street, 49 Barb. 455; Astor v. Mayor, 62 N. Y. 580.

The legislature may provide that the act of any two shall be valid. Matter of Broadway, 63 Barb. 572.

It was formerly held that all of them must be present and act, although the report may be signed by two. Doughty v. Hope, 3 Den. 594, affd., 1 N. Y. 79. (The amendment, L. 1874, Chap. 321, supra, appears to have changed

And a ratification by the Common Council would not render the act

The act has been held applicable to trustees of common schools. Gildersleeve Board of Education, 17 Abb. 202; Horton v. Garrison, 23 Barb. 176. But not to two out of three trustees to apportion a school tax under a

law (Law of 1847, Chap. 480) requiring the trustees to do so. Lee v. Parry, 4 Den. 125; Keeler v. Frost, 22 Barb. 400.

It has been held not to apply to judicial officers. Hawes v. Walker, 23-Barb. 304; Corning v. Slosson, 16 N. Y. 294.

It has been held that the above section applies to the persons to select a commissioner for jurors in New York city. The People v. Walker, 23 Barb. 304.

As to commissioners of highways, see Stewart v. Wallis, 30 Barb. 344. It is also held that although the above statute does not apply to judicial officers, it does to quasi judicial and ministerial officers. Parrot v. Knickerbocker Ice Co., 38 How. 508, and cases hereafter cited.

Where a statute prescribes that acts are to be performed by "the commissioners"-i. e., in partition-held all must act. Schuyler v. Marsh,

37 Barb. 350.

The rule held to apply to all matters of public concern. People v. Washington, 52 N. Y. 478.

Also to commissioners to assess damages on taking land for a public

use. Astor v. Mayor, 62 N. Y. 580.

As a general rule, where a public authority is conferred upon individuals not a court, as a continuous public trust or duty, and some die or become disqualified, the others may discharge the trust or perform the duty, provided there be a sufficient number to confer together, deliberate, and in view of a possibility of division of opinion, decide upon the course to be adopted. Downing v. Rugar, 21 Wend. 178; Gildersleeve v. The Board of Education, 17 Abb. 201; Perry v. Tynen, 22 Barb. 137; In re Church St., 49 id. 455; People v. Palmer, 52 N. Y. 83, 87.

If a statute or charter require all or a certain number to be present,

held all must be present, and if an act is required upon the joint consultation of all of a body, and all must be present for the deliberation, and continue present. Johnson v. Dodd, 56 N. Y. 76. Where the authority is public, and the number be such as to admit of a majority, such majority will bind the minority, after all have duly met and conferred. Where the authority is conferred upon two, nothing can be done without the assent of both, yet where the authority is public, to prevent a failure of justice, held one may act, if the other be dead, interested, or absent. In re Rogers, 8 Cow. 526; Downing v. Rugar, 21 Wend. 178; Woolsey v. Tompkins, 23 id. 324; The People v. Walker, 2 Abb. 421; Keeler v. Frost, 22 Barb. 400; Powell v. Tuttle, 3 N. Y. 396; Doughty v. Hope, 3 Den. 594, affd., 1 N. Y. 79.

According to the rules which govern corporate bodies, and deliberative or elective assemblies composed of a definite number of persons, a majority of the whole number is necessary to constitute a legal meeting, and the number necessary to constitute a quorum remains the same even though there may be vacancies in the membership. Erie R. R. Co. v. City of Buffalo, 180

N. Y. 192.

Where a public authority is conferred upon individuals not a court, nor acting judicially, all members should be notified to attend in some proper manner, either directly or through by-laws. If, thereupon, the majority of the whole number attends, the majority so attending may organize, and legally proceed to the transaction of business, and the majority of that quorum, if not less than a majority of the whole number of such persons, will bind whole body. See Statutory Construction Law, G. L., Chap. I;

L. 1892, Chap. 677, § 19.

As respects those who neglect or refuse to attend, it is the same as if they had attended and assented to the act of those who were present. however, are entitled to reasonable notice of the time and place of the meeting. The members of a corporate or other body, interested with the management of a matter of public concern, are deemed to have notice of a general or stated meeting, held pursuant to the by-laws of the body. In re Church St., 49 Barb. 455; Stewart v. Wallis, 30 id. 344; The People v. McSpedon, 18 How. Pr. 152; Gildersleeve v. The Board of Education, 17 Abb. 201; Perry v. Finehout, 22 Barb. 137; Horton v. Garrison, 23 id. 176; The People v. Walker, Id. 404; The People v. Loew, 28 id. 310, affd., 22 N. Y. 28; Washington v. Nichols, 52 id. 478.

See also People v. Bd. of Police Comrs., 99 N. Y. 676.

Less than a quorum may adjourn. Matter of Light, 25 Misc. 737.

Held, where nothing is shown to the contrary, it will be presumed that all persons necessary met and consulted in doing the act. Keeler v. Frost,

22 Barb. 400; McCoy v. Curtice, 9 Wend. 17; Downing v. Rugar, 21 id. 178; Doughty v. Hope, 3 Den. 253, 594, affd., 1 N. Y. 79; The People v. Com. C. of Rochester, 5 Lans. 11; People v. Bradley, 64 Barb. 228. See, however, the last sentence of the section above quoted, which is new, as to a recital. If the act be of a nature to require the exercise of discretion and judgment—in other wirds, if it be a judicial act, or one of that nature—all the persons to whom the authority is delegated must meet and confer together, but a majority may decide. Harris v. The Commissioners, etc., 6 How. Pr. 175; Woolsey v. Tompkins, 23 Wend. 324; In re Rogers, 8 Cow. 526; The People v. Walker, 2 Abb. 421; Crocker v. Crane, 21 Wend. 211; Perry v. Tynen, 22 Barb. 137; The People v. Walker, 23 id. 304. Held, if two only of three referees sign a report, it will be presumed that

Held, if two only of three referees sign a report, it will be presumed that all met and consulted. Yates v. Russel, 17 Johns. 466. See, however, last sentence of section 19 above. Quare whether a recital should not be made.

Private Corporations.—"* * * Unless otherwise provided (by law) a majority of the board of directors of a corporation at a meeting duly assembled shall be necessary to constitute a quorum for the transaction of business and the act of a majority of the directors present at a meeting at which a quorum is present shall be the act of the board of directors. The members of a corporation may in by-laws fix the number of directors necessary to constitute a quorum at a number less than a majority of the board, but at least equal to one-third of its number * *

General Corporation Law, G. L., Chap. XXXV, L. 1890, Chap. 563, § 29, as amd. L. 1892, Chap. 687, and L. 1901, Chap. 214, and L. 1904, Chap. 737.

See 1 R. S. 600, § 6; L. 1848, Chap. 40, § 7. See Story v. Furman, 25 N. Y. 214.

Where Persons not Designated.—Though the persons to execute a power are not specified, it may be valid, and its execution would devolve on the Court of Chancery.

Crocheron v. Jaques, 3 Edw. 207.

Trustee not Designated.—" Where a power in trust is created by will, and the testator has omitted to designate by whom the power is to be executed, its execution devolves on the Supreme Court."

Real Property Law, § 141; 1 R. S. 734, § 101.

But frequently, from the terms of the will, a power of sale in the executors will be implied.

Meakings v. Cromwell, 2 Sandf. 512, affd., 5 N. Y. 136; Delaney v. McCormick, 25 Hun, 574; affd., 88 N. Y. 174; Bogert v. Hertell, 4 Hill, 492; Dorland v. Dorland, 2 Barb, 63; Holland v. Alcock, 108 N. Y. 312.

The Court appoints its agent if no trustee of a power is named by the settlor. Kirk v. Kirk, 137 N. Y. 510; Myers v. McCullagh, 63 App. Div.

The cy pres doctrine in relation to powers prevails in this State only in case the power is to appoint to charity. Real Property Law, § 93; Hillen v. Iselin, 144 N. Y. 365; Holland v. Alcock, 108 id. 312; Cottman v. Grace,

The beneficiaries may elect to take the lands and extinguish the power. Hetzel v. Barber, 69 N. Y. 11; Mellen v. Mellen, 139 id. 210; Smith v.

Farmer Type F. Co., 18 Misc. 434.

See also Real Property Law, § 162.

And see infra, "Powers and Duties of Executors and Administrators over Realty," Chap. XVII.

TITLE VI. VALID EXECUTION OF POWERS.

A power cannot be exercised before or after the time prescribed for its exercise. When the mode in which a power is to be executed is not defined, it may be executed by deed or will, or simply by writing. The statutes prescribe that the power must be executed by some instrument in writing which would be sufficient in law to pass the estate, if the person executing the power were the actual owner. The general modes in which the power is to be exercised are given fully below.

Real Property Law, §§ 145, 207. See 1 R. S. 735, § 113; 2 R. S. 134, § 6.

As a general rule, powers of revocation and appointment and sale need not be executed to their full extent at once, but may be exercised at different times over different parts of the estate.

Power Exhausted by its Exercise.—A power conferred by statute is exhausted by once exercising it. People v. Woodruff, 32 N. Y. 355.

Dormant Powers.—A naked power cannot lie dormant so as to prevail against a bona fide purchaser for value without notice. Jackson v. Davenport, 20 Johns. 537. It will, at times, be assumed to be defunct or inactive.

Powers to Mortgage, to Sell, or to Lease, etc.—A power to mortgage implies a power to authorize a sale on default.

Wilson v. Troup, 2 Cow. 195.

Sales under a power in a mortgage must be according to the foreclosure statute in force at the time of default made, although the power may provide differently.

Lawrence v. The Farmers' Loan and Trust Co., 13 N. Y. 200; id. 642; James v. Stull, 9 Barb. 482; Wilson v. Troup, 2 Cow. 196.

As a general rule, a power to sell does not imply a power to mortgage. The rule, however, is subject to qualifications.

Bloomer v. Waldron, 3 Hill, 361; Coutant v. Servoss, 3 Barb. 128; Pitcher v. Carter, 4 Sand. Ch. 1; Potter v. Hodgman, 81 App. Div. 233; Benedict v. Arnoux, 154 N. Y. 715; Albany Fire Ins. Co. v. Bay, 4 id. 9; Shrady v. Van Kirk, 77 App. Div. 260; Cf. Willard, Eq. Juris., 487.

A power to sell authorizes a lease with a covenant to give a fee. Williams

v. Woodward, 2 Wend. 487.

A power to contract to sell means an absolute sale, and not one optional to the purchaser. Ives v. Davenport, 3 Hill, 373.

A power to repair and improve authorizes a mortgage. Holsman, 23 How. Pr. 202. Wetmore v.

A power to divide gives no power to sell. Craig v. Craig, 3 Barb. Ch. 76.

As a general rule, a power to execute an instrument of known and definite signification in the law will not authorize the execution of one having a different effect.

A power to use principal, held to cover right to mortgage. Swarthout v.

Ranier, 143 N. Y. 499.

A general power to dispose of property includes the right to dispose of it by will, unless the grant of the power contains words which expressly or by fair implication, exclude such a method of disposition. Matter of Gardner.

140 N. Y. 122.

Held trustees having the legal estate in lands, with a duty to perform with respect to the rents and profits, and without any restriction upon the right to lease, may lease vacant lots for 21 years, and give covenants for renewal for a similar term, and for appraisal; and such covenants may be enforced against a new trustee. Newcomb v. Ketletas, 19 Barb. 608, affd., 17 N. Y. 91.

See also Root v. Stuyvesant, 18 Wend. 257. The latter case, however, is not considered now an authority. Vide Hone's Exors. v. Van Schaick, 20 Wend. 564, at 569; Darling v. Rogers, 22 id. 483, 496; Lang v. Ropke, 5

Sandf. 363, at 372.

Where a power in trust to executors to lease the real estate of the testator until it can be sold would have the effect to suspend the absolute power of alienation in such real estate beyond the time allowed by law, it is void. But the power to sell in such a case would still be valid; and the real estate in equity will be considered as converted into personalty immediately, where such conversion is necessary to carry into effect the will of the testator. Haxton v. Corse, 2 Barb. Ch. 506; Hawley v. James, 16 Wend. 60.

When the object of a power is illegal, the power is void; and where it is void, or no appointment is made, the future estates limited take effect as if the power had not been given. The estates limited are held to be vested, subject to the execution of the power if valid.

(This section is new.) See Dana v. Murray, Real Property Law, § 31. 122 N. Y. 604; also Fowler's Real Property Law (2d ed.), 234, 235.

Execution by Devise.—"Where a power to dispose of real property is confined to a disposition by devise or will, the instrument must be a written will, executed as required by law."

Real Property Law, § 147, formerly 1 R. S. 736, § 115. See 1 Sugd. Pow. 255, 256.

When a power to dispose of property by will to children of donee, will be enforced in equity for their benefit. Smith v. Floyd, 140 N. Y. 337.

It is only where a power is coupled with a trust that a court of equity will enforce it. Towler v. Towler, 142 N. Y. 371.

See as to rights of creditors of donee of power to devise. Cutting v. Cutting, 86 N. Y. 522.

How far a prior will may be regarded as an execution of a power subsequently granted, quære. Chapl. Ex. Trusts & Pow., § 653; Farwell, Pow. (2d ed.), 222; Cf. Lynes v. Townsend, 33 N. Y. 558, at 561.

"Real property embraced in a power to devise passes by a will purporting to convey all the real property of the testator, unless the intent that the will is not to operate as an execution of the power, appears, either expressly or by necessary implication."

Real Property Law, § 156; formerly 1 R. S. 737, § 126. White v. Hicks, 33 N. Y. 383.

The same rule applies to personalty. Hutton v. Benkard, 92 N. Y. 295; N. Y. Life Ins. Co. v. Livingston, 133 id. 125; Lockwood v. Mildeberger, 159 id. 181.

An intent not to execute power will not be inferred from failure of testator to mention it. Lockwood v. Mildeberger, 159 N. Y. 181.

For the contrary rule at common law, see 2 Chance, Pow. 84; Mut. L. I.

Co. v. Shipman, 119 N. Y. 324, at 328.

Wills made under a power must be executed with the same formalities, and must be proved in the same manner as proper wills. They must be proved in the Probate Court; but that court has nothing to do with the question whether the power is well executed. or whether it authorizes the will, or in fact exists at all.

The question of its being a due execution of a power is for the determination of a court of construction. A will in execution of a power is ambulatory, and revocable in the same manner as a proper will. The testamentary instrument, however, which a married woman might formerly execute under power of appointment, was not strictly a will, nor did it operate as such in the proper legal sense of the term. It operated as an appointment, and the devisee or legatee took the property by force of the power. This was the rule before the statutes of 1848-9.

Frazer v. Western, 1 Barb. Ch. 240; Van Wert v. Benedict, 1 Bradf. 114; Strong v. Wilkin, 1 Barb. Ch. 13.

A power executed by a will made in accordance with laws of another State, where the appointee resided, was held valid in Betts v. Betts, 4 Abb. N. C. 317, 389. See also Ward v. Stanard, 82 App. Div. 386; see Code Civ. Proc., § 2694.

A will giving all testator's estate (after paying debts and funeral expenses), "both real and personal of every nature whatsoever and wheresoever," will pass lands embraced by a power in testator to designate the uses to which trustees shall stand seized. Mott v. Ackerman, 92 N. Y. 539. Cf. Lockwood v. Mildeberger, 159 N. Y. 181.

Execution by Grant.—Where a power is confined to a disposition by grant, it cannot be executed by will, although the disposition is not intended to take effect until after the death of the person executing the power.

Real Property Law, § 148; formerly 1 R. S. 736, § 116.

Method and Formalities of Execution .-- "Where grantor of a power has directed or authorized it to be executed by an instrument not sufficient in law to pass the estate, the power is not void, but its execution is to be governed by the provisions of this article." (Art. IV, Real Property Law.)

Real Property Law, § 149; formerly 1 R. S. 736, § 118.

"Where the grantor of a power has directed any formality to be observed in its execution, in addition to those which would be sufficient by law to pass the estate, the observance of such additional formality is not necessary to the valid execution of the power."

Real Property Law, § 150; formerly 1 R. S. 736, § 119.

As a general rule, there must be a substantial compliance with every condition required to precede or accompany the exercise of a power, and the power must not be exceeded; but see as to this, infra.

Nixon v. Hyserott, 5 Johns. 58; Allen v. Dewitt, 3 N. Y. 276; Cleveland v. Boerum, 27 Barb. 252, affd., 24 N. Y. 613; Ladd v. Ladd, 8 How. (U. S.) 10; Griswold v. Perry, 7 Lans. 98.

A provision that the grantor unite in the execution of the power is valid. Kissam v. Dierkes, 49 N. Y. 602.

Where there are several modes, however, of executing the power, the donee may select his mode.

"Where the conditions annexed to a power are merely nominal, and evince no intention of actual benefit to the party to whom, or in whose favor, they are to be performed, they may be wholly disregarded in the execution of the power."

Real Property Law, § 151, formerly 1 R. S. 736, § 120.

Real Property Law, § 151, formerly 1 R. S. 736, § 120.

A grantee under the power is bound to see to the performance of conditions precedent, and is not excused by a recital of performance in the conveyance, but is protected as to conditions subsequent. Griswold v. Perry, 7 Lans. 98.

A power of sale cannot be executed after the time limited. Richardson v. Sharpe, 29 Barb. 222.

A power to sell on a credit of twelve months is not exceeded on a sale at a six months' credit. Richardson v. Hayden, 18 B. Mon. 242.

A power of sale may be executed by contract as well as by deed. Demarest v. Ray, 29 Barb. 563.

Where the power is so hampered by restrictions as to be preciselly in-

Where the power is so hampered by restrictions as to be practically in-operative it may be wholly disregarded. Macy v. Sawyer, 66 How Pr. 381.

But the court will give effect to conditions, so far as practicable, while taking care that the object of the power be not defeated. Phillips v. Davies, 92 N. Y. 199.

The requirement of the consent of third persons will be sustained. Phillips v. Davies, 92 N. Y. 199; Kissam v. Dierkes, 49 id. 602; Stokes v. Hyde. 14 App. Div. 530.

Intentions of Grantor.—" Except as provided in this article, the intenions of the grantor of a power as to the manner, time and conditions of its execution must be observed; subject to the power of the Supreme Court, to supply a defective execution as provided in this article" (Art. IV, Real Property Law).

Real Property Law, § 152, formerly 1 R. S. 736, § 121.

Where the direction is that the power must be exercised for a special purpose, any deviation (e. g., as if a transfer to pay a precedent debt were made under a power of sale to pay legacies) would make the execution void. Russell v. Russell, 36 N. Y. 581.

The parties may not repudiate or disclaim the burdens which they voluntarily undertake. Rochevot v. Rochevot, 74 App. Div. 585. See also Schreyer v. Schreyer, 101 App. Div. 456; Gardner v. Dembinsky, 52 App. Div. 473. "Powers of Sale to Executors," infra, Chap. XVII.

Consent of Grantor or Third Person to Execution of Power.-"Where the consent of the grantor or a third person to the execution of a power is requisite, such consent shall be expressed in the instrument by which the power is executed, or in a written certificate thereon. In the first case, the instrument of execution, in the second, the certificate, must be subscribed by the person whose consent is necessary; and to entitle the instrument to be recorded, such signature must be acknowledged or proved and certified in like manner as a deed to be recorded."

Real Property Law, § 153; see 1 R. S. 736, § 122. Even since the Revised Statutes, if the consent of a third person is required,

Even since the Revised Statutes, if the consent of a third person is required, the power cannot be executed, if he die before execution. Barber v. Cary, 11 N. Y. 397; Kissam v. Dierkes, 49 id. 602; Mott v. Ackerman, 92 id. 539; Phillips v. Davies, id. 199; Gulick v. Griswold, 14 App. Div. 85, affd., 160 N. Y. 399; Stokes v. Hyde, 14 App. Div. 530.

But a limitation may be so framed as to make it apparent that the grantor intended to make the consent of a third person conditional only upon such third person's being alive at the time of the execution of the power. House v. Raymond, 3 Hun, 44; Kimball v. Chappell, 27 Abb. N. C. 437; Odell v. Youngs, 64 How. Pr. 56; Hoyt v. Hoyt, 85 N. Y. 142; Phillips v. Davies, 92 id. 100 id. 199.

Consent of legatees whose legacies were charged on real estate, obtained without consideration, is not such a consent as is required before exercise of power of sale. Hoyt v. Hoyt, 17 Hun, 192, affd., 85 N. Y. 142.

An instrument of revocation may be sufficient though not in the form

required by statute. Schreyer v. Schreyer, 101 App. Div. 456.

When All Must Consent.—"Where the consent of two or more persons to the execution of a power is requisite, all must consent thereto: but if, before its execution, one or more of them die, the consent of the survivor or survivors is sufficient, unless otherwise prescribed by the terms of the power."

Real Property Law, § 154. This section is new.

This section is not retroactive. Gulick v. Griswold, 160 N. Y. 399.

In cases where the limitation requires the consent of certain officers or of a class, the rule is merely declaratory of pre-existing decisions. See Correll v. Lauterbach, 14 Misc. 469; Hoyt v. Hoyt, 85 N. Y. 142; Hamilton v. N. Y. Stock E. B. Co., 20 Hun, 88.

Unauthorized Exercise.—"A disposition or charge by virtue of a power is not void on the ground that it is more extensive than was authorized by the power; but an estate or interest so created, so far as embraced by the terms of the power is valid."

Real Property Law, § 157; see 1 R. S. 737, § 123. This was the rule of the common law, 2 Chance, Pow. 511, § 2891.

The donee of a special power given by will to appoint an estate is invested with an authority merely, and an appointment, so far as it transcends the

power, is invalid.

The execution of the power, however, will not be defeated because of some provision in the appointment made which is in excess of the power, when such provision may be eliminated without disturbing the general scheme. Hillen v. Iselin, 144 N. Y. 365. See Fowler's Real Property Law (2d ed.), 548. 549.

Purchase Under Defective Execution.—"A purchaser for a valuable consideration, claiming under a defective execution of a power, is entitled to the same relief as a similar purchaser, claiming under a defective conveyance from an actual owner."

Real Property Law, § 160; see 1 R. S. 737, § 132.

The words "in equity" found in the Revised Statutes after "relief" have been omitted in the Real Property Law.

Disposition Among Several.—" Where a disposition under a power is directed to be made to, or among or between two or more persons, without any specification of the share or sum to be alloted to each, all the persons designated shall be entitled to an equal proportion; but when the terms of the power import that the estate or fund is to be distributed among the persons so designated, in such manner or proportions as the grantee of the power thinks proper, the grantee may allot the whole to any one or more of such persons in exclusion of the others."

Real Property Law, § 138; see 1 R. S. 734, §§ 98, 99. Shannon v. Pickell, 2 N. Y. St. Rep. 160.

It is a settled principle that where a discretion has been conferred by statute, its exercise cannot be reviewed, and is not subject to any appellate tribunal. See Extension of Church St., 49 Barb. 455.

A limitation to the donee of the power of a discretion as to shares or amounts must be clear. Matter of Conner, 6 App. Div. 594; Jones v. Jones,

8 Misc. 660; Shannon v. Pickell, 2 N. Y. St. Rep. 160; Stuyvesant v. Neil, 67 How. Pr. 16; Stewart v. Keating, 15 Misc. 44.

As to the discretionary import of the word "or," see Drake v. Drake, 134

N. Y. 220. See intra, as to the imperative nature of such trust powers.

Execution of Power on Death of Trustee.—" If the trustee of a power, with the right of selection, dies leaving the power unexecuted, its execution must be adjudged for the benefit, equally, of all the persons designated as beneficiaries of the trust."

Real Property Law, § 140; see 1 R. S. 734, § 100.

See Dominick v. Sayre, 3 Sandf. 555; Leggett v. Hunter, 19 N. Y. 445, at 459; Delaney v. McCormack, 88 id. 174; Greenland v. Waddell, 116 id. 234; Smith v. Floyd, 140 id. 337; Meldon v. Devlin, 31 App. Div. 146, 157; Wilson v. Van Epps, 38 Misc. 486.

Power not Referred to in the Instrument.—"An instrument executed by the grantee of a power, conveying an estate or creating a charge, which he would have no right to convey or create except by virtue of the power, shall be deemed a valid execution of the power, although the power be not recited or referred to therein."

Real Property Law, § 155; 1 R. S. 737, § 124. Cf. Real Property Law,

This settled the former law on the subject, which in most cases required a reference to the power in the instrument, particularly where the donee had

an interest separate from the power.

A person may execute a will without reference to the power and this would be a valid execution of the power, if it otherwise appear that the intention was to execute the power; and the amount of a testator's property may be inquired into to show an intention to execute the power. White v. Hicks, 43 Barb. 64, affd., 33 N. Y. 383; Stuyvesant v. Neil, 67 How. Pr. 16; Mott v. Ackerman, 92 N. Y. 539; Cole v. Gourlay, 9 Hun, 493, affd., 79 N. Y. 527; Onderdonk v. Ackerman, 62 How. Pr. 318.

This section has no application where the grantee has both an interest and a power. Mut L. I. Co. v. Shipman, 119 N. Y. 324; Weinstein v. Weber, 58 App. Div. 112, affd., 178 N. Y. 94.

Powers in Trust.-It has been seen in a previous chapter (Chap. X), that where, in a devise to executors or other trustees. they are not entitled to receive the rents and profits, no estate vests in them.

Another provision of statute has also been considered, to the effect that where an express trust shall be created for any purpose not authorized by statute, no estate shall vest in the trustee; but the trust, if directing or authorizing the performance of any act which may be lawfully performed under a power, shall be valid as a power in trust, subject to the provisions of Part II, Chap. I, Tit. II, Article Third of the Revised Statutes, respecting powers: and the lands vest in the persons entitled, subject to the execution of the trust as a power.

The interpretation of these statutory provisions has been considered in a previous chapter relative to trusts. (Chap. X.)

A general power, it has been seen (supra, Tit. II), is in trust when persons other than the grantee of the power are designated as entitled to all or a portion of the proceeds or benefits resulting from its execution.

A special power is in trust —

- I. Where the disposition authorized is limited to a person or class of persons other than the grantee of the power.
- 2. Where a person or class of persons other than the grantee is designated as entitled to any benefit from the disposition or charge authorized by the power.

The provisions of the statutes relative to the valid execution of such trust powers will now be considered.

Every trust power, unless its execution or nonexecution is made expressly to depend on the will of the grantee, is imperative, and imposes a duty on the grantee, the performance of which may be compelled in equity, for the benefit of the parties interested.

Real Property Law, § 137; see 1 R. S. 734, § 96.

Under the views of our courts, a power is always considered imperative when its subject — that is, the property given — and its object — that is, the person to whom it is given — are certain. Such a power is not to be construed as discretionary because the terms used are simply those of authority, request, or recommendation, and not those of direction; nor because a right of selection is given to the donee of the power. A power is always considered a trust when a disposition is made to a class, unless its execution is made, in terms, to depend upon the mere discretion of the grantee. It is considered, in equity, a gift to all who are the objects of the power, subject to be altered or restricted by its execution.

A power is also considered imperative, if its execution is not made to depend upon the will of the grantee, and if it imposes on the grantee a duty, the performance of which may be compelled in equity for the benefit of the parties interested.

Selden v. Vermilya, 1 Barb. 58, partially reversed, 3 N. Y. 525.

A general power in trust, the execution or nonexecution of which does not depend on the mere volition of the trustee, is imperative in its nature, and imposes a duty, the performance of which may be compelled in equity. Arnold v. Gilbert, 5 Barb. 190; Van Boskerck v. Herrick, 65 Barb. 250.

Under a general and beneficial power of appointment the person entitled to exercise it may appoint himself or any other person. Hubbard v. Gilbert,

25 Hun, 596.

A trust power does not cease to be imperative where the grantee has the right to select any, and excludes others of the persons designated as the beneficiaries of the trust.

Real Property Law, § 137; see 1 R. S. 734, § 97. See Tilden v. Green, 130 N. Y. 29; Coleman v. Beach, 97 id. 545; Matter of Bierbaum, 40 Hun, 504; Austin v. Oakes, 117 N. Y. 577; Rochevot v. Rochevot, 74 App. Div. 585,

Where an express power in trust is given to executors to divide specified Where an express power in trust is given to executors to divide specified real estate in certain proportions among a class, it is a valid and imperative power in trust, and the executors must perform it by setting off the shares in severalty by a valid and legal instrument. Dominick v. Sayre, 3 Sandf. 555; Craig v. Craig, 3 Barb. Ch. 76.

How far a quasi-trust power may be outside this principle and not imperative it is not always easy to discern. Towler v. Towler, 142 N. Y. 371.

As to the compelling of execution, see Haight v. Brisbane, 96 N. Y. 132; Chapl. Ex. Trusts & Pow., § 583. *Of.* as to powers of sale, Mellen v. Mellen, 139 N. Y. 210; Reade v. Continental Trust Co., 28 Misc. 721.

Where the execution of a power in trust is defective, wholly or partly, under the provisions of this article, its proper execution may be adjudged in favor of the person designated as the beneficiary of the trust.

Real Property Law, § 143; see 1 R. S. 737, § 131. Prentice v. Janssen, 79 N. Y. 478.

A defective execution of an appointment, made for a valuable consideration, is not wholly void. It amounts only to a defective execution, and equity will supply it. Schenck v. Ellingwood, 3 Ed. 175.

The court will also exercise a power of distribution given in trust to a party who has died. Hoey v. Kenney, 25 Barb. 396; Bolton v. De Peyster, 25 id. 540; De Laney v. McCormick, 25 Hun, 574, affd., 88 N. Y. 174.

The distinction between a void and a defective execution of powers remains unchanged by this section. Austin v. Oakes, 48 Hun, 492, 117 N. Y. 577; Hillen v. Iselin, 144 id. 365; Cf. Farw. Pow. (1st ed.), 262 et seq.

Fraud.—"An instrument in execution of a power is affected by fraud, in the same manner as a conveyance or will, executed by an owner or by a trustee."

Real Property Law, § 161; see I R. S. 737, § 125. The fraud referred to may be the fraud of a third person, not the grantee of the power. Scroggs v. Scroggs, Arbl. 272; Harty v. Doyle, 49 Hun, 410.

Married Women. Before the statutes enlarging her rights, when not prohibited by the terms of the power, express or implied, a married woman might execute a power, if so authorized by it, by grant or devise, without the concurrence of her husband. Those statutes, however, have made much of the law, contained in the Revised Statutes in regard to her rights, obsolete. However, reference may be made to the following decisions under the old law:

Jackson v. Edwards, 7 Paige, 386, affd., 22 Wend. 498; 1 R. S. 735, § 110.

No power vested in her during infancy could be exercised by her until of

age. Î R. S. 735, § 111.

A power to mortgage, reserved to a married woman in respect to lands held in trust for her separate use, held not to support a mortgage to secure

her husband's debt. Leavitt v. Pell, 25 N. Y. 474, affg. 27 Barb. 322.

If a married woman execute a power by grant, the concurrence of her husband as a party held not to be requisite, but it had to be acknowledged separate and apart from him to be valid. See 1 R. S. 736, § 117. See Chap. III, Tit. III.

But see as to present law of acknowledgments by married women, infra, Chap. XXVI, Tit. I.

Powers Executed by Alien Women.—See Real Property Law, § 5 (L. 1845, Chap. 115).

Vide supra as to Alien Women, Chap. III, Tit. IV.

TITLE VII. REVOCATION OF POWERS.

Formerly there might be a power of revocation reserved even in the deed executing the power, though the deed creating the power did not authorize it.

On every execution of the power, a new power of revocation had to be reserved, otherwise the appointment could not be revoked.

4 Kent, 336.

On this head of appointment and revocation, vide Evans v. Sanders, 31 Eng. Law & Eq. 366; Gelb v. Tugwell, 35 id. 429.

The Real Property Law provides as to the revocation of powers, that a power, whether beneficial or in trust, is irrevocable, unless an authority to revoke it is granted or reserved in the instrument creating the power.

Real Property Law, § 128; 1 R. S. 735, § 108.

It is also provided that the grantor in a conveyance may reserve to himself any power, beneficial or in trust, which he may lawfully grant to another; and the power thus reserved, shall be subject to the provisions of this article, in the same manner as if granted to another. (Art. IV, Real Property Law.)

Real Property Law, § 124; I R. S. 735, § 105.

And where the grantor in a conveyance reserves to himself for his own benefit, an absolute power of revocation, he is to be still deemed the absolute owner of the estate conveyed, so far as the rights of creditors and purchasers are concerned.

Real Property Law, § 125; 1 R. S. 733, § 86.

A power coupled with an interest is not revoked by the death of the grantor, as a power to sell in a mortgage, but passes with the mortgage,

and is not revoked by the death of the mortgagor. Nor is a power to sell for the benefit of the grantee revocable.

aell for the benefit of the grantee revocable.

A mere naked authority expires with the person who gave it.

A power coupled with an interest, however, continues after the decease of the creator, and cannot be revoked until after the demand, which it is given to satisfy, is fully paid up. Morgan v. Raynor, 5 Alb. Law J. 109.

As to revocation of power to agent, on making compensation for services rendered, see Culver v. W. U. Tel. Co., 50 N. Y. 691.

See Fowler's Real Property Law (2d ed.), 501, 502.

An instrument reserving or creating an absolute power of revocation to the settlor may be valid inter parties; Conklin v. Davies, 14 Abb. N. C. 499; Belmont v. O'Brien, 12 N. Y. 394; Van Cott v. Prentice, 104 id. 45; Von Hesse v. Mac Kaye, 136 id. 114; Locke v. F. L. & T. Co., 140 id. 135; Gilman v. McArdle, 99 id. 451; Lore v. Dierkes, 16 Abb. N. C. 47; Matter of Masury, 28 App. Div. 580, affd., 159 N. Y. 532; Matter of Bostwick, 160 id. 489; Real Property Law, §§ 226, 227, 228; but void as to the State and other creditors and purchasers prejudiced. Von Hesse v. Mac Kaye, 136 N. Y. 114; Real Property Law, § 231.

N. Y. 114; Real Property Law, § 231.

Whether a reservation can be treated as a power within the meaning of the statute, quære. Towler v. Towler, 142 N. Y. 371.

Right of revocation reserved does not affect the validity of the trust, save that as to creditors the creator is to be deemed the absolute owner. Schreyer v. Schreyer, 101 App. Div. 456, affg. 43 Misc. 520.

Statute of Frauds as to Power to Revoke.—"A conveyance of or charge on an estate or interest in real property, containing a provision for the revocation, determination or alteration of the estate or interest, or any part thereof, at the will of the grantor, is void, as against subsequent purchasers and encumbrancers, from the grantor, for a valuable consideration, of any estate or interest so liable to be revoked or determined, although the same be not expressly revoked, determined or altered by the grantor, by virtue of the power reserved or expressed in the prior conveyance or charge."

Real Property Law, § 231; 2 R. S. 134, § 3; see 1 R. L. 75, § 5.

"Where a power to revoke a conveyance of real property or the rents and profits thereof, and to reconvey the same, shall be given to any person, other than the grantor in such conveyance, and such person thereafter conveys the same real property, rents or profits to a purchaser or encumbrancer for a valuable consideration, such subsequent conveyance is valid, in the same manner and to the same extent as if the power of revocation were recited therein, and the intent to revoke the former conveyance expressly declared."

Real Property Law, § 231; 2 R. S. 134, § 4.

"If a conveyance to a purchaser or encumbrancer, under this section, be made before the person making it is entitled to execute his power of revocation, it is nevertheless valid, from the time the

power of revocation actually vests in such person, in the same manner, and to the same extent, as if then made."

Real Property Law, § 231; 2 R. S. 134, § 5.

TITLE VIII. EXTINGUISHMENT AND TERMINATION OF POWERS.

Powers may be suspended, merged or extinguished. As a general rule a party cannot defeat his own action where other rights have attached under it, by a subsequent act extinguishing the power. A power is also considered extinguished where its execution becomes practically impossible.

It is a general rule that a purchaser under a power purchases at his peril, and is bound to inquire whether the power has not been extinguished.

Stafford v. Williams, 12 Barb. 240.

An alienation of the estate formerly extinguished the power, sometimes even in cases of mortgage; also a release to the tenant of the frehold; also a fine and recovery.

The Real Property Law provides:

"Where a power to sell real property is given to a mortgagee, or to the grantee in any other conveyance intended to secure the payment of money, the power is deemed a part of the security, and vests in, and may be executed by any person who, by assignment or otherwise, becomes entitled to the money so secured to be paid.

Real Property Law, § 126; 1 R. S. 737, § 133. The Revised Statutes removed the doubt whether a power of sale_in_a mortgage was a power with an interest. Terwiliger v. Ontario & S. R. R. Co., 149 N. Y. 94.

"A mortgage executed by a tenant for life, having a power to make leases, does not extinguish or suspend the power; but the power is bound by the mortgage in the same manner as the real property embraced therein * * *."

Real Property Law, § 136; 1 R. S. 733, § 90. See further as to this section, supra, Tit. IV.

It was also a question if an estate were limited to uses, to be appointed by a person, and in default of appointment, to himself in fee, whether the power was not merged in the fee. The Statutes provide that where there is no trust, and the absolute power of disposition is given, and no remainder limited on the estate of the grantee, he takes a fee absolute. Real Property Law, § 131; 1 R. S. 733, § 83. See as to these provisions, supra, Tit. IV.

Power of Life-Tenant to make Leases, when Extinguished.— "The power of a tenant for life to make leases is not assignable as a separate interest, but is annexed to his estate, and passes by a

grant of such estate unless specially excepted. If so excepted, it is extinguished. Such a power may be released by the tenant to a person entitled to an expectant estate in the property, and shall thereupon be extinguished."

Real Property Law, § 135; 1 R. S. 733, §§ 88, 89.

Express Powers.—An express power to dispose of lands when not clothed with an estate or interest, is not descendible or transmissible, but terminates with the lives, or according to the terms of its creation, with the life of the survivor of those in whom it is vested.

Held, when a power to sell lands, even for the payment of debts, is given to executors, if it pass to a surviving executor at all, it ceases upon his death, and cannot be exercised by his executor when he makes a will, nor when he dies intestate, by an administrator with the original will annexed. Dominick v. Michael, 4 Sandf. 374.

See, however, Code Civ. Proc., § 2613; and as to the survivorship of trust powers, and the substitution of executors and trustees for those removed, dying or discharged, see supra, Chap. X, Tit. VII, and infra, Chap. XVII, and surra. Tit. V

and supra, Tit. V.

Powers simply collateral can neither be barred nor extinguished by any act of the party in whom they are vested. Leonard v. Tallmadge, 26 Barb. 443.

Where an executor was removed for becoming a nonresident and sub-sequently returning received letters of administration with the will annexed, it was held that he could still execute the power. Hetzell v. Easterly, 66 Barb. 443.

Code Civ. Proc., § 2613.

When the Objects or Purposes of the Power Cease.—The power is also considered no longer operative when its alleged purposes no longer exist — as to provide for a widow who dies, or when its objects are unattainable. Thereupon it ceases or becomes extinguished by operation of law, and lands formerly affected by it are no longer subject to its exercise.

Jackson v. Jansen, 6 Johns. 72; Slocum v. Slocum, 4 Edw. 613; Hutchins v. Jones, 7 Bos. 236; Hotchkiss v. Elting, 36 Barb. 38; Sharpsteen v. Tillou, 3 Cow. 651; McCarty v. Terry, 7 Lans. 236; Hetzel v. Barber, 69 N. Y. 1, affg. in part and reversing in part, 6 Hun, 534.

A power in the execution of which it is provided that grantor join is extinguished by his death. Kissam v. Dierkes, 49 N. Y. 602.

See also as to persons for whose benefit power of sale is to be exercised, taking the land itself and thus exhausting the power. 12 Barb. 117; Garvey v. McDevitt, 72 N. Y. 556; Prentice v. Janssen, 79 id. 478; Savage v. Sherman, 24 Hun, 307; 87 N. Y. 277. See also Chap. XVII, infra.

CHAPTER XIII.

POWERS OF ATTORNEY.

TIME I .- CONTRACTS AND CONVEYANCES BY ATTORNEY.

II .- REVOCATION.

III .- RECORD OF POWERS OF ATTORNEY

IV .- POWERS BY MARRIED WOMEN.

TITLE I. CONTRACTS AND CONVEYANCES BY ATTORNEY.

A person may make a contract or conveyance by attorney "in fact," through a power of attorney, with the like effect as if made personally. If the subject-matter is real estate, the power should be in writing.

Real Property Law, § 207; 2 R. S. 134, § 6.

An executor may make a valid power of attorney though he do not attach his official designation to his signature. Myers v. Mutual L. I. Co., 99 N. Y. 1. When an executor may delegate execution of power to sell real estate. Gates v. Dudgeon, 173 N. Y. 426.

A sealed contract executed by an agent with only parol authority, is not the deed of the principal, and no act in pais can make it his unless the ratification be written. Hanford v. McNair, 9 Wend. 54; Blood v. Goodrich, 12 id. 525.

As to the construction and effect of a general power of attorney between partners and others, see Fereira v. De Pew, 17 How. Pr. 418.

As to married women, see Laws 1878, Chap. 300; Domestic Relations Law, G. L., Chap. XLVIII, L. 1896, Chap. 272, § 21; Nash v. Mitchell, 71 N. Y. 199. See fully as to the law regulating powers in general, supra, Chap. XII.

The authority given under a power of attorney and all special powers is strictly construed, and any act substantially varying from it would be void. The general words are to be construed with reference to the particular terms which form the subject-matter of the instrument, and in furtherance of, but in subordination to, the general power conferred.

Geiger v. Bolles, Supm. 129.

Therefore, if a party were authorized as an attorney in fact, to sell and grant lands and execute conveyances, he would not be authorized to enter into covenants or do any act other than was actually necessary to transfer the property by deed sufficient for the purpose. Nixon v. Hyserott, 5 Johns. 58; Schulz v. Griffin, 121 N. Y. 294, declaring Gibson v. Colt, 7 Johns. 390, overruled in Nelson v. Cowing, 6 Hill, 336. See also Sanford v. Handy, 23

As a general rule a power to sell, if general and qualified, does not include a power to mortgage. Coutant v. Servoss, 3 Barb. 128; The Albany Fire Ins. Co. v. Bay, 4 N. Y. 9; Bloomer v. Waldron, 3 Hill, 361; and see *supra*. "Powers," Chap. XII. But a power to sell for the purpose of raising money might imply a power to mortgage, which is a conditional sale, and within the object of the power. 4 Kent, 147; 1 Powell on Mortgages, 61.

A power to mortgage, lease, sell and convey does not give authority to

employ counsel, except in and about such instruments as the attorney may execute. Harnett v. Garney, 36 Super. 326.

A power to mortgage includes a power to execute a mortgage with a power of sale in it. Wilson v. Troup, 7 Johns. Ch. 25, affd., 2 Cow. 195.

A trust to raise money out of the profits of land will include a power

to sell or mortgage. 4 Kent, 148.

One dealing with the attorney is bound by the terms of the power. Bumstead v. Hoadly, 11 Hun, 487.

A power to invest money and authorizing the use of the principal's signature and seal whenever the same may be necessary or proper, gives powers to assign a bond which accompanies a mortgage, the power to assign the letter being companies. the latter being expressly conferred. Feldman v. Beier, 78 N. Y. 293.

A power of attorney to sue, recover and release judgments recovered, gives no power to release without payment. DeMets v. Dagron, 53 N. Y.

Under a power of attorney to sell land the attorney cannot sell to himself through a third person. Bain v. Matteson, 54 N. Y. 663.

Instruments, how Executed by Attorney.—Instruments executed through an attorney in fact, duly authorized, are executed by the attorney in the principal's name, per the attorney's name, appended as such.

A contract or deed, to be obligatory upon the principal, when made by the agent, must be made in the name of the principal. If the agent contract in his own name, although describing himself as agent or attorney for his principal, the contract is the contract of the attorney and not of the constituent.

The principle or theory of the above rule is, that the interest in the estate, that is the subject of the power, is vested alone in the principal, and the power of attorney as such vests no interest in the representative, consequently none can pass from him. A covenant for the sale of land, therefore, or a deed passing an interest in land where the contract or instrument is made by an attorney in fact, to be valid as against the principal, must be executed in the name of the principal by his attorney. If the attorney affix only his own name, the covenant is void, although in the body of the instrument it be stated that it is the agreement or deed of the principal by his attorney, and although the principal be individualized as making the covenants. This would be the case even if, in the testatum clause, it be alleged that the attorney, as the attorney of the principal, had signed and sealed the instrument.

⁴ Wash. C. C. 280; Spencer v. Field, 10 Wend. 88; Taylor's Landlord and Tenant, §§ 139, 140, 141; Stone v. Wood, 7 Cow. 453; Townsend v. Corning, 23 Wend. 435; see, as to mistake in name of the principal, 14 Wall. 173. See also Townsend v. Hubbard, 4 Hill, 351; Sherman v. N. Y. C. R. R. Co., 22 Barb. 239.

TITLE II. REVOCATION.

It will be necessary to ascertain, before taking title under a deed executed through attorney, that the power has not been revoked in fact or by law, as, by the decease or civil disability of the grantor before the execution of the deed, a power of attorney, not coupled with an interest, being revocable at will.

Farmers' Loan & T. Co. v. Wilson, 139 N. Y. 284.

The decease of the attorney revokes the appointment of any sub-attorney made by him. Watt v. Watt, 2 Barb. Ch. 371.

As a general rule the revocation takes effect, as to the agent, from the time it was made known to him. As regards third persons, it depends upon the notice given. But the question as to what amounts to notice seems unsettled. If, with the exercise of ordinary caution, a party would be led to a knowledge of the revocation, it seems sufficient. Williams v. Birbeck, 1 Hoff. 359.

Failing to ask about the principal in case of a power several years old held fatal neglect. Weber v. Bridgman, 113 N. Y. 600.

Lunacy of the Principal.— This does not, per se, revoke a power of attorney nor invalidate the acts of the attorney until the fact of lunacy is judicially established. Wallis v. The President, etc., of the Manhattan Co., 2 Super. 495.

Record of Revocation .- See next title.

TITLE III. RECORD OF POWERS OF ATTORNEY.

To make a proper title to realty of record, the power should be properly acknowledged and recorded. It need not be recorded. however, as a matter of law.

Real Property Law, § 240; Williams v. Birbeck, Hoffman Ch. 359.

An instrument containing a power to convey real property, as the agent or attorney for the owner of the property, acknowledged or proved, and certified, in the manner to entitle a. conveyance to be accorded, may be recorded by the recording officer of any county in which any of the real property to which it relates is situated."

Real Property Law, § 244; See 1 R. S. 762, § 39.

Books of powers of attorney are kept properly indexed in the offices of the various registers or clerks of counties; also books of revocation of such powers. See Real Property Law, §§ 265, 273; see also infra.

Power of attorney may be acknowledged and proved in the same manner as deeds. St. John v. Croel, 5 Hill, 573; Paolillo v. Faber, 56 App. Div. 241; Lerche v. Brasher, 104 N. Y. 157; Code Civ. Proc., §§ 935, 937.

For an instrument not entitled to be recorded, and ordered canceled, see Davidson v. Fox, 65 App. Div. 262; see Real Property Law, § 276.

Record of Revocation.—It is also provided that a power of attorney or other instrument, so recorded, shall not be deemed

revoked by any act of the party by whom it was executed, unless the instrument containing such revocation is also recorded in the same office in which the instrument containing the power was recorded.

Real Property Law, § 273; 1 R. S. 763, § 40.

It is a rule that no one is chargeable with constructive notice of an instrument merely from its being recorded, unless the law makes it necessary to record it. If, however, a power to convey is recorded, an instrument of revocation also recorded in the same county appears to be sufficient notice. Williams v. Birbeck, 1 Hoff. 359.

TITLE IV. POWERS BY MARRIED WOMEN.

A married woman now has the same rights over her real property as a feme sole and a power may be executed by her in the same manner and with the same effect as if she were unmarried.

Dom. Rel. Law, L. 1896, Chap. 272, § 21. See as the earlier law and its development, L. May 11, 1835, Chap. 275; L. 1848, Chap. 200, § 3; L. 1849, Chap. 375, § 1; L. 1884, Chap. 381, as amd. L. 1892, Chap. 594; L. 1860, Chap. 90, § 2; L. 1878, Chap. 300.

Even after the Acts of 1848 and 1849, it was considered doubtful if a

married woman could execute a power of attorney to her husband. Hunt v. Johnson, 19 N. Y. 279.

By L. 1878, Chap. 300, any married woman of full age, resident in this

State, might make and acknowledge power of attorney as if sole.

L. 1893, Chap. 599, allowed any married woman of full age to give power to release her inchoate right of dower in all cases where she could herself release, as to lands in this State.

For the corresponding provision of the present law, see Real Property Law,

§ 187.

She may thus release dower and even by her husband as her attorney. Wronkow v. Oakley, 133 N. Y. 505.

See also Chap. VII, supra, and "Married Women," Chap. III, Tit. III, supra.

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CHAPTER XIV.

TITLE BY DESCENT.

TITLE I .- WHO TAKE BY DESCENT.

II .- WHAT DESCENDS AS LAND.

III .- Successive Changes of the Law in this State.

IV .- COMMON LAW RULES OF DESCENT.

V .- THE NEW YORK STATUTE OF 1786.

VI.— DESCENT UNDER THE REVISED STATUTES AND THE REAL PROPERTY LAW.

VII,— LIABILITY OF REAL PROPERTY DESCENDED AND DEVISED TO PAY DEBTS.

Descent, or hereditary succession, is defined by Blackstone as the title whereby a man, on the death of his ancestor, obtains his estate by right of representation, as his heir at law. Purchase, in law, is used in contradistinction to descent, and is any other mode of acquiring real property, as by "devise," "deed," and the like.

Descent of land is regulated by the law of the State where it is situated. The law on this point has been fully reviewed in a preceding chapter. Chapter IV.

TITLE I. WHO TAKE BY DESCENT.

Every citizen of the United States is capable of taking lands by descent.

Real Property Law, § 2; 1 R. S. 719, § 8.

As to aliens and descent through them, see Chap. III, Tit. IV.

Lunatics, etc.— Where a person, of whose property a committee has been appointed, dies during his incompetency, the power of the committee ceases; and the property of the decedent must be administered and disposed of, as if a committee had not been appointed.

Code Civ. Proc., § 2344. See 1 R. L. 148; 2 R. S. 55, § 25; L. 1865, Chap. 724; L. 1874, Chap. 446.

Heirs as against Residuary Devisees.— General Rule.— At common law as a general rule the *heir* takes, although excluded by name in a will, unless some *valid* disposition of the land is made.

He also takes on an invalid or insufficient devise in preference to the residuary devisee, unless the contingency of the failure of the devise can be deemed to have been forseen by the testator.

To deprive an heir at law or a distributee of what comes to him by operation of law, as property not effectually disposed of by will. it is not sufficient that the testator in his will has signified his intention that such heir or distributee shall not inherit any part of the estate; but the testator must make a valid and effectual disposition thereof to some other person.

Van Kleeck v. The Dutch Church, 20 Wend. 457; Haxtun v. Corse, 2 Barb. Ch. 506; Roosevelt v. Fulton, 7 Cow. 71; Vail v. Vail, 4 Paige, 317; 7 Barb. 226; Tucker v. Tucker, 5 N. Y. 408; Adams v. Perry, 43 id. 488; Manice v. Manice, id. 303, 305; Oakes v. Massey, 94 App. Div. 165. See also Roper & White, Legacies, 516; Jarman's Rule IV; Scott v. Guernsey, 48 N. Y. 106; Brown v. Quintard, 177 id. 75, 84.

Probate of Heirship.— This proceeding is now regulated by Code Civ. Proc., § 2654 (amd. L. 1892, Chap. 115), § 2659, providing for a petition, citation, taking of proof and decree, which is to be recorded like a deed, and to be presumption evidence of the facts. But if there be any contest, the surrogate must dismiss the proceeding.

See Laws of 1873, Chap. 552, amended, as to the proof required, by Laws 1874, Chap. 127, and repealed by Laws 1880, Chap. 245.

Lapsed or Void Devise.—Where a devise lapses by the death of the devisee in the lifetime of the testator, or because the contingency does not happen upon which, as a condition precedent, the devise was made or was to take effect, or where the devise is void, the property goes into the residuary. This was contrary to the rule of the common law, which was changed by the Revised Statutes (2 R. S. 57, § 5).

Cruikshank v. Home for the Friendless, 113 N. Y. 337; Matter of Allen, 151 id. 243; Gallavan v. Gallavan, 57 App. Div. 320; Moffett v. Elmendorf, 152 N. Y. 485; Adams v. Anderson, 23 Misc. 705.

There is no distinction between the case where the devise is void or where it lapses. Gallavan v. Gallavan, 57 App. Div. 320; Matter of Allen, 151 N. Y. 243, at 249. This harmonizes the rule in regard to devises with the rule as to legacies. See Ricker v. Cornwell, 113 N. Y. 124.

It should be noted, however, that such a rule in regard to void devises may

work great injustice to the heirs, and probably the rule should be modified by the statement that intent will govern. Matter of Allen, 151 N. Y. 243, at 249; Gallavan v. Gallavan, 57 N. Y. 320, at 323. See Jones v. Kelly, 170 N. Y. 401.

In the case, however, of aliens not authorized by statute to hold real estate

there seems to be a different rule, and the devise being void goes to the heir, if competent. 2 R. S. 57, § 4; Downing v. Marshall, 23 N. Y. 366.

The rule was based on the terms of the Revised Statutes, which made will speak as of the date of the death of the testator, rather than as of the date The following cases may be referred to on this subject:

Van Kleeck v. The Dutch Church, 20 Wend. 457; Waring v. Waring, 17

Barb. 552; Beekman v. Bonsor, 23 N. Y. 298.

The above case of Van Kleeck v. The Dutch Church was upon a devise

to a corporation incapable of taking; and it was held that nothing could

be claimed on the lapse of such a devise by the residuary devisee on the ground of a contingent interest given by the residuary clause, based upon the possibility of a reversion of the estate by the dissolution of the corporation, or by a forfeiture of its rights in consequence of the nonperformance of

Also that it appeared from the will that the testator presumed that he had, by the will, disposed of the entire fee, leaving nothing remaining for further disposition, and therefore could not have intended to dispose of any

interest in such land by the residuary clause.

The opinions show that if the disposition made had been upon a contingency that might have left an interest undisposed of, such contingent

interest would have passed under the residuary clause.

The court in this case also holds that, at the common law, a residuary devisee of real estate takes only what was intended for him at the time of

Not so as to residuary legatee of personal estate. The latter takes not only what was undisposed of by the will, but also that which became undisposed of at the death of the testator by the disappointment of his intention. It was supposed, however, that the distinction between them was abolished by the Revised Statutes.

The case of Van Kleeck v. The Dutch Church was commented on in the case of Youngs v. Youngs, 45 N. Y. 254, and the opinion therein expressed was approved by the Court of Appeals, to the effect that, if the disposition made had been upon a contingency that might have left an interest undisposed of, such contingent interest would have passed under the residuary clause. The court questioned, however, whether the decision was a correct one.

It is held also that a residuary devise of real or personal estate carries with it not only the property of the testator in which no interest is devised or bequeathed by other parts of the will, but also all the reversionary and contingent interests in the property, which are not otherwise disposed of.

Cruikshank v. Home for the Friendless, 113 N. Y. 337; Matter of Allen, 151 id. 243.

This rule was applied formerly only in events contemplated by the testator, see Brigham v. Shattuck, 10 Pick, 309; Hopewell v. Ackland, 10 Salk. 239; Doe v. Weatherby, 11 East. 332; Craig v. Craig, 3 Barb Ch. 76.

It is also held that where a codicil revokes a specific devise in a will without making any further disposition of the property, such devise will, in general, pass to the residuary devisee, the codicil being held to be a republication of the will.

The intention of the testator is to govern, so far as it can be ascertained from both the will and the codicil taken together.

No distinction is drawn, therefore, between lapsed or void devises and revoked devises, though such a distinction was formerly made before the Revised Statutes

Kip v. Cortlandt, 7 Hill, 346; Hillis v. Hillis, 16 Hun, 76, 78.

In the case of Youngs v. Youngs, 45 N. Y. 254, lands were specifically devised to two nephews for life, and on their deaths respectively to their children. They both died, unmarried, before the testator. There was a residuary clause devising all his real and personal estate whatsoever to residuary devisees. The nephews having died in the lifetime of the testa-

tor, it was held that the lands in which a life estate was devised to them, passed under the will to the residuary devisees and not to the heirs.

The decision in this case is put upon the ground that, since the Revised Statutes, the common law rule was changed, and the will operated upon all the real estate left by the testator at the time of his death, in default of other specification; and the residuary clause was intended to cover all the testator's real estate not before specifically disposed of, especially as by the recitals in the will the intention appeared to be to dispose, in the residuary clause, of all that should be undisposed of.

The court held that there was a remainder in the lands given to the nephews, contingent upon the death of either leaving no descendants, and this remainder was not disposed of by the will, unless under the residuary

The residuary clause gave all the real estate not otherwise disposed of, and thus brought the contingent remainder directly within the language of that clause, and the presumption was that the testator so understood it. See also Bowers v. Smith, 10 Paige, 193; Redfield on Wills, Part II, 444; 1 Jarman on Wills, 590, 591; Doe v. Weatherby, 11 East, 322, and Chap. XV. Cruikshank v. Home, etc., 113 N. Y. 337, holds that the common law rule that lapsed devisees do not fall into the residue was done away with by 2 R. S. 57, § 5, and there is now no difference between lapsed devises and

lapsed legacies with respect to the operation upon them of a general residuary

Held, where real estate has been converted into personalty for the purpose of carrying into effect the will of the testator, and a contingency happens by which an interest in the converted fund is undisposed of by the will, such interest belongs to the heirs at law of the testator, and not to the distributees of the personal estate. Wood v. Keyes, 8 Paige, 365; Vail v. Vail, 4 id. 317.

Held, where land was devised specifically to a wife in lieu of dower, and she declined to accept it, but took her dower in the real estate, the land devised passed to the residuary devisee and not to the heirs. James v.

James, 4 Paige, 115.

Held, where by reason of a legal incapacity only one of the persons of a class can take, that one takes all the estate which a devise, by its terms, gives to the whole class, but where, by reason of their alienage, none of the class is competent to take, the estate does not pass to the residuary deviations of the testate of the visees, but descends to the heirs of the testator under 2 R. S. 57, § 4. Downing v. Marshall, 23 N. Y. 366.

This seems to be an express statutory exception to the general rule that a void devise falls into the residue. See Gallavan v. Gallavan, 57 App. Div. 320; Matter of Allen, 151 N. Y. 243.

Where a will disposing of both real and personal estate is proven only as to the personal estate, the heirs only may sue a third person in relation to the realty. Dixon v. Rice, 16 Hun, 422; Quinn v. Hardenbrook, 54 N. Y. 83, 86; Scott v. Guernsey, 48 id. 106. See also as to residuary interests and lapsed devises, Chap. XV, Tit. V and VIII infra.

Descents.— Descents are of two sorts, lineal, as from father or grandfather; and collateral, as from brother to brother, cousin to cousin, etc.

With reference to the line of pedigree or consanguinity, a descent is considered *immediate* when the ancestor from whom the party derives his blood is such without any intervening link or degrees, and mediate when the kindred is derived from him, another ancestor intervening between them.

A descent from father to son is considered immediate, but a descent from grandfather to grandson (the father being dead), or from uncle to nephew (the brother being dead), would be deemed mediate, the father and the brother being, in these latter cases, the medium deferens, as it was called, of the descent or consanguinity.

In the leading case of Collingwood v. Pace, 1 Vent. 413, where the question of succession arose between brothers, the father being an alien, it was determined that the descent from brother to brother was to be considered immediate and not mediate through the father, and that the latter's alien blood could not prejudice the descent.

The case of inheritance as between brothers, although they were collaterals, was, therefore, by this case held to be *immediate*. This case is fully reviewed in Levy v. McCartee, 6 Pet. 102, where it was held that the descent between an intestate and the children of his cousin, being mediate through their grandfather, the testator's maternal uncle, an alien, they could not inherit.

Vide, as to modification of these rules as to alienage, supra, Chap. III, Tit. IV; also Title VI.

See also Valentine v. Wetherell, 31 Barb. 655; McGregor v. Comstock, 3 N. Y. 408; Beebe v. Griffing, 14 id. 235; Stewart v. Russell, 91 App. Div. 310.

Post-testamentary Children.—Where children are born after the execution of a will, no provision being made for them nor any mention of them, they take the same share of the estate as if he had died intestate.

2 R. S. 65, § 49, as amended by L. 1869, Chap. 22.
Drischler v. Van Den Henden, 49 Super. 508; Smith v. Robertson, 89
N. Y. 555; Minot v. Minot, 17 App. Div. 521; Davis v. Davis, 27 Misc. 455.
Prior to L. 1869, Chap. 22, this provision did not apply to wills of married women. Cotheal v. Cotheal, 40 N. Y. 405, overruling Plummer v. Murray, 51 Barb, 201,

Void Marriages.— See Domestic Relations Law, G. L. 1896, Chap. XLVIII, L. 1896, Chap. 272, § 2; 2 R. S. 139, § 3, as amd. by L. 1893, Chap. 601; Domestic Relations Law, § 3; 2 R. S. 139, §§ 5, 6.

TITLE II. WHAT DESCENDS.

Everything comprised in the term real property descends to the heirs at law, according to the law existing at the time the descent takes effect. The term "real property," as used in Art. IX of the Real Property Law, it is provided, includes every estate, interest and right, legal and equitable in lands, tenements and hereditaments except such as are determined or extinguished by the death of the intestate; leases for years, estates for the life of another person; and real property held in trust, not devised by the beneficiary. And "inheritance" means real property as therein defined, descended according to the provisions of the article.

Real Property Law, L. 1896, Chap. 547, § 280. See 1 R. S. 754, § 27, in which the term is "real estate," for which the term "real property" has been substituted in the Real Property Law of 1896.

Under the statute of distribution of personal assets, leases for vears. lands held by the deceased from year to year, estates held by him for the life of another, his interest in a term of years, after the expiration of any estate for years therein granted by him or any other person, the interest in lands devised to an executor for a term of years for the purpose of paying debts, things annexed to the freehold or to any building for the purpose of trade or manufacture, and not fixed into the wall of a house so as to be essential to its support; crops growing on the lands of the deceased at the time of his death; every kind of produce raised annually by labor and cultivation, except growing grass and fruit ungathered; rent reserved to the deceased which had accrued at the time of his death; debts secured by mortgages, bonds, notes or bills; accounts, money and bank bills, or other circulating medium; things in action and stock in any corporation or joint stock association, and certain other specified effects of a personal character, are to be deemed assets, to go to the executor or administrator to be applied and distributed as personalty.

Code Civ. Proc., § 2712; 2 R. S. 82, § 6. See also L. 1893, Chap. 686. But see, as to rent, infra, pp. 375, 376.

Fixtures.— It is also provided that things annexed to the freehold or to any building shall not go to the executors, but shall descend with the freehold to the heirs or devisees, except such fixtures as are mentioned above.

Code Civ. Proc., § 2712, subd. 9; 2 R. S. 83, § 7.

Whether a thing be a substantial part of the freehold, or a mere annexation thereto, for the purpose of trade and manufacture, determines its relation to the inheritance. Murdock v. Gifford, 18 N. Y. 28; Potter v. Cromwell, 40 id. 287; Hovey v. Smith, 1 Barb. 372; Ford v. Cobb, 20 N. Y. 344; Buckley v. Buckley, 11 Barb. 43; as to mirrors, Lockwood v. Lockwood, See more fully as to fixtures, supra, pp. 115, 217.

It is also provided that the right of an heir to any property not enumerated in this section (Code Civ. Proc. § 2712) which, by the common law, would descend to him, shall not be impaired by the general terms of the section.

Code Civ. Proc., § 2712, subd. 9; 2 R. S. 83, § 8.

Rent.— Where a lessor dies before the rent becomes due, rent payable after the death of the decedent goes to the heir or devisee as the case may be, the executors or administrators taking what accrues from the date of last payment up to and including the day

of decedent's decease. The heir formerly took it as an incident of the reversion, but an apportionment of rent is now allowed as between the executor of the lessor and a remainderman. In like manner a remainderman who succeeded to the reversion was formerly entitled to the entire rent due after lessor's death, as an entire sum due him. So also in this case there is apportionment now between tenant for life and remainderman. For the former law as to rent becoming due after the termination of the life estate, on a lease executed by the testator of the parties, vide supra, p. 150.

Laws of 1875, Chap. 542, completely reversed the old rule and allowed apportionment in all cases. Wright v. Williams, 5 Cow. 501; Fay v. Holloran, 35 Barb. 295; Marshall v. Moseley, 21 N. Y. 280; Jones v. Felch, 3 Bosw. 63. As to change of this law and as to apportionment of rent on leases made by a tenant for life, vide supra, 150, as to the present rules.

See now Code Civ. Proc., § 2720, as to the apportionment of rents, annuities

and dividends.

Rent Reserved on a Grant in Fee.—Such rent is a hereditament, descendible and devisable. Van Rensselaer v. Hays, 19 N. Y. 68; Tyler v. Heidorn, 46 Barb. 439; vide supra, p. 140, also as to the apportionment of a rent charge.

Crops.—Grass, trees, and fruits, growing upon lands belonging to an intestate at the time of his decease, are not assets belonging to the administrator, but descends with the land to the heir. Nor can the widow retain one-third on account of her right of dower in the land, prior to any assignment thereof for dower, even in the case of annual crops.

The annual crops, however, as distinguished from the spontaneous produce as above, are chattels, and would go to the executor.

As to the rights as between heirs, devisees and executors to the growing crops, annual or spontaneous, see the following cases: Cain v. Fisher, 6 N. Y. 597; Evans v. Robers, 5 Barn. & Cress. 829; Whipple v. Foote, 2 Johns. 418; Austin v. Sawyer, 9 Cow. 39; James v. Flint, 10 Adol. & El. 753; The Bank of Lansingburgh v. Cary, 1 Barb. 542; Warren v. Leland, 2 id. 613; Stall v. Wilbur, 77 N. Y. 159.

Growing grass goes to the heir or devisee. Matter of Chamberlain, 140

N. Y. 390.

See also Chap. XVII, Tit. II.

Burial Ground.— See Mitchell v. Thorne, 134 N. Y. 536. The rights of holders of burial lots or vaults are descendible. Richards v. Northwest Dutch Church, 32 Barb. 42; Freleigh v. Platt, 5 Cow. 494.

Equity of Redemption and Converted Property.— The equity of redemption in mortgaged lands also descends, the mortgagor, before entry or foreclosure, being legally seized as to all persons except the mortgagee; and even as to him, according to the later views of the courts, the mortgagor is only supposed to give a lien, and not to disturb his legal estate.

Where, by a foreclosure and sale of mortgaged premises, however, the interests of the owners of the equity of redemption are converted into personal estate; if any of the owners die subsequent to the conversion, their interests in the surplus moneys must be distributed as personal estate among the legatees and next of kin.

Roosevelt v. Fulton, etc., 7 Cow. 71; Bogert v. Furman, 10 Paige, 496; Wright v. Rose, 2 Sim. and Stu. 323; Cox v. McBurney, 2 Sandf. 561; Dunning v. Ocean Nat. Bk., 61 N. Y. 497. So also of land sold under order of court. Denham v. Cornell, 67 N. Y. 556.

The distinction drawn is, that if a sale takes place in the lifetime of the mortgagor, the surplus is personal estate, but if after his death, it is real estate, because in the latter case the equity of redemption descended to the heir.

Where, at the time of the sale of mortgaged premises, however, under a decree, the equity of redemption is owned by a minor. and a surplus arises from the sale, his interest would be deemed real estate, and will be disposed of as such at his death, if he die under

In converting the real estate of an infant for a particular purpose, courts have no power to convert to all intents and purposes any more than was required to answer such purpose, and if it incidentally happen that more was converted, courts will treat the excess as property of the same nature as that converted, and dispose of it accordingly.

It was held under the Revised Statutes (1 R. S. 226, § 52) that lands appropriated by the State for canals do not pass until the amount of damage is fixed by appraisement. If the owner die before that is done, they descend together with the claim against the State, to his heirs; if after the award, it is a personal asset which passes to his personal representative. Ballou v. Ballou, 78 N. Y. 325.

See, however, the Canal Law, General Laws, Chap. XIII, L. 1894, Chap. 338, § 70.

Character of Converted Property .- The general principle asserted by the courts is, that where real estate is converted by operation of law, in the lifetime of an adult owner, the surplus, if any, will be treated as money, and at his decease will be distributed as such; also, where a court of equity is required to determine between persons claiming converted property by the right of succession, it will treat it as property impressed by the will or act of the party who is the ultimate source of title, with a specific character different from that in which it is found, and will dispose of it as continuing to possess that character, until some one entitled to the whole beneficial interest has elected to take it in the form in which it is found, or has received it under the performance of the contract, or in execution of the provisions of a will by which the original right to it was created.

A court of equity, therefore, would not divest property of the character which it finds impressed upon it, except at the instance of some party having the whole beneficial interest, and who has a right to convert it himself from one form to another, and who is of legal capacity to make an election.

It is pursuant to and in the application of the above principles that surplus moneys arising after sales of real estate in which lunatics or infants are interested, or moneys arising from the sale of their lands, made in order to raise money for a particular purpose by order of a court, are considered to represent the land of which they were the proceeds, and are treated as realty until the party is capable of electing, and elects to take the amount as money.

Craig v. Leslie, 3 Wheat. 563; 2 Story's Eq. 790, 793, § 1357; Stagg v. Jackson, 1 N. Y. 206; Lloyd v. Hart, 2 Barr. 473; 2 Yeates' R. 261; Deller v. Young, 5 Whart. 64; Scull v. Janegan, 2 Dev. and Bat. Eq. R. 144; March v. Berrier, 6 Iredell Eq. 524; Banks v. Scott, 5 Mad. 500; Dixon v. Dawson, 2 Sim. and Stu. 327; Sweezy v. Thayer, 1 Duer, 286; Moses v. Murgatroyd, 1 Johns. Ch. 119; Horton v. McCoy, 47 N. Y. 21; Denham v. Cornell, 67 id. 556; Petition of Thomas, 4 N. Y. S. C. 369. Where on the decease of an intestate, lands were sold on the petition of infant heirs, and the proceeds brought into court, and the infants subsequently died, the infants, it was held, owned the fund as realty, not personalty, and it descended as such. Valentine v. Wetherell, 31 Barb. 655; Matter of Igglesden, 3 Redf. 375.

Where real estate, owned by tenants in common, of whom an infant is one, is sold under and in pursuance of a judgment in a partition suit insti-

where real estate, owned by tenants in common, or whom an infant is one, is sold under and in pursuance of a judgment in a partition suit instituted by others of the tenants in common, the portion of the proceeds belonging to the infant remains impressed with the character of real estate, and as such does not pass under the infant's will. Horton v. McCoy, 47 N. Y. 21; Bowman v. Tallman, 27 How. Pr. 212, affd., 40 id. 1. And see Flynn v. Lynch, 23 Civ. Proc. R. 369; Matter of Thomas, 1 Hun, 473. See also more fully, as to equitable conversion, by a power, Chap. XV.

Title in Another's Name.—One who paid the consideration for land conveyed to another and took his covenant to convey according to his appointment, but died without appointing, held that his interest, whether a fee under 1 R. S. 732, §§ 81-5, or an equity to enforce performance, passed to his heirs and could be enforced by them. Hubbard v. Gilbert, 25 Hun, 596; Bowery Nat. Bk. v. Duncan, 12 id. 405.

See, as to power of sale to executors, infra, Chap. XVII; Matter of Dodge,

40 Hun, 443.

Equitable conversion will be implied only where absolutely necessary. Chamberlain v. Taylor, 105 N. Y. 185.

Proceeds of Sale of Estates of Infants or Incompetent Persons under Order of the Supreme Court .- By the Code of Civil Procedure, § 2359 (amd. by L. 1892, Chap. 523), the proceeds of lands of infants or incompetent persons, sold pursuant to title 7.

of chapter 17 of the Code, shall be deemed property of the same nature as the estate or interest sold.

The above provisions of the statutes do not apply, after the infant is of age, or the incompetency is removed and the estate has come into his possession and under his control.

So formerly by 2 R. S. 195, § 180, which was repealed by L. 1880, Chap. 245. The object of the enactment was to preserve during minority or incompetency the character of the property, in relation to the statutes of descent and distribution.

Forman v. March, 11 N. Y. 544, revg. 7 Barb. 215; sub. nom. Foreman v. Foreman; and see Stiles v. Stiles, 1 Lans. 90.

See also as to the further interpretation of this provision, infra, Chap. XXV. The above section 2359 of the Code will have to be considered as to details of distribution.

Effect of a Power of Sale.—Where, according to the terms of a will, its provisions do not work an equitable conversion of the real into personal estate, a power of sale to executors does not affect the descent of realty; but it descends to heirs, subject to the exercise of the power.

As to when the land is considered as converted into personalty under the terms of a will, further reference is made to a subsequent chapter relative to title by devise (infra. Chap. XV).

See also Reed v. Underhill, 12 Barb. 113; Dominick v. Michael, 4 Sandf.

374; Germont v. Jones, 2 Hill, 569; Allen v. DeWitt, 3 N. Y. 276.
Where a conversion of real into personal estate is ordered in a will for a particular purpose which fails, the land retains its original character and descends to the heir. Gourley v. Campbell, 66 N. Y. 169, revg. 6 Hun, 218. Where lands are directed to be sold, equitable conversion arises. Hood v.

Hood, 85 N. Y. 561. But the direction must be express and independent of discretion. White v.

Howard, 46 N. Y. 144, 162; Hobson v. Hale, 95 id. 588; Trowbridge v. Metcalf, 5 App. Div. 318, 321; Chamberlain v. Taylor, 105 N. Y. 185; Matter of McComb, 117 id. 378; Clements v. Babcock, 26 Misc. 90, 97; Matter of Traver, 161 N. Y. 54, 57; Matter of Tatum, 61 App. Div. 513; Matter of Hammond, 74 id. 547, 557; Russell v. Hilton, 80 id. 178; Matter of Coolidge, 85 id. 295; Phænix v. Trustees of Columbia College, 87 id. 438, 444.

Expectant Estates.— Expectant estates are descendible. devisable and alienable, in like manner as those in possession; and a limitation over, whether considered as a vested or contingent remainder or an executory devise, is descendible as an expectant estate.

Real Property Law, § 49; 1 R. S. 725, § 35; Savage v. Pike, 45 Barb. 464; N. Y. S. & T. Co. v. Schoenberg, 87 App. Div. 262, 266.

Determinable Fees.—These descend to the heir.

Stillwell v. Melrose, 15 Hun, 378.

Pews.— These, as usufructuary interests in land, would pass by descent as incorporeal hereditaments.

McNabb v. Pond, 4 Bradf. 7. See also as to pews, Voorhees v. The Presbyterian Church, 8 Barb. 135, affd., 17 id. 103; St. Paul's Church v. Ford, 34 id. 16; Cooper v. First Presbyterian Church, 32 id. 222; also supra, p. 115, more fully as to pews.

Equitable Interest in a Contract to Purchase Lands.—As to this vide infra, Chap. XIX, contracts to purchase, etc., real estate.

Rights of Entry.—As to rights of re-entry by heirs on default of rent by lessees, vide supra, pp. 143, 144.

Lands in Trust.—Under the Revised Statutes, real estate held in trust for any other person, if not devised by the person for whose *use* it is held, descended to his heirs, according to the provisions of the chapter on descents.

1 R. S. 754, § 21; 1 R. L. 74.

This had reference wholly to an estate of cestui que use. Revisers' note to

1 R. S. 754, § 21.

See now Real Property Law, § 280, which includes this section of the Revised Statutes in the words "and real property held in trust, not devised by the beneficiary."

Under the Revised Statutes the *cestui que trust* ceased to have an equitable estate, the whole estate being vested in trustees and on the death of the survivor passing to the Supreme Court.

For the corresponding provision of the present law, see Real Property Law, § 91.

Partnership Lands.—Vide supra, p. 329, as to the descent of such lands; and Buckley v. Buckley, II Barb. 43.

Loss on an Insurance Policy on Buildings.—As to loss on insurance policy and the descent of interest therein, vide.

Wyman v. Wyman, 26 N. Y. 253; Parry v. Ashley, 3 Simm. 97; Lappin v. The Charter Oak Insurance Co., 58 Barb. 325; Sherwood v. Agricultural Ins. Co., 73 N. Y. 447.

Lands Conveyed as Security for Money Lost at Play.— Instruments affecting realty executed by a person for money lost at play shall immediately enure to the benefit of the person who would be entitled thereto on the death of the grantor, and shall be taken and

held to his use; and all grants, covenants and conveyances to the contrary are to be deemed void.

1 R. L. 153; 1 R. S. 663.

Advancements.—The Real Property Law provides as to advancements, in the article relative to descents, as follows:

§ 295. "If a child of an intestate shall have been advanced by him, by settlement or portion, real or personal property, the value thereof must be reckoned for the purposes of descent and distribution as part of the real and personal property of the intestate descendible to his heirs and to be distributed to his next of kin; and if such advancement be equal to or greater than the amount of the share which such child would be entitled to receive of the estate of the deceased, such child and his descendants shall not share in the estate of the intestate; but if it be less than such share, such child and his descendants shall receive so much, only, of the personal property, and inherit so much only, of the real property, of the intestate, as shall be sufficient to make all the shares of all the children in the whole property, including the advancement, equal.

"The value of any real or personal property so advanced, shall be deemed to be that, if any, which was acknowledged by the child by an instrument in writing; otherwise it must be estimated according to the worth of the property when given.

"Maintaining or educating a child, or giving him money without a view to a portion or settlement in life is not an advancement.

"An estate or interest given by a parent to a descendant by virtue of a beneficial power, or of a power in trust, with a right of selection, is an advancement."

Formerly 1 R. S. 754, §§ 23-26; 1 R. S. 737, § 127.

§ 296. "When an advancement to be adjusted consisted of real property, the adjustment must be made out of the real property descendible to the heirs. When it consisted of personal property, the adjustment must be made out of the surplus of the personal property to be distributed to the next of kin. If either species of property is insufficient to enable the adjustment to be fully made, the deficiency must be adjusted out of the other."

This section of the Real Property Law is new.

Provision is also made relative to the distribution of personal estates, that advancements of real or personal estate are to be

charged against children of a deceased person in the distribution of the surplus of personalty. The provisions are not to apply where there shall be any real estate of an intestate to descend to his heirs.

Code Civ. Proc., § 2733 (as amd. by L. 1893, Chap. 686). Formerly 2 R. S. 97-98, §§ 76-78.

This is based upon the Laws of Feb. 20, 1787, Chap. XXXVIII, and 1

R. L. of 1813, 313.

An advancement will cut off the heirs of the party advanced from their share in the other real estate, if the advancement would equal the party's distributive share. Parkes v. McClure, 36 How. Pr. 301. See also "Powers,"

supra, p. 347.

Sections 23 and 24 of the Statute of Descent (1 R. S. 754) held not applicable where a testator has disposed by will of a portion of his estate. The purpose of the statute is to make equality of division in the distribution of an estate, when no disposition is made by a will, but when a person who has made advances to his children makes a will, he is presumed to make it with reference to such advances, and the two acts represent his intention with reference to the disposition of his estate. Thompson v. Carmichael, 3 Sandf. Ch. 120; followed, Kent v. Hopkins, 86 Hun, 611.

The general course of decisions is to the effect that the maintenance and education of a child or the gift of money, without a view to a portion or

settlement in life, is not deemed an advancement. A gift of money or property to a child is prima facie an advancement, though it may be shown it was intended as a gift and not an advancement. If originally intended as a content of the prima facie as a different prima facie and advancement. If originally intended as a gift and not an advancement. Mitchell v. was intended as a gift and not an advancement. If originary intended as a gift, it cannot subsequently be treated as an advancement. Mitchell v. Mitchell, 8 Ala. 414; Browne v. Burke, 22 Ga. 574; Hodgson v. Macy, 8 Ired. 21; Grattan v. Grattan, 18 Ill. 167; Lawrence v. Mitchell, 3 Jones (N. C.) 190; Sherwood v. Smith, 23 Conn. 516; Hook v. Hook, 23 B. Mon. 526; Vail v. Vail, 10 Barb. 69; Sanford v. Sanford, 5 Lans. 486.

526; Vail v. Vail, 10 Barb. 69; Sanford v. Sanford, 5 Lans. 486.

The provision in the statute regulating descents for bringing advancements made by an intestate into hotch pot, in the division of his real estate, does not apply where there is a will disposing of a part of the decedent's property either real or personal; it relates to a total intestacy only. Thompson v. Carmichael, 3 Sandf. Ch. 120; Arnold v. Haronn, 43 Hun, 288; Hays v. Hibbard, 3 Redf. 28; Kent v. Hopkins, 86 Hun, 611; DeCaumont v. Bogert, 36 id. 382; Messman v. Egenberger, 46 App. Div. 46, 51.

As to how the fact of an advancement is proved by evidence, and the modus by which a child is charged with advancements in the courts, see Hicks v. Gildersleeve, 4 Abb. 1. As to what powers are deemed advancements.

Hicks v. Gildersleeve, 4 Abb. 1. As to what powers are deemed advancements, see p. 347.

The statutes of distribution and of descent on the subject of advancements are to be taken and construed together, as the two statutes are in pari

materia. Beebe v. Estabrooke, 79 N. Y. 246, affg. 11 Hun, 523.

Loans made by a testator are properly treated as not coming within the term "advancements." Matter of Cramer, 43 Misc. 494.

TITLE III. SUCCESSIVE CHANGES OF THE LAW IN THIS STATE.

The law of descents in this State, until changed by statute, was the same as the law of descents in the common law of England, and had its foundation in principles of feudal policy not now in accord with the spirit or theory of the institutions of this country. The common law of descents was the law of the Colony and State of New York down to the 12th of July, 1782 (6th Sess., Chap. 2). The law was then altered by directing descent to be, in future, to lawful issue of equal degree in equal parts; and to those of unequal degree by representation, and in default of issue, to brothers and sisters or their descendants. But the act was repealed as to subsequent descents by the new act regulating title by descent, passed 23d February, 1786 (I Greenl. 205; I R. L. 52). The Revised Statutes, as will be seen hereafter, further changed the common law, and the Real Property Law of 1896, as amended, General Laws, Chap. XLVI, modifying and superseding the provisions of the Revised Statutes, still further changed the common law.

Although the common law rules of descent were, in the main, abolished as early as 1782, since in the investigation of titles in this State, the common law rules will have to be understood, and sometimes applied, a brief abstract of them is given, particularly, as in some respects they are still expressly retained. The force and effect of the English common law in this State generally has been considered in a previous chapter. Supra, Chap. I, Tit. IV.

By the common law must be understood the general unwritten principles and rules of the English common law, exclusive of any amendments or changes therein which had been made by British statutes anterior to the Revolution, or otherwise.

Levy v. McCartee, 6 Pet. 102.

TITLE IV. COMMON LAW RULES OF DESCENT.

The prominent common law principles of descent are as follows:

1st. Descent to Issue of Person Last Seized.— Inheritance descended lineally to the issue of the person who last died, actually seized, in infinitum, but it never ascended.

It was the seizin and not the right to seizin that made the stirps or stock of descent. A constructive seizin indeed for all legal purposes was equivalent to actual seizin. Green v. Liter, 8 Cranch, 244, 249. And a constructive seizin, resulting from proof of the legal title without actual seizin, has been held sufficient to maintain a writ of right. Bradstreet v. Clarke, 12 Wend. 603.

A seizin might be either by the ancestor's own entry, or by the possession of the ancestor's lessee for years, or by being in receipt of rent from the lessee of the freehold.

By the common law a reversion or remainder in fee, expectant on a freehold estate, would not, during the continuance of such freehold, pass by descent from a person in whom the title thereto had vested by descent, as a new stock of inheritance, unless some acts of ownership which the law regarded as equivalent to an actual seizin of a present estate of inheritance had been exercised by the owner over such expectant estate.

The heir, to be entitled to take, had to be the nearest male heir of the whole blood to the person who was last actually seized of the freehold, the

seizin making the stirps or stock from which future inheritance was de-Therefore, if the presumptive heir died before he acquired the requisite seizin so as to make him the new stirps or stock, his ancestor and not himself was the person last actually seized of the inheritance, and to him those claiming had to establish themselves as heirs.

The exceptions or qualifications to the above rule were, that if a person acquired land by purchase, he might transmit without having had actual seizin, or, if on an exchange of lands, he died before entry, or if a person were seized of an equitable interest. as in a contract to purchase, or if a tenant for years were possessed, it enured to the remainderman or reversioner; but not if the estate were under a freehold lease or life lease, unless the party entered in his life time, or received rent after the expiration of the life estate.

If the heir had not become a stirps or stock of descent by reason of an If the heir had not become a stirps or stock of descent by reason of an intervening life estate, and the expectant estate had been purchased, then the claimant had to make himself heir to the first purchaser of the expectant estate, at the time when it came into possession. The heir of such purchaser would take the inheritance, though he were a stranger to all the mesne reversioners and remaindermen through whom the inheritance had devolved. Bates v. Shraeder, 13 Johns. 260; Vanderheyden v. Crandall, 2 Den. 9, affd., sub. nom. Wendell v. Crandall, 1 N. Y. 491.

The rule has been held to apply where the seizin was not complete until actual entry, but it would not apply where the estate came by purchase. Jackson v. Jackson, 5 Cow. 74.

Seizin of One Tenant in Common, Guardian, etc.—The seizin of one co-parcener or tenant in common is considered the seizin of the others. So also the possession of a guardian in socage is the possession of his ward.

Assignment of Dower, Effect of.— Before assignment the widow had no estate in the lands of her husband. After assignment, the seizin of the heir was defeated ab initio, and the dowress was in of the seizin of her husband, as of the time when that seizin was first acquired or held during the coverture, or to the time of marriage if he was seized before coverture. By assignment of dower the seizin of the heir was defeated ab initio. Lawrence we miller N V 245. Lawrence we Brown 5 N V 394 v. Miller, N. Y. 245; Lawrence v. Brown, 5 N. Y. 394.

The Revised Statutes, however, altered the above rule, and included in the descent every legal and equitable right and interest to which the intestate was in any manner entitled at his decease, except leases for years, and estates for the life of any other person.

2d. Preference of Males.— The male was admitted before the female; the eldest male taking in preference to others of equal degree, and the females equally.

The lineal descendants in infinitum of any person deceased, represented their ancestor. Thus the child, grandchild, or great-grandchild, either male or female, of an oldest son, succeeded before the younger son or his representatives, and so on in infinitum, per stirpes, a child or children taking, by representation, the ancestor's share.

ad. Descent to Collaterals.— On failure of lineal descendants. or issue of the person last seized, the inheritance descended, subject to the above rules, to his collateral relatives being of the blood of the first purchaser, i. e., he who first acquired the land by any means other than by descent.

To be of the blood of the first ancestor was to be either immediately descended from him, or to be descended from the same couple of the common ancestors.

4th. Nearest Collateral of Whole Blood.—The collateral heir of the person last seized had to be next collateral kinsman (either personally or jure representationis) of the whole blood.

Therefore the brother, being in the first degree, he and his descendants excluded the uncle and his issue, who was only in the second, and in default of the uncle or his issue, the estate passed to the descendants of the greatgrandfather, and so on ad infinitum. The degrees were reckoned by distance from the common ancestor (the father of the propositus). On failure of the issue of the person last seized, therefore, the inheritance descended to the issue of his next immediate ancestor. The lineal ancestors, therefore, though themselves incapable of inheriting, became common stocks from which the

next succession sprang.

In the mode of computing the degrees of consanguinity, the civil law begins with the intestate, and ascends from him to a common ancestor, and descends from that ancestor to the next heir, reckoning a degree for each person, as well in the ascending as descending lines. According to this rule, the father of the intestate stands in the first degree, his brother in the second, and his brother's children in the third; or, the grandfather stands in the second degree, the uncle in the third, the cousins in the fourth, and so on in a series of genealogical order. In the canon law, as also by the rule of the common law in tracing title by descent, the common ancestor is the terminus a quo. The several degrees of kindred are deduced from him. By this method of computation, the brother of A. is related to him in the first degree instead of being in the second, according to the civil law; for he is but one degree removed from the common ancestor. The uncle is related to A. in the second degree; for though the uncle be but one degree from the common ancestor, yet A. is removed two degrees from the grandfather, who is the common ancestor. 4 Kent, 413; 2 Black. Comm. 206, 224, 504.

The descent between brothers was held immediate, and therefore title might be made by one brother or his representatives to or through another without mentioning their common ancestor. Vide supra, as to the descent of brothers,

p. 373.

5th. Preference of Males to Females as to Collateral Stocks.— In collateral inheritances, the male stocks were preferred to the female (that is, kindred derived from the blood of the male ancestor, however remote, were admitted before those from the blood of the female, however near), unless where the lands in fact descended from a female.

Thus the relations on the father's side were admitted in infinitum, before those on the mother's side were admitted at all, and the relatives of the father's father before those of the father's mother, and so on.

Whenever, however, the land descended from the mother's side, the rule was reversed; and no relation by the father's side as such could be admitted to them, because he could not possibly be of the blood of the first purchaser. And so e converso, if the lands descended from the father's side, no relation

of the mother as such could ever inherit.

When the side from which the land descended was unknown, the right of inheritance first ran up the father's side with a preference of the male stocks in every instance, and if no heirs were found there it then only reverted to the mother's side.

Posthumous Children .- By the principles of the common law, also, a child en ventre sa mere, for all the beneficial purposes of heirship, is considered as absolutely born.

They would take intermediate profits between the decease of the ancestor and their birth. Basset v. Basset, 3 Atk. 203; Doe v. Clarke, 2 H. Blacks. 399.

TITLE V. THE NEW YORK STATUTE OF 1786.

The English Common Law was the law of the land until statutes were passed modifying or repealing it.

Reference has been made above, p. 382, to the Acts of July 12, 1782, and February 23, 1786. By the latter act (I Greenl. 205), repealing the former, the law still required the heir to be the heir of the person dying seized (i. e., the ancestor had not only to have the title but the possession), and estates descended to the lawful descendants of the person seized, in the direct line of lineal descent as tenants in common in equal parts, if of equal consanguinity.

The rule of common law, requiring the heir to deduce his title from the person last actually seized, existed in New York under the statute of descents

of 1786, down to the Revision of 1830.

The effect of the rule under the Statute of 1786, as applied by the courts, was that where there was an adverse possession at the time of the death of the ancestor, or where the right of the ancestor was contingent or executory, the inheritance, instead of descending according to the principles of the Statute of 1786, to all the heirs equally, passed, by the rules of the common law, to the eldest male heir. Thus, if the ancestor, although his title was certain, had lost the possession by force or fraud, or was entitled to the lands under a contingent remainder or executory devise and died before the determination of the preceding estate, his whole property might pass to his eldest son or the eldest male descendant of such son, to the exclusion of all his other children. Jackson v. Hendricks, 3 Johns. Cas. 214; Bates v. Schræder, 13 Johns. 260; Jackson v. Hilton, 16 id. 96; Reports of the Revisors, title " Descents."

An estate of dower or curtesy or other life estate suspended the descent, and the heir was not seized to make a new stock of descent. Also if the heir to the reversion died during the existing life estate, he was not held seized so as to make a stock of descent. Jackson v. Hilton, 16 Johns. 96; Bates v. Schraeder, 13 Johns. 260.

One who had a vested remainder in fee simple, expectant on the determion the descent remainder in the simple, expectant on the descent nation of a freehold estate, had such a seizin in law during the continuance of the freehold estate where the estate was acquired by purchase, as would constitute him a *stirps* or stock of descent. Not so, however, if the estate had vested by descent. Vanderheyden v. Crandall, 2 Den. 9, 24: 1 N. Y. 491. A right of entry, it was held, would pass by descent under the Statute of 1786. I R. L. 52.

There was no disseizin in fact, except by the wrongful entry of a person claiming the freehold and an actual ouster or expulsion of the true owner, or by some act tantamount thereto, such as a common law conveyance with livery of seizin by a person actually seized of an estate of freehold in the premises, or some one lawfully in possession representing the freeholder, or by a common recovery, in which there was a judgment for the freehold and an actual delivery of seizin by the execution or by levying a fine, which was an acknowledgment of a feoffment of record. Varick v. Jackson, 2 Wend. 166, affg. 7 Cow. 166.

Where a woman died seized, leaving a husband and sons and daughters, and the husband continued seized in curtesy, and the eldest son died intestate without issue, the second son, on the death of the father, entered as their of the mother. It was held that the descent was suspended during the tenancy by the curtesy, and that the wife being last seized, was the stock of descent, and as she died before the statute of descents (i. e., in 1795) the second son took the inheritance as sole heir to his mother. Jackson v. Gomez,

3 Johns. Cas. 214.

Wild Lands.—Ownership of wild lands was sufficient without seizin in fact. Jackson v. Howe, 14 Johns. 105; Bradstreet v. Clarke, 12 Wend. 602.

Rights of Reversions Alienable.—Although the owner in reversion might not be so seized as to make a stock of descent, he might alien his interest. Fowler v. Griffin, 3 Sandf. 385; and see supra, Chap. IX.

Title of Officers and Soldiers in the Revolutionary War .- See Act of April 5, 1803, re-enacted April 8, 1813. 1 R. L. 303.

As to the interpretation of this law, vide 3 Caines, 62; 2 Johns. 80; Jackson v. Howe, 14 id, 405.

By the above Law of February 23, 1786, also, the preference of males over females was removed, and parents could inherit from children. The inheritance descended -

- I. To the lawful issue standing in equal degrees as to tenants in common in equal parts, however remote the common degree of consanguinity might be.
- 2. To the lawful issue in the direct line and their descendants in different degrees as tenants in common, according to the right of representation.
- 3. If there were no issue, to the father, unless the inheritance came from the mother. In case it came from the mother, then it descended as if the intestate had survived the father.

This would refer to inheritances that came by devise as well as by descent

from a relative on the mother's side. Torrey v. Shaw, 3 Edw. 356.

But would not apply to land bought with money by the intestate, no matter whence the money came. Champlain v. Baldwin, 5 Paige, 562.

And those of the half blood would take equally with those of the whole

blood.

4. If there were no father or lawful issue, then to the brothers and sisters of the whole or half blood in equal parts, excluding those not of the blood of the ancestor from whom the intestate derived the inheritance.

5. To the children of brothers and sisters, taking by representation.

And in all cases of descent beyond those, the common law, it was enacted, should govern.

The Revised Statutes made further changes of the common law. and in the general repealing act of 1828, repealed the law of 1786. except the second and seventh sections.

These sections (2d and 7th) turned estates tail into fees simple.

Under the Law of 1786, nephews and nieces took per stirpes and not per capita in all cases. Jackson v. Thurman, 6 Johns. 322.

Under the statute of descents, in force before the Revised Statutes, there was no representation among collateral heirs of a decedent beyond brothers' and sisters' children. Harman v. Osborn, 4 Paige, 336.

A grandnephew could not take under the statute. Revisers' Notes to § 8, Chap. II, Part II. The descent after brothers' children would be accord-

ing to common law.

The said statute of descents extended to brothers and sisters equally of the half blood as those of the whole blood, but not to the grandchildren. Fuller v. Williams, 7 Cow. 53.

The words "ex parte materna," at common law, apply to a descendible The words "ex parte materna," at common law, apply to a descendible estate when it is a question of inheritance among collaterals on the father's or mother's side. If the point be as to property acquired by purchase, and the party last seized die without issue or lineal descendant, the heirs on the father's side are preferred, and those ex parte materna do not take until the father's side are extinct. But where the estate comes to the person last seized by descent and no act has changed it, the descent goes to the blood of the first purchaser, so that if the property came by descent from or through the mother, it will descend ex parte materna. Torrey v. Shaw, 3 Edw Ch 356 3 Edw. Ch. 356.

TITLE VI. UNDER THE REVISED STATUTES AND THE REAL PROPERTY Law.

The provisions of the Revised Statutes of 1830 relative to the descent of land abrogated the previous statutes. They are contained in Chap. II, Part II, of the Revised Statutes (1 R. S. 750) and became applicable after the Revised Statutes took effect. They were in turn superseded by the provisions of the Real Property Law, G. L., Chap. XLVI, L. 1896, Chap. 547, which latter were in effect, however, merely re-enactments with little or no change of the provisions of the Revised Statutes.

Consequently, though the Revised Statutes were in force until October 1, 1906, in considering the law with regard to descents under this title, the provisions of the Real Property Law, as amended, are given, with references merely to the corresponding provisions of the Revised Statutes, the differences, if any, between the former and the latter being noted.

The main provisions of the Real Property Law, as amended, relative to descents are to the effect as follows:

- § 281. General Rule of Descent.—The real property of a person who dies without devising the same shall descend:
 - 1. To his lineal descendants.
 - 2. To his father.
 - 3. To his mother; and
- 4. To his collateral relatives, as prescribed in the following sec-: tions of this article.

1 R. S. 751, § 1.

By Laws of 1895, Chap. 171, the above section was amended so as to allow a widow to inherit as a lineal descendant. The law was not to go in force until Jan. 1, 1896, and never took effect, as it was repealed by Laws of 1895, Chap. 1022, and the section was restored as above. These two acts, while not repealed in the repealing schedule of the Real Property Law, are

repealed by implication.

L. 1873, Chap. 552, and L. 1874, Chap. 127, provided for recording certificates of descent. See now Code of Civ. Proc., §§ 2654–2659, as to probate

of heirship.

- § 282. Lineal Descendants of Equal Degree.— If the intestate leave descendants in the direct line of lineal descent, all of equal degree of consanguinity to him, the inheritance shall descend to them in equal parts however remote from him the common degree of consanguinity may be.
 - 1 R. S. 751, § 2.
- § 283. Lineal Descendants of Unequal Degree.— If any of the descendants of such intestate be living, and any be dead, the inheritance shall descend to the living, and the descendants of the dead, so that each living descendant shall inherit such share as would have descended to him had all the descendants in the same degree of consanguinity who shall have died leaving issue been living; and so that issue of the descendants who shall have died shall respectively take the shares which their ancestor would have received.
- 1 R. S. 751, §§ 3, 4. The word "descendants" replaces the word "children" in the section of the Revised Statutes, and 1 R. S. 751, § 4, which further defined how descendants of unequal degree should take has been omitted.

1 R. L. 52, § 3. Adopted Children.—Adopted children now inherit. L. 1887, Chap. 703, amd. L. 1873, Chap. 830, § 10.

As also their heirs and next of kin. But this shall not apply so as to defeat the rights of remaindermen.

Before the passage of the Act of 1887 they could not inherit.

§ 284. When Father Inherits.—If the intestate die without lawful descendants, and leave a father, the inheritance shall go to

such father, unless the inheritance came to the intestate on the part of his mother, and she be living; if she be dead, the inheritance descending on her part shall go to the father for life, and the reversion to the brothers and sisters of the intestate and their descendants, according to law of inheritance by collateral relatives hereinafter provided; if there be no such brothers or sisters or their descendants living, such inheritance shall descend to the father in fee.

1 R. S. 751, § 5, as amd. by L. 1830, Chap. 320, § 13. See also I R. L. 52. The section in the Revised Statutes as originally passed ended with the words "unless the inheritance came to the intestate, on the part of his mother," the remainder of the above provision being first added by L. April 20, 1830, Chap. 320, § 13.

Vide Real Property Law,, § 280 (also I R. S. 755, § 29), as to the meaning of the world, "own to the intestate on the part of the father or make."

ing of the words, "come to the intestate on the part of the father or mother."

- 8 285. When Mother Inherits.— If the intestate die without descendants and leave no father, or leave a father not entitled to take the inheritance under the last section, and leave a mother, and a brother or sister, or the descendant of a brother or sister, the inheritance shall descend to the mother for life, and the reversion to such brothers and sisters of the intestate as may be living, and the descendants of such as may be dead, according to the law of inheritance hereinafter provided. If the intestate in such case leave no brother or sister or descendant thereof, the inheritance shall descend to the mother in fee.
- 1 R. S. 752, § 6; see Wheeler v. Clutterbuck, 52 N. Y. 67, illustrating this section.

The reversion vests in the brothers and sisters at the time of the intestate's death and is not suspended by the outstanding life estate. Barber v. Brundage, 169 N. Y. 368, affg. 50 App. Div. 123.

- § 286. When Collateral Relatives Inherit; Collateral Relatives of Equal Degree.- If there be no father or mother capable of inheriting the estate, it shall descend in the cases hereinafter specified to the collateral relatives of the intestate; and if there be several such relatives, all of equal degree of consanguinity to the intestate, the inheritance shall descend to them in equal parts, however remote from him the common degree of consanguinity may be.
 - 1 R. S. 752, § 7; 1 R. L. 52,
- § 287. Brothers and Sisters and their Descendants.— If all the brothers and sisters of the intestate be living the inheritance shall descend to them; if any of them be living and any be dead, to the

brothers and sisters living, and the descendants, in whatever degree, of those dead, so that each living brother or sister shall inherit such share as would have descended to him or her if all the brothers and sisters of the intestate who shall have died, leaving issue, had been living, and so that such descendants in whatever degree shall collectively inherit the share which their parent would have received if living; and the same rule shall prevail as to all direct lineal descendants of every brother and sister of the intestate whenever such descendants are of unequal degree.

1 R. S. 752, §§ 8, 9.

The inheritance between brothers is immediate, and was never affected by the alienage of the father. Parish v. Ward, 28 Barb. 328; Luhrs v. Eimer, 80 N. Y. 171.

The law of 1786 provided for collateral descent only as far as brothers' or sisters' children; "and in all cases of descent not particularly provided for by this act, the common law shall govern." Hence, grandnephews took in accordance with the rules of the common law, and it is sometimes said not in accordance with or under the statute of 1786. See Revisers' Note to § 8, Chap. II, Part II. "As the law now is, a grandnephew could not take at all under the statute."

A brother is not a "descendant." Citing Van Buren v. Dash, 30 N. Y. 393; Howard v. Barnes, 65 How. Pr. 122.

As to personal estate no representation is admitted among collaterals after brothers' and sisters' descendants. Code Civ. Proc., § 2732, as amd. 1905; Matter of Hadley, 43 Misc. 579. See under broader provisions of L. 1898, Chap. 319, Matter of Davenport, 172 N. Y. 454.

- § 288. (as amd. by L. 1904. Chap. 106.) Brothers and Sisters of Father and Mother and their Descendants and Grandparents.-If there be no heir entitled to take, under either of the preceding sections, the inheritance, if it shall have come to the intestate on the part of the father, shall descend:
- I. To the brothers and sisters of the father of the intestate in equal shares, if all be living.
- 2. If any be living, and any shall have died, leaving issue, to such brothers and sisters as shall be living and to the descendants of such as shall have died.
- 3. If all such brothers and sisters shall have died, to their descendants.
- 4. If there be no such brothers or sisters of such father, nor any descendants of such brothers or sisters, to the brothers and sisters of the mother of the intestate, and to the descendants of

such as shall have died, or if all have died to their descendants. But, if the inheritance shall have come to the intestate on the part of his mother, it shall descend to her brothers and sisters and their descendants; and if there be none, to the brothers and sisters of the father and their descendants, in the manner aforesaid. If the inheritance has not come to the intestate on the part of either father or mother, it shall descend to the brothers and sisters both of the father and mother of the intestate, and their descendants in the same manner. In all cases mentioned in this section the inheritance shall descend to the brothers and sisters of the intestate's father or mother, as the case may be, or to their descendants in like manner as if they had been the brothers and sisters of the intestate.

5. If there be no such brothers or sisters of such father or mother, nor any descendants of such brothers or sisters, the inheritance, if it shall have come to the intestate on the part of his father, shall descend to his father's parents then living, in equal parts, and if they be dead, then to his mother's parents, then living, in equal parts; but if the inheritance shall have come to the intestate on the part of his mother, it shall descend to his mother's parents, then living, in equal parts, and if they be dead, to his father's parents, then living, in equal parts. If the inheritance has not come to the intestate on the part of either father or mother, it shall descend to his living grandparents, in equal parts.

Except for subd. 5 which was added by the amendment of 1904, this provision is practically the same as 1 R. S. 752, § 10; 753, §§ 11-13. See 1

By sections 287, 288 (1 R. S. 752, §§ 8, 9, 10), above, the descent to collateral relatives of the decedent is placed upon the same footing as the descent to lineal heirs. That is, if all the heirs are in the same degree of consanguinity to the intestate, they take equally, however remote they may be from him; but if some of the class of relatives nearest to the decedent are dead, and leave issue the supported of the class of relatives. decedent are dead, and leave issue, the survivors of the class take equally among themselves, and the representatives of those who are dead take the share which their ancestors of that class would be entitled to if living. See

Pond v. Bergh, 10 Paige, 140.
Under the above subdivision 1, brothers and sisters of the half blood would take equally with those of the whole blood. Beebe v. Griffing, 14 N. Y. 235.
Where the intestate inherits land from a brother, the brothers and sisters, or their descendants, both of the father and mother of the intestate, take equally, irrespective of the source from which the brother received it. Hyatt

v. Pugsley, 33 Barb. 373.

Lands Partitioned .- Lands allotted to an heir by voluntary partition and release are deemed to come to him by inheritance from the ancestor, and not by purchase, and on his death such of his heirs as are not of the blood of the ancestor are excluded. Conkling v. Brown, 8 Abb. N. S. 345. See further as to deviation of property, Adams v. Anderson, 23 Misc. 705.

§ 280. Illegitimate Children.— If an intestate who shall have been illegitimate die without lawful issue, or illegitimate issue entitled to take under this section, the inheritance shall descend to his mother; if she be dead, to his relatives on her part, as if he had been legitimate. If a woman die without lawful issue, leaving an illegitimate child, the inheritance shall descend to him as if he were legitimate. In any other case illegitimate children or relatives shall not inherit.

1 R. S. 753, § 14; 754, § 19; L. 1855, Chap. 547, § 1.

Under the common law, illegitimate children cannot take by descent; for they have not, in contemplation of law, inheritable blood; nor could they transmit by descent, except to their own offspring.

This changed the principle of the common law, by which a person of illegitimate birth can neither inherit lands himself nor transmit them by descent to any others except his own legitimate offspring, or persons otherwise capable of inheriting, claiming by virtue of inheritance from or through

This provision has been held to apply only to the relatives in case the mother is dead at the birth of the intestate. If she be living and an alien, she could not take nor her relatives through her. The People v. Irvin, 21 Wend. 128; McLean v. Swanton, 13 N. Y. 535; St. John v. Northrup, 23 Barb. 26.

As to widow and children of such decedent, see 1 R. S. 751; 2 id. 96, § 75. They may take as if decedent was legitimate.

Presumption of Legitimacy.—The law presumes every one born during wedlock legitimate, until the contrary is shown, even if born so short a time after wedlock as to have been necessarily begotten before. 2 R. S. 145, §§ 43, 44; Code Civ. Proc., § 1760; Cross v. Cross, 3 Paige, 139; Montgomery v. Montgomery, 3 Barb. Ch. 132; Caujolle v. Ferrie, 26 Barb. 177, affd., 23 N. Y. 90.

Laws of 1855, Chap. 547, provided that illegitimate children, in default of lawful issue, should inherit real and personal property from their mothers, as if legitimate; but nothing in this act was to affect any right or title to property already vested in the lawful heirs of any person theretofore deceased.

Ferrie v. The Pub. Admr., 3 Brad. 249. See ante, Tit. I. A child who has become legitimatized in the domicile of the parents may take land in New York. Miller v. Miller, 91 N. Y. 315, revg. 18 Hun, 507, and overruling Bollerman v. Blake, 24 id. 187.

But an illegitimate child cannot inherit from a maternal grandfather, the

mother being dead. Matter of Mericlo, 63 How. Pr. 62.

See Dom. Rel. Law, G. L., Chap. XLVIII, L. 1896, Chap. 272, § 2; L. 1893, Chap. 601, amendg. 2 R. S. 139, § 3, as to void and incestuous marriages.

Children whose parents have intermarried or may do so are made legitimate that the contraction of the contraction mate, but not to interfere with vested interests or estates.

L. 1895, Chap. 531; Dom. Rel. Law, § 18, as amd. by L. 1899, Chap. 725.

§ 200. Relatives of the Half Blood.—Relatives of the half blood and their descendants, shall inherit equally with those of the whole blood and their descendants, in the same degree, unless the inheritance came to the intestate by descent, devise or gift

from an ancester; in which case all those who are not of the blood of such ancestor shall be excluded from such inheritance.

1 R. S. 753, § 15. See also 2 R. S. 97, § 75, subd. 12.

"Ancestor," as employed in this section embraces collateral as well as lineal predecessors in blood and title. Wheeler v. Clutterbuck, 52 N. Y. 67; McCarthy v. Marsh, 5 id. 263; Conkling v. Brown, 8 Abb. Pr. N. S. 345, 350 note; Valentine v. Wetherill, 31 Barb. 655, 659; Matter of Reeve, 38 Misc.

But it means the immediate ancestor, from whom intestate received the

But it means the immediate ancestor, from whom intestate received the estate, not some remote ancestor who may have first acquired the estate by purchase. Wheeler v. Clutterbuck; Valentine v. Wetherill, supra; Emanuel v. Ennis, 48 N. Y. Super. 430; Hyatt v. Pugsley, 33 Barb. 373.

Applies to uncles and aunts and their descendants to remotest degrees. Beebe v. Griffing, 14 N. Y. 235.

The meaning of this section is that the relatives of the half blood shall inherit precisely as if they were of the whole blood, in every case of descent provided for in the previous sections. In all cases of a newly purchased inheritance that can arise under 1 R. S. 752, § 8, all brothers and sisters, and their descendants of the half blood, would take as if relatives of the whole blood. Brown v. Burlingham, 5 Sandf. 418; Champlin v. Baldwin, 1 Paige, 562; Hallett v. Hare, 5 id. 316; Conkling v. Brown, 8 Abb. Pr. N. S. 345; s. c., 57 Barb. 265:

The above provision of the statutes excluding all not of the blood of the

The above provision of the statutes excluding all not of the blood of the ancestor through whom the intestate derived title, refers to the immediate relatives, collateral as well as lineal, from whom the intestate received the inheritance. Wheeler v. Clutterbuck, 52 N. Y. 67; Emanuel v. Ennis, 48 Super. 430; Dargin v. Wells, N. Y. Daily Reg., Aug. 9, 1883; Leary v. Leary, 50 How. Pr. 122.

It does not include purchasers for value. Morris v. Ward, 36 N. Y. 587. See as to the application of this section in certain cases, Valentine v. Wetherill, 31 Barb. 655; Hyatt v. Pugsley, 33 id. 373; Vanderheyden v. Crandall, 2 Denio, 9, affd., 1 N. Y. 497; Torrey v. Shaw, 3 Edw. 356.

§ 290a. (Added L. 1901, Chap. 481.) When Inheritance Comes to Intestate from Deceased Husband or Wife. When the inheritance shall have come to the intestate from a deceased husband or wife, as the case may be, and there be no person entitled to inherit under any of the preceding sections, then such real property of such intestate shall descend to the heirs of such deceased husband or wife, as the case may be, and the persons entitled, under the provisions of this section, to inherit such real property shall be deemed to be the heirs of such intestate.

This section is new.

"Inheritance" must be taken here to mean "Estate of inheritance;" and from a deceased husband or wife" as the equivalent of "on the part of,

The effect of this section is to restore the estate to the original family instead of allowing an escheat.

See comments on this section in Fowler's Real Property Law (2d ed.), 879.

§ 291. Cases not Hereinbefore Provided for.—In all cases not provided for by the preceding sections of this article, the inheritance shall descend according to the course of the common law.

1 R. S. 753, § 16; 1 R. L. 52.

Under this provision, the old rule of the common law would seem to apply relative to the exclusion of the half blood, where the English common law

still applies. Brown v. Burlingham, 5 Sandf. 418.

The "common law" of this section is not the Statute of Distributions of English law, founded as Blackstone thought, on the 118th and 127th Novels of Justinian, but the pure Anglo-feudal law of succession, or that which is now termed the common law of the land.

The five new rules of descent prescribed by the Real Property Law provide as the mother and father of the intestate; (3) collateral succession of brothers and sisters and their descendants in infinitum; (4) collateral succession of uncles, aunts, both agnates and cognates, and their descendants in infinitum; (5) grandparents. Beyond this point the common law prevails. In default of grandparents, it would seem the granduncles of the fathers

side became the stock of descent under the common law rule that males are preferred. Hunt v. Kingston, 3 Misc. 309. Cf. Brown v. Burlingham, 5 Sandf. 418. See Fowler's Real Property Law (2d ed.), 881, 882.

§ 293. Inheritance, Sole or in Common.—When there is but one person entitled to inherit, he shall take and hold the inheritance solely; when an inheritance or a share of an inheritance descends to several persons they shall take as tenants in common, in proportion to their respective rights.

1 R. S. 753, § 17.

This section seems to have been indispensible to regulate the kind of tenancy descendants and collaterals shall take by descent. Cole v. Irvine,

6 Hill, 634, 638.

This section does not modify R. P. L., § 291, and when the common law prevails in the descent, it has no application to the succession. So that presumably great-aunts (being sisters) would succeed as coparceners; section 56 of the Real Property Law being limited to grants and devises. 2 Black. Comm. 187; Hunt v. Kingston, 3 Misc. 309.

- § 292. Posthumous Children and Relatives.—A descendant or a relative of the intestate begotten before his death, but born thereafter, shall inherit in the same manner as if he had been born in the lifetime of the intestate and had survived him.
- 1 R. S. 754, § 18, amd. L. 1869, Chap. 22, vide infra; Drischler v. Van Den Henden, 49 Super. 508; 1 R. L. 54; Mason v. Jones, 2 Barb. 229; 2 R. S. 65, § 49; 2 R. S. 97, § 75, subd. 13.

At common law a posthumous child took by descent. Watkins Descents, 131; Challis, 111, 126; 1 Black Comm. 130; Marsellis v. Thalhimer, 2 Paige

At common law an infant en ventre sa mére succeeded only on its actual birth, the title meanwhile devolving on the "heir presumptive." At its birth the child could enter as the occupant. The statute, however, expressly permits an abeyance of the seisin, as the child is now in esse only from the time of its birth for the purposes of descent. Mason v. Jones, 2 Barb.

In case of child born dead, it is considered as if never born or conceived, in so far as others claiming through such child are concerned. Marsellis v.

Thalhimer, 2 Paige, 35.

Tenant by curtesy is not entitled where child is delivered by Cæsarian operation and immediately dies. It is not "issue born alive." Id.

As to bost testamentary children inheriting, vide supra, p. 374. § 280. This section of the Real Property Law combined several sections contained in the Revised Statutes.

Certain Estates not Affected.—This article (Real Property Law, Art. IX) does not affect a limitation of an estate by deed or will, or tenancy by the curtesy or dower.

1 R. S. 754, § 20; 1 R. L. 54.

Estates in Trust.—Real property held in trust not devised by the beneficiary descends in accordance with the provision of this article. (Real Property Law, Art. IX.)

1 R. S. 754, § 21; 1 R. L. 74; vide supra, Tit. 11, p. 10.

The words "Living," etc., Construed.—When in this article (Real Property Law, Art. IX), a person is described as living, it means living at the time of the death of the intestate from whom the descent came; when he is described as having died, it means that he died before such intestate.

1 R. S. 755, § 28.

Other Expressions.—The expressions "where the inheritance shall have come to the intestate on the part of the father" or "mother" as the case may be, include every case where the inheritance shall have come to the intestate by devise, gift or descent from the parent referred to, or from any relative of the blood of such parent.

1 R. S. 755, § 29.

This was was different from the common law which traced back the title to the purchaser, in order to decide from which side the estate was derived.

It is held that the insertion of a small pecuniary nominal consideration in a deed of gift as "one dollar," does not change the nature of the gift into a purchase. Morris v. Ward, 36 N. Y. 587.

Land purchased with money the gift of intestate's mother held not to have come to him "on the part of the mother." Champlin v. Baldwin, 11 Paige,

An estate purchased from mother is not an estate derived ex parte materna. Morris v. Ward, 36 N. Y. 587, 594.

Laws of 1860. By Law of 1860, Chap. 90 (repealed), the following provisions were enacted:

visions were enacted:

§ 10. At the decease of husband or wife, leaving no minor child or children, the survivor shall hold, possess, and enjoy a life estate in one-third of all the real estate of which the husband or wife died seized.

§ 11. At the decease of the husband or wife intestate, leaving minor child or children, the survivor shall hold forever and enjoy all the real estate

of which the husband or wife died seized, and all the rents, issues and

profits thereof, during the minority of the youngest child, and one-third

thereof during his or her natural life.

These sections were repealed by Law of 1862, Chap. 172, but they are given here as they may affect interests vesting when they were in force. See cases cited, supra, § 15.

Widow's Interests and Exemptions.— By Laws of 1889, Chap. 406, a widow's interest was increased in an estate to \$1,000 for life if the testator left descendants, and absolutely if there were none. This act was repealed, Chap. 173 of Laws of 1890. By Laws of 1893, Chap. 686, this latter law was repealed and the subject was regulated by §§ 2713 and 2732 of the Code of Civil Procedure. As to computation of amount to widow, see Daggett v. Daggett, 14 N. Y. Supp. 182.

§ 294. Alienism of Ancestors.—A person capable of inheriting under the provisions of this article, shall not be precluded from such inheritance by reason of the alienism of an ancestor.

1 R. S. 754, § 22.

At common law, no one could make title by descent through an alien ancestor. People v. Conklin, 2 Hill, 67; Jackson v. FitzSimmons, 10 Wend. 9; Jackson v. Green, 7 id. 333; and if the heirs were alien, the land vested immediately in the State. Heeney v. Brooklyn Benevolent Soc., 33 Barb. 360, affd. 39 N. Y. 333. The above provision of the Revised Statutes of 1830 is purely prospective, and does not affect inheritances through persons dying before that time. Redpath v. Rich, 3 Sandf. 79; Jackson v. Green, 7 Wend. 333. It applies only to the case of a deceased, not a living ancestor. People v. Irvin, 21 Wend. 128; St. John v. Northrup, 23 Barb. 25; McLean v. Swanton. 13 N. Y. 535: McCreery's Lessee v. Somerville. 9 Wheat. 354. The Swanton, 13 N. Y. 535; McCreery's Lessee v. Somerville, 9 Wheat. 354. The word "ancestor" held to embrace collaterals. McCarthy v. Marsh, 5 N. Y. 263.

See the whole subject of title of and through aliens, supra, pp. 95-109.

§ 215. Mortgages on Real Property Inherited or Devised .-Where real property, subject to a mortgage executed by any ancestor or testator, descends to an heir, or passes to a devisee, such. heir or devisee must satisfy and discharge the mortgage out of his own property, without resorting to the executor or administrator of his ancestor or testator, unless there be an express direction in the will of such testator, that such mortgage be otherwise paid.

1 R. S. 749, § 4.

This is contrary to the general principle and to the law prior to the Revised Statutes, when the onus rested on the personal representative. Revisers' Note to 1 R. S. 749, § 4; see White & Tudor's notes to Duke of Ancaster v. Mayer, 1 Lead. Cas. in Eq. 723, et seq.; Cumberland v. Codrington, 3 Johns. Ch. 229; Mollan v. Griffith, 3 Paige, 402.

This provision would apply as well to a mortgage that had been assumed, although not greated by the tagstator. Halsay v. Paid, 9 Paige, 446; approved.

Inis provision would apply as well to a mortgage that had been assumed, although not executed by the testator. Halsey v. Reid, 9 Paige, 446; approved, Trotter v. Hughes, 12 N. Y. 74.

An equitable lien for the purchase money is not a mortgage within this statute. Wright v. Holbrook, 32 N. Y. 587, affg. 18 Abb. Pr. 302. And the heir or devisee has the right to have the same paid out of the personal estate of the decedent. Id.

See further as to the characteristics.

See further, as to the above provision charging the payment of a mortgage on the land descended. Johnson v. Corbett, 11 Paige, 265; Hauselt v. Patterson, 124 N. Y. 349.

The personal estates of decedents are now liable only for deficiencies, unless the will makes different provision. Glaucius v. Fogel, 88 N. Y. 434.

The heir or devisee is not personally liable. Hauselt v. Patterson, 124

N. Y. 349.

But a mortgagee may proceed either against the personal or the real estate, though a court of equity would compel him first to exhaust the latter. Rice v. Harbeson, 63 N. Y. 493; Roosevelt v. Carpenter, 28 Barb. 426.

Descent of Lands Subject to a Power.—As to this, vide supra. 275, and Chap. XII, Tit. VIII.

Descent Cast.—The right of a person to the possession of real property is not impaired or affected by a descent being cast in consequence of the death of a person in possession of the property.

Code Civ. Proc., § 374 (formerly § 87). See 2 R. S. 295.

Descent where a Child is Born after a Will is Made. - Whenever a testator shall have a child born after the making of a last will, either in the lifetime or after the death of such testator, and shall die leaving such child, so after born, unprovided for by any settlement, and neither provided for, nor in any way mentioned in such will, every such child shall succeed to the same portion of such parent's real and personal estate, as would have descended or been distributed to such child, if such parent had died intestate, and shall be entitled to recover the same portion from the devisees and legatees, in proportion to and out of the parts devised and bequeathed to them by such will."

2 R. S. 65, § 49, as amd. by L. 1869, Chap. 22. See Minot v. Minot, 17 App. Div. 521; Herriot v. Prime, 155 N. Y. 5; Davis v. Davis, 27 Misc. 455. See further as to this section, infra, also supra, Tit. I.

Heir or Devisee.— The heir takes as heir rather than as devisee.

Buckley v. Buckley, 11 Barb. 43; Smith v. Robertson, 89 N. Y. 555; Henriques v. Stirling, 26 App. Div. 30, 35; Pyatt v. Waldo, 85 Fed. Rep. 399. Sales by Heirs.—See infra, Chap. XVI; 1 R. S. 748, § 3; Code Civ. Proc., § 2628; also Cole v. Gourlay, 79 N. Y. 527, affg. 9 Hun, 493; Corley v. McElmeel, 149 N. Y. 228; Fox v. Fee, 167 N. Y. 44.

It seems that the burden of proof is on the purchaser to show that there is a will existing, even within four years. 12 Daly, 292.

As to objections by purchasers from heirs within three years after testator's death. Schermerhorn v. Niblo, 2 Bosw. 161; Moses v. Cochran, 107 N. Y. 41. One who takes a mortgage from a devisee who claims no title except

under the will, within three years from the death of the devisor, cannot be treated as a bona fide incumbrancer or purchaser so as to give his lien on the premises priority over the claims of creditors of the devisor; nor is he entified to priority over the legatees, where land was devised upon the condition that the devisee pay the legacies. Cunningham v. Whitford, 74 Hun, 273.

Probate of Heirship.— See Code Civ. Proc., § 2654 et seq.

TITLE VII. LIABILITY OF REAL PROPERTY DESCENDED TO PAY DERTS.

The general rule of the English and American law is, that the personal estate is the primary fund for the discharge of debts, and is to be first exhausted.

The order of marshaling assets in equity toward payment of debts is to apply them as follows:

- I. The general personal estate.
- 2. Estates specially devised for the payment of debts.
- 3. Estates descended.
- 4. Estates devised, though generally charged with the payment of debts.

It requires express words, or the manifest intent of the testator, or express statute, to disturb this order.

The mere charge by will of a secondary fund with the payment of debts, does not exempt the primary fund, unless it plainly appears to have been the testator's intention to exonerate it for the benefit of some legatee. Lowndes on Legacies, 329; 4 Kent, 447, and cases cited. See Redfield's Law and Practice of Surrogates' Courts, 553, for cases on the above.

Liability of Land to Contract Debts.— By the common law, land descended or devised was not liable to simple contract debts of the ancestor or testator, nor was the heir bound even by a specialty, unless he was expressly named.

4 Kent, 446; Black. Comm. 430; Read v. Patterson, 134 N. Y. 128, 131.

But the Law of 1786 (1 R. L. 316, § 1), and 2 R. S. 452, §§ 32, 33, amd. L. 1859, chap. 110, as now by the Code of Civil Procedure (§§ 1843, 1848), the heirs of intestates and the heirs and devisees of a testator are rendered liable for the debt of the decedent arising by simple contract, as well as by specialty, to the extent of the estate interest and right in the real estate effectually devised or descended on condition that the personal estate of the decedent, if any, within the State, is insufficient, and that the plaintiff has been unable or will be unable with due diligence to collect his debt through proceedings before the Surrogate's Court and at law, both against the representatives, surviving husband or wife, legatees, and next of kin.

Code Civ. Proc., §§ 1843, 1848. Earlier acts were substantially similar in their provisions. The Revised Statutes and the Act of 1859 were repealed by Laws of 1880, Chap. 245. When lands are exonerated after surrogate's sales, vide, infra, Chap. XVIII.

This provision does not effect the liability of an heir or devisee, when

the debt is, by the will of the ancestor, charged expressly and exclusively

upon the real property descended or devised; or made expressly payable by the heir or devisee, or directed to be paid out of the real property descended or devised before resorting to the personal estate or other real property. Code Civ. Proc., § 1859. So formerly; 2 R. S. 455, § 35. Youngs v. Youngs, 45 N. Y. 254.

Lands may be sold when expressly charged to redeem stock pledged as collateral for loan and an action in equity may be maintained by legatee to enforce the lien. Dunning v. Dunning, 82 Hun, 462. Intention to charge may be inferred. Matter of Thompson, 18 Misc. 143.

Debts as above, due by heirs or devisees, have to be paid in a certain order

of preference. Code Civ. Proc., § 1855.

The statutes also provide for proceedings against said heirs and devisees, and the defenses that may be set up. Code Civ. Proc., Chap. 15, Tit. 3, Art. 2, §§ 1856, 1857; see 2 R. S. 453.

Such proceedings must be taken within three years. § 2750; Salls v. Salls, 19 N. Y. Supp. 246. Code Civ. Proc.

As to notice of suit brought against heirs to charge debt of ancestor

after three years. See Rogers v. Patterson, 79 Hun, 483.

In an action under the statute against heirs or devisees to enforce their liability of debts of the decedent to the extent of their respective estates in the realty, fraudulent transfers by such heirs or devisees cannot be attacked and judgment given that such debts be collected out of the realty notwithstanding such alienation. The only remedy afforded by the statute, when the property has been aliened, is a personal judgment against the heir or devisees for the value of such property. Rogers v. Patterson, 79 Hun, 483, affd. 150 N. Y. 560.

The debts are not a lien; the heir takes an absolute title, subject to be

charged with the debts, on proper steps being taken. 13 Barb. 252. See Van Sycle v. Richardson, 3 Ill. 171. Wilson v. Wilson,

Where the personalty is grossly inadequate, very slight words will charge legacies upon the realty. So held where the devisee was executor and was ordered by the will to pay the legacies. Monson v. Monson, 8 Abb. N. C. 123.

Debts are not charged on realty unless the intent be clear and mere inadequacy of personalty will not affect it. Matter of Rochester, 110 N. Y.

Where heirs are remaindermen under a trust deed, they are not liable as heirs. Matteson v. Palser, 173 N. Y. 404.

Lien of Judgment on Lands Descended.—A judgment rendered against the heirs or devisees in such an action has preference as a lien on the real estate descended and not aliened over any judgment, etc., obtained against such heir or devisee personally, for his individual debt or demand.

Code Civ. Proc., § 1852; 2 R. S. 454, §§ 47, 48; Morris v. Mowatt, 2 Paige,

Only when the heirs have aliened land are they personally liable. When the land has not been aliened by the heirs or devisees the remedy is by an equity action having the nature of a proceeding in rem to reach the land. Hauselt v. Patterson, 124 N. Y. 349.

Alienation of Land by Heir .- If the defendant has aliened the descended land before suit or after suit, but before notice of lis pendens or judgment filed, he is personally liable, at the election of the plaintiff, for the value of the estate so aliened; but no such judgment binds, nor does execution thereon affect the title of the purchaser in good faith and for value, acquired before notice of *lis pendens* or judgment entered, or judgment roll on final judgment filed.

Code Civ. Proc., §§ 1853, 1854; 2 R. S. 454, §§ 49, 51, 61; 1 R. L. 317; Salls v. Salls, 19 N. Y. Supp. 246; Hamilton v. Smith, 110 N. Y. 159. See also Waring v. Waring, 3 Abb. 246; Hyde v. Tanner, 1 Barb. 75.

The rights of creditors are subordinate to those of the holder of a mort-

The rights of creditors are subordinate to those of the holder of a mortgage executed in good faith by the devisee, where the debts are not by the terms of the will charged upon the land. Cunningham v. Parker, 146

N. Y. 29.

In suits brought against joint heirs or devisees, the amount recovered is to be apportioned among them respectively according to their respective interests.

Code Civ. Proc., § 1847; 2 R. S. 455, §§ 52, 53; Wambaugh v. Gates, 1 How. App. Cas. 247.

Liability of Devisees.— To render devisees liable to the extent of lands devised to them respectively, it must appear, in addition to the facts required to be shown in an action against heirs, that the real estate descended to the heirs was insufficient, or that the plaintiff cannot with due diligence collect the same against them. Where, however, the debt was charged expressly and exclusively upon the real estate devised, or made exclusively payable by the devisee of the land devised, the devisee is liable before resorting to the personal property or any other real property descended or devised.

Code Civ. Proc., §§ 1849, 1859; 2 R. S. 455, §§ 56-59.

Plaintiff must show he has exhausted his remedy. DeCrano v. Moore, 30 Misc. 303.

Proceeds of sales of lands devised, but directed to be sold, when regarded as real estate and not subject to decedent's debts, etc. Matter of Bolton, 5 Misc. 475.

Debts are not charged on realty unless the intent be clear and mere inadequacy of personalty will not effect it. Devise after payment of debts with power of sale to executors does not charge debts on realty. Matter of Rochester, 110 N. Y. 159, revg. 46 Hun; see Matter of Thompson, 18 Misc. 143.

Where one of several devisees of two lots mortgaged his interest in one lot and the mortgage was foreclosed, it was ordered on a proceeding to sell lands to pay testator's debts that the other lot should first be sold, so that no unjust burden should fall on the mortgagee. Matter of Clark, 3 Redf. 225.

Alienation by Devisee.—Devisees are made liable to the same extent as heirs and with like provisions as to alienation. Code Civ. Proc., §§ 1853,

1854, supra; 1 R. L. 317; 2 R. S. 456, § 61.

The above provisions are made applicable to the case of a child born after the making of a will, and entitled to succeed to a part of the real and personal property of a testator, or a subscribing witness to a will, who is entitled to succeed to a share of such property; each may maintain an action against the legatees or devisees, to recover his share of the property,

and each is subject to the same liabilities, has the same rights and is entitled to the same remedies as any other person who is so entitled to succeed. Code Civ. Proc., § 1868; 2 R. S. 456, §§ 62-66.

Actions Brought.—By Code Civ. Proc., § 1846 (following Law of May 16, 1837, Chap. 460, which was repealed by L. 1880, Chap. 245), an action against heirs or devisees of any person who may be liable to any creditor of such person in consequence of lands having descended to them, must be brought jointly against all the heirs or devisees as the case may be.

But they are not jointly liable. Kellog v. Olmsted, 6 How. 487.

Where land is devised to the children and heirs at law of the testator, after the payment of debts, if it does not appear that the devisees have taken possession of the real estate, or have accepted the devise to them, or promised to pay, or have paid, any portion of the debt owing by the testator, or sold the land, or any part of it, as heirs at law of the testator, they are not personally liable to pay the debt.

An action brought to reach real estate which a testator devised to the

defendants, and to have the same sold for the purpose of satisfying a debt which the testator owed to the plaintiff, is an action in rem for equitable relief, of which the Supreme Court had not jurisdiction previous to the Code, and may be commenced at any time within ten years after the cause of action accrued. Wood v. Wood, 26 Barb. 356.

A final decree in a suit against heirs and devisees, to obtain satisfaction

of the debts due from the estate of the testator or intestate, has a preference as a lien on the estate descended or devised over any judgment or decree obtained against the heir or devisee for his personal debt. Code Civ. Proc.,

1852; 2 R. S., §§ 47, 48.

And a sale under an execution, issued on such decree, will overreach not only all judgments and decrees which have been recovered against such heir or devisee, but also all mortgages and alienations of the estatesubsequent to the commencement of the suit. Whether a sale under execution issued on the decree is necessary to give the purchaser a legal title, sufficient to protect him at law against a sale under a previous judgment against the heir or devisee, quare. Morris v. Mowatt, 2 Paige, 586.

Land conveyed to an administratrix under a contract held by intestate as security for a debt was held personalty. Matter of Potter, 32

Hun, 599.

To entitle a creditor of a deceased debtor to a legal preference over a judgment creditor of the heir at law of the debtor, he must himself proceed to a judgment against the heir at law, for the debt due from the latter in respect to the lands descended from the deceased debtor; or he must apply to the surrogate for a sale of the land, to satisfy the debts of the decedent which the personal estate is insufficient to pay. Pierce v. Alsop, 3 Barb. Ch.

Actions cannot be brought against heirs or devisees to charge them with the debts of the testator or intestate, except where three years have elapsed since the death of decedent and no letters have been granted within the State, or where three years have elapsed since the grant of letters within the State. Code Civ. Proc., § 1844, following 2 R. S. 109, § 53; see Selover v. Coe, 63 N. Y. 438.

The action is not to enforce but to acquire the lien. Rogers v. Patterson,

79 Hun, 483, affd. 150 N. Y. 560.

A decree for deficiency cannot be obtained against them in a foreclosure suit. Leonard v. Morris, 9 Paige, 90; Roe v. Swezey, 10 Barb. 247.

Infancy of the defendants is no bar to the action, but execution cannot issue against infants until one year after judgment and judgment-roll filed. Code Civ. Proc., § 1858; so formerly by 2 R. S. 454, § 43; 455, § 54.

A suit at law against the prior parties was formerly an essential preliminary to a right to sue the devisee's heirs. The heirs were to be sued jointly in equity. Stuart v. Kissam, 11 Barb. 271. But now an action need not be first brought against the personal representative. Code Civ. Proc., § 1848.

An heir takes an absolute title to the land descended, subject only to be defeated or charged with the debts of the testator or intestate, either by be defeated or charged with the debts of the testator or intestate, either by the representatives or the creditors taking the steps authorized by statute; but the debts due by a decedent, or advances made for the estate, are not a lien or charge upon the land in the possession of the heir, in law or equity. Wilson v. Wilson, 13 Barb. 252.

Under the provisions of the Revised Statutes, heirs or devisees who had not alienated any part of the property descended or devised to them, could not be charged personally for the debts of the testator or intestate; nor were they personally liable for contribution for the payment of such debts.

The judgment or decree could only direct a satisfaction of their portion of the debt out of the estate so descended or devised. Schermerhorn v. Bar-

hydt, 9 Paige, 28. Cf. Code Civ. Proc., § 1852.

The above case of Schermerhorn v. Barhydt fully reviews all the old proceedings against heirs and devisees, and the provisions of the Revised ceedings against neirs and devisees, and the provisions of the Revised Statutes and the laws prior to them, affecting heirs and devisees. See also Johnson v. Corbett, 11 Paige, 265; Wilkes v. Harper, 1 N. Y. 586; Mersereau v. Ryers, 3 id. 261; Roe v. Swezey, 10 Barb. 247; Stewart v. Kissam, 11 id. 271; Sandford v. Granger, 12 id. 392; Loomis v. Tifts, 16 id. 541; Roosevelt v. Carpenter, 28 id. 426; Morris v. Mowatt, 2 Pai. 586; Wood v. Wood, 26 Barb. 256; Kellogg v. Olmstead, 10 How. Pr. 487; Herkimer v. Rice, 27 N. Y. 163; Hyde v. Tanner, 1 Barb. 75; Lane v. Doty, 4 id. 539; Waring v. Waring, 3 Abb. 246; Ferguson v. Broome, 1 Brad. 10; Traud v. Magnes. 49 Super. 309 Magnes, 49 Super. 309.

These cases give the manner of procedure in obtaining judgments against heirs and devisees, and the effect and lien of such judgments. See also, infra,

Chap. XVIII, as to sale of lands by order of surrogate to pay debts.

Notice of Charge on Land .- Persons taking title through an instrument creating a charge or raising an equity are charged with notice thereof and take the land cum onere. Salisbury v. Morss, 7 Lans. 359, affd., 55 N. Y. 675; Cambridge Valley Bk. v. Delano, 48 id. 326.

CHAPTER XV.

TITLE BY DEVISE.

I .- THOSE CAPABLE OF MAKING A WILL. TITLE

II .- DEVISES, TO WHOM MADE.

III .- NATURE OF THE ESTATE DEVISED.

IV .- EXTENT OF THE ESTATE DEVISED.

V.— As to Lands Acquired After Will Made.
VI.— Execution of Wills.
VII.— Revocation and Cancellation of Wills.
VIII.— Lapse of Devises.
IX.— General Rules of Construction.

X .- DEVISES TO CORPORATIONS.

A "Last Will and Testament" is a disposition of real or personal property, to take effect after the death of the testator.

During the earlier periods of the English common law, lands held in tenure were not devisable, except through a devise of the use; subsequent statutes, however, in time, gave the right to dispose of every estate in real property, by will.

The form, construction, and efficacy of devises of real estate involve numerous and important principles; and so intricate and extensive is the law on the subject, as to render impossible, in this volume, more than a general reference to it.

The English law of devises was incorporated into our colonial jurisprudence; and the statutory regulations on the subject, in this State, are framed upon the English statutes of 32 Hen. VIII, 29 Charles II, and 25 George II. These acts were also probably in force in this Province.

By the Duke of York's laws a right to make wills was recognized as part of the socage tenure.

TITLE I. THOSE CAPABLE OF MAKING A WILL.

By the earlier statutes of New York (see an act to reduce the laws concerning wills into one, Statute 3d March, 1787, I Greenl. 386; the Act of 20th Feb. 1801, Chap. 9, Laws of 1801; 1 R. L. 364), substantially re-enacted in the Revised Statutes (2 R. S. 56), all persons except idiots, persons of unsound mind, married women and infants, may devise their real estate by a last will and testament, duly executed according to the statutes.

By L. 1867, Chap. 782, § 3, the words "married women" are stricken out

of the excepting clause.

The words "not being a married woman" were also stricken out of the section as to wills of personal property (2 R. S. 60, § 21); see L. 1867, Chap. 782, § 4; and such women might become executrices, administratrices,

and guardians, and give bonds as such, as if sole.

The Statute of 1787, consolidating the old English Statutes of Wills (1 Greenl. 386), gave the power of devise to persons having sole estate or interest in fee, or any estate of inheritance, or to persons seized as tenants in common or coparceners of estates of inheritance in lands, rents, and other hereditaments, in possession, remainder, or reversion, etc., also estates, pur autre vie, etc. The subsequent provisions of the statute law (L. 1801, Chap. 9; I R. L. 364) dropped the word seized, and gave the power of devising to all persons having estates of inheritance either in severalty or common (except bodies politic or corporate). The above statutes were incorporated in the Revised Laws of 1813, and were superseded by the provisions of the Revised Statutes, of 1830, and later by the provisions of the Real Property

Under the above statutes, a devise of a right of entry was good, notwithstanding an actual disseizin or adverse possession. Such right would also pass by descent, or be bound by a judgment. Varick v. Bacon, 7 Cow. 138,

affd., 2 Wend, 166.

Married Women.—A married woman, by the common law. was considered to be incapable of making a valid will of lands. even with the consent of the husband, and without any statutory prohibition to that effect.

Notwithstanding, however, the prohibition against the making of wills of real estate by married women, by the common law, and as contained in the English statutes, which were re-enacted in this State, a married woman was competent to appoint, by a will, the uses of land, where a power for that purpose had been reserved by or given to her by some conveyance competent to raise and to direct the execution of such uses; or where land had been conveyed in trust for her benefit, with a like power of appointment.

Her devise by way of appointment was held as not an infringement of the law or the statutes, because her action was supposed to be through a delegation of a power, and she was a mere donee of a use, acting, in other words, as the instrument or attorney of another. When the power was executed, the person in whose favor the appointment was made became invested with the use, and instantly gained the legal estate by force of the Statute of Uses.

A married woman in this State could not, until the passage of the act respecting married women in 1849 (Supra, p. 88), make a will of her real estate, except by virtue of such power, or by way of appointing a use; but where she was clothed with such power, her coverture formed no impediment to the transaction.

also a principle of the law, that a formal conveyance to uses, or to trustees upon trusts to be executed by virtue of a power, was unnecessary; and marriage articles, and ante-nuptial contracts, in which the husband gave his intended wife power to dispose of her real estate, might be enforced in the same manner as if there were a formal conveyance.

The Revised Statutes, it will be remembered, specially excluded the exercise of a power by a married woman during infancy. This provision was omitted from the Real Property Law, as obsolete. Chap. XII, Tit. VI.

If the appointment authorized was not made, then the estate given passed to the parties otherwise entitled to it by law.

As to the above principles, vide Osgood v. Breed, 12 Mass. 525; Peacock v. Monk, 2 Ves. Sen. 190, 191; Fettiplace v. Gorges, 1 Ves. Jun. 46; Wagstaff v. Smith, 9 id. 520; 1 Sugden on Powers, 210, 211; Jacques v. M. E. Church, 17 Johns. 548; Stewart v. Stewart, 7 Johns. Ch. 229; Thomlinson v. Dighton, 1 P. Wms. 149; Bradish v. Gibbs, 8 Johns. Ch. 523; Wright v. Cadagan, 6 Brown's P. C. 156; Wadhams v. Am. Miss. Soc., 12 N. Y. 415, revg. 10 Barb. 597; Van Wert v. Benedict, 1 Brad. 114; Brown v. Torrey, 25 Barb. 283; and vide supra, pp. 340, 341, "Powers."

The above principles of law would not apply to wills of personal property, for the statute of uses had no reference to such property.

erty, for the statute of uses had no reference to such property.

Power of Married Women to Devise Under the Acts of 1848, 1849 .- As to married women's powers under the Acts of 1848-49, to dispose of their real estate as if sole, *vide supra*, pp. 91, 92, where the constitutionality of those acts, as affecting real estate acquired before those acts went into effect, is reviewed.

It was held that married women, by the Married Woman's Act of 1849 (supra, p. 88), were competent to devise and bequeath real and personal property in the same manner and with like effect as if they were unmarried. But not if they are infants. Zimmerman v. Schoenfeldt, 6 Supm. 142.

A mutual will by husband and wife, each devising to the other, is valid.

Matter of Diez, 50 N. Y. 88.

Will of two persons contained in one instrument held valid. Matter of Raupp, 10 Misc. 300, citing Matter of Diez, 50 N. Y. 88.

It has been held that the Married Woman's Act of 1848 did not give them power to make a will. Wadhams v. American, etc., Missionary Society, 12 power to make a will. Wadhams v. American, etc., Missionary Society, N. Y. 415, revg. 10 Barb. 597; Waters v. Cullen, 2 Brad. 354.

See further as to married women and their power under subsequent acts and decisions to make wills, supra, Chap. III, Tit. III.

Joint Tenants.—A joint tenant while such has not an interest which will pass by will.

2 R. S. 57, § 2; 4 Kent, 606; see infra, Tit. III, this chapter.

Persons of Unsound Mind .- The legal presumption at common law and under our statutes is, that every man is compos mentis. As to what weakness or unsoundness of mind is necessary in order to disqualify a person from making a will, the decision in each particular case would be so dependent upon the facts involved in it, that it would be impossible for courts to lay down any general rule or guiding principle. To avoid a will on the ground of the mental disability of the testator, however, it is not enough that the testator be of weak understanding, or may, at some former period, have been of feeble intellect or laboring under some disability; but the question is, had he capacity to make a will at the time of the execution of the instrument? Until the contrary appears, sanity is presumed; and where an act is sought to be avoided on the ground of mental disability, the burden of proof is on the party who alleges the disability. It is also held, that mere erroneous, foolish, or even absurd opinions on certain subjects do not indicate insanity when the person entertaining them still continues in the possession of his faculties and discreetly conducts his business affairs, and there is no entire loss of intellect. The following are some of the leading cases on the above subject:

Thompson v. Thompson, 21 Barb. 107; Newhouse v. Godwin, 17 Barb. 236; Alston v. Jones, id. 276; Delafield v. Parish, 25 N. Y. 9, disapproving Stewart's Ex'r v. Lispenard, infra; Thompson v. Quimby, 2 Bradf. 261, affd., 21 Barb. 107; Brown v. Torrey, 24 id. 583; Watson v. Donnelly, 28 id. 653; Austin v. Graham, 29 Eng. Law and Eq. 38; Van Alst v. Hunter, 5 Johns. Ch. 148; Gombault v. Pub. Ad., 4 Brad. 226; Stewart's Ex'r v. Lispenard, 26 Wend. 255; Clark v. Fisher, 1 Paige, 171. See also Jarman on Wills, Vol. 1, Chap. 13; Blanchard v. Nestle, 3 Den. 37; Matter of Hamersley, N. Y. Daily Reg., Jan. 8, 1886; Matter of Martin, 98 N. Y. 193; Potter v. McAlpine, 3 Dem. 108; La Bau v. Vanderbilt, 3 Redf. 384, 436; Snyder v. Sherman, 23 Hun, 139; Wade v. Holbrook, 2 Redf. 378.

A lunatic, under commission, if temporarily sane, may make a valid will. In re Burr, 2 Barb. Ch. 208; Eau v. Snyder, 46 Barb. 230.

Mere weakness, age, or failure of memory will not incapacitate a person from making a will. Reynolds v. Root, 62 Barb. 250; Crolius v. Stark, 64 id. 112; s. c., 7 Lans. 311; Horn v. Pullman, 72 N. Y. 269, affg. 10 Hun, 471; Lawrence v. Lawrence, 4 Week. Dig. 299; Children's Aid Soc. v. Leveridge, 70 N. Y. 387; Forman v. Smith, 7 Lans. 443; Ligg v. Myer, 5 Redf. 628; Townsend v. Bogart, id. 93; Cornwell v. Riker, 2 Dem. 354; Dobie v. Armstrong, 160 N. Y. 584; Matter of Brower, 112 App. Div. 370.

The term "unsound mind" is interpreted to be of like significance as "non compos mentis." Blanchard v. Nestle, 3 Den. 37; Stanton v. Weatherwax, 16

compos mentis." Blanchard v. Nestle, 3 Den. 37; Stanton v. Weatherwax, 16

A permanent "delusion" constitutes unsoundness, only if it impairs the testator's judgment and understanding in relation to subjects connected with the will, id.; Foweler v. Ramsdell, 4 Alb. L. J. 94; Bonard's Will, 16 Abb. Pr. N. S. 128; Lathrop v. Borden, 5 Hun, 560; Shaw's Will, 2 Redf. 107; Coit v. Patchen, 77 N. Y. 533; Calhoun v. Jones, 2 Redf. 34; Lathrop v. Am. Board of Foreign Miss., 67 Barb. 590; Merrill v. Rolston, 5 Redf. 220; Phillips v. Chater, 1 Dem. 533.

Mere eccentricity does not incapacitate. Hartwell v. McMaster, 4 Redf. 389; Brick v. Brick, 66 N. Y. 144, affg. 3 Hun, 617.

Nor do mere habits of intemperance. McLaughlin's Will, 2 Redf. 505; Estate of Moneypenny, 1 Month. Law Bul. 7.

Nor mere imbecility. McGowan v. Underhill, 115 App. Div. 638.

Nor unreasonable prejudices. McLaughlin's Will, supra; Dobie v. Armstrong, 160 N. Y. 584.

If it be shown that the testator, at the time of the execution of the will, was possessed of sufficient intelligence to comprehend the condition of his property, his relations to those who were the objects of his bounty, and the scope and meaning of the provisions of his will, and that the making thereof was his free act, the will should be admitted to probate. Matter of Lewis, 81 Hun, 213; McGown v. Underhill, 115 App. Div. 638. A permanent "delusion" constitutes unsoundness, only if it impairs the

Questions of fact arising in actions to determine invalidity of a will must be determined by the jury as in other actions, though wills are not to be set aside by juries except for gravest reasons. Hagan v. Scne, 174 N. Y. 317, revg. 68 App. Div. 60; Byrne v. Byrne, 109 App. Div. 476; Smith v. Holden, 128 App. Div. 128.

Verdict against the weight of evidence set aside. Heyser v. Morris, 110

It seems expert testimony may lay a basis sufficient for the submission to the jury. Byrne v. Byrne, 109 App. Div. 476. For procedure to test the validity of a will, see Code Civ. Proc., § 2653a.

Undue Influence.— Wills may also be rendered invalid by the exercise of undue influence or duress, or by importunity so exercised over a testator of infirm or feeble mind as to impair the freedom of his will and action, especially if exercised by parties who stand in a confidential and intimate relation with him. Some of the prominent cases on the subject in our courts are the following:

Tunison v. Tunison, 4 Bradf. 138; Waterman v. Whitney, 11 N. Y. 157; O'Neil v. Murray, 4 Bradf. 311; Coffin v. Coffin, 23 N. Y. 9. See also Jarman on Wills (4th ed.), 4; Newhouse v. Godwin, 17 Barb. 236; Reynolds v. Root, 62 Barb. 250; Forman v. Smith, 7 Lans. 443; Seguine v. Seguine, 4 Abb. App. Cas. 191.

The mere fact that the mind of a testator has been influenced by the suggestions, arguments or persuasions of the person principally benefited, however indecorous, indelicate or improper they may be, will not, ordinarily, in the absence of fraud, vitiate a will where a testator is in possession of his faculties. Still, it must be the will of the testator, however induced. If it be the will of another, to which the testator assented from mere habit, and that habit produced by prostration of both body and mind, it cannot be considered his will, and ought not to be sustained. Newhouse v. Godwin, 17 Barb. 236; Tunison v. Tunison, 4 Bradf. 138; O'Neil v. Murray, id. 311; Blanchard v. Nestle, 3 Den. 37; Rollwagen v. Rollwagen, 63 N. Y. 504; Brick v. Brick, 66 id. 144; Rider v. Miller, 86 id. 507.

As a general rule, however, a competent testator may make whatever will As a general rule, however, a competent testator may make whatever will he chooses, though it be unjust and unreasonable. Children's Aid Soc. of N. Y. v. Leveridge, 70 N. Y. 387; Wade v. Holbrook, 2 Redf. 378; Snyder v. Sherman, 23 Hun, 139; Copeland v. Van Alst, 9 Week. Dig. 407; Hazard v. Hazard, 5 Supm. 79; Van Kleeck v. Phipps, 4 Redf. 99, affd. in 22 Hun, 541; cf., 4 Redf. 455, 477; Swenarton v. Hancock, 9 Abb. N. C. 326, mem.; s. c., 84 N. Y. 653, affg. 22 Hun, 38; Bicknell v. Bicknell, 2 Supm. 96; Tucker v. Field, 5 Redf. 139; Merrill v. Rolston, id. 220; Ewan v. Perrine, id. 640; Matter of Marx, 8 N. Y. Daily Reg., March 29, 1886; Hazard v. Hefford, 2 Hun, 445, explained, Van Kleeck v. Phipps, 3 Redf. 98, 127, and questioned in McCov v. McCov 4 id. 54 58. Cf. Marx v. McGlynn, 88 N. Y. questioned in McCoy v. McCoy, 4 id. 54, 58. Cf. Marx v. McGlynn, 88 N. Y.

357; Wait v. Breeze, 18 Hun, 403.

That instructions for the will have been given by a beneficiary will not invalidate it. Stein v. Wilzinski, 4 Redf. 441.

Knowledge of Contents .- To sustain the probate of a will it must be shown to the satisfaction of the trial court by direct proof, or as a legal inference from the evidence, that the testator was not only competent to make it, but that he knew its contents. Matter of Hall, 5 Misc. 461.

The fact that a testator was fully apprised of the testamentary character of the instrument sought to be probated as a codicil to his last will and testament, may be considered in aid of the proofs tending to establish the publication thereof. Any act of a testator, in the presence of the witnesses, at the time of the execution of his will, which tends to show that he desired to publish the paper as his will and that he wished the witnesses to execute it may be considered. Matter of Hardenburg, 85 Hun, 580.

TITLE II. DEVISES, TO WHOM MADE.

§ 3. Such devise may be made to every person capable by law of holding real estate; but no devise to a corporation shall be valid, unless such corporation be expressly authorized by its charter, or by statute, to take by devise.

2 R. S. 57, § 3.

Illegitimate Children would not take under a devise generally to children, unless such intent was manifested. Collins v. Hoxie, 9 Paige, 81; Gardner v. Heyer, 2 Paige, 11. But children of a second marriage after a divorce not recognized in this State will not take under the term "lawful issue." Olmsted v. Olmsted, 190 N. Y. 458.

Aliens.—At common law an alien could take by devise, except as against the State. Wadsworth v. Wadsworth, 12 N. Y. 376. Devises to alien not authorized by statute to hold real estate were made void by statute, and the estate devised passed to the heirs or devisees of the testator. 2 R. S. 57, § 4. The law on the rights of aliens has been completely changed and devises to aliens are now in many respects valid. Vide supra, Chap. III, Tit. IV, "Aliens," p. 95 to 110.

Heirs of One Living.—A general devise to the heirs of a person who is then living, but is not referred to as living, is void; but a devise to the heirs of one who is stated in the will to be living, is a valid disposition in favor of those who would be his heirs, if he should then die. Heard v. Horton, 1 Den. 165.

But a devise of a future estate to the "heirs," in a strict sense, of a living person, is a valid limitation, and the rule construing the word "heirs," used in a will in respect to a living person, as merely designatio personarum, is inapplicable to the devise of a future estate. In such case the word has its strict legal meaning, and carries the inheritance, unless a different intention appears clearly from the context. Campbell v. Rawden, 18 N. Y. 412, rvg. 19 Barb. 494.

Where the word "heirs" is used in a will, and there are no other words to control the presumption, the legal inference is, that it designates the persons whom the law appoints to succeed to the inheritance, in cases of intestacy.

Citizens.— Every citizen of the United States is capable of holding lands within this State, and of taking the same by descent, devise or purchase. Real Property Law, § 2; 1 R. S. 719, § 8. Vide supra, p. 61.

Devise to a Class.—A devise to a class of persons takes effect in favor of those who constitute the class at the death of the testator, unless a contrary intent can be inferred from some particular language of the will, or from such extrinsic facts as may be entitled to consideration in construing its provisions. Matter of Barr, 147 N. Y. 348.

To a Government.—It has been held that a devise to the Government of the United States, or to a State government, was void, as such governments were incompetent to act as trustees, they being created for certain determinate political purposes, and having no other functions or existence. Levy v. Levy, 33 N V 97 rvg 40 Barb 585

33 N. Y. 97, rvg. 40 Barb. 585.

It is held that neither under the common law nor under our statutes regulating devises to corporations, can a devise of land to the United States be held valid, nor can the United States act as trustee. In re Fox, 63 Barb.

157, affd., 52 N. Y. 530, and reaffd., 4 Otto, 315.

In the case of Burrill v. Boardman, 43 N. Y. 254, cited at length, supra. p. 307, it was stated to be a doubtful question whether a devise and bequest or residuary estate to the United States, with precatory words creating a trust, would be valid. It is suggested, in view of the above and other decisions bearing on the subject, that a bequest of personalty or of the proceeds of realty to the Government or to a State without any words of qualification or trust, would be valid, although a direct devise of real estate might be invalid. Vide infra, more fully as to this subject, "Devises to Corporations," Tit. X.

Infants, Femes Coverts, etc .- Infants, femes coverts, persons of unsound mind, and aliens may be devisees, for the devise is without consideration and requires no action on their part.

To a Church.—A devise to a church is valid, if the property is to be applied to the uses of the church. Cammeyer v. United German Lutheran Church, etc., 2 Sandf. Ch. 186; People v. Fulton, 11 N. Y. 94; Christie v. Gage, 2 Supm. 344, affd., 71 N. Y. 189.

Witnesses.— Beneficial devises, legacies and any interest or appointment to a witness to a will, if the will cannot be proved without the testimony of such witness, are void so far as the witness is concerned, or those claiming under him; but he is a competent witness, and may be made to testify. If he would have been entitled to any share in the estate, however, in case the will was not established, that will be saved to him to an amount not exceeding the value of the devise or bequest made to him in the will, in proportion to and out of the parts devised and bequeathed to the devisees or legatees.

1 R. L. 367; 2 R. S. 65, §§ 50, 51; Burrit v. Silliman, 13 N. Y. 93; Code

Civ. Proc., §2544.

Where legatees under a will are subscribing witnesses to a codicil indorsed upon it, it does not preclude them from taking under the will, where it alone is proved and the codicil does not benefit them and is not necessary to the proof of the will. Matter of Johnson, 37 Misc. 334.

Under the statutes in force before the Revised Statutes, a devise since

March 1, 1753 to a witness, was absolutely void, except charges to pay debts to them. Jackson v. Denniston, 4 Johns. 311; 1 Green, 386.

The above statute would not apply to legacies or devises in trust. McDonough v. Loughlin, 20 Barb. 238. Nor to executors. Children's Aid Soc. v. Loveridge, 70 N. Y. 387; Rugg v. Rugg, 83 id. 592. As to creditors. Code Civ. Proc., § 2544.

Nor to a nonresident witness whose testimony is unnecessary; nor to one of three who is not examined. Caw v. Robertson, 5 N. Y. 125, 128, revg. 3 Barb. 410; Cornwell v. Wooley, 47 Barb. 327; 41 id. 200, affd., 1 Abb. Ct.

App. Dec. 441; Pruyn v. Brinckerhoof, 7 Abb. 400.

Devises to Corporations in Trust.—As to these, vide supra, Chap. X, p. 307, and infra, Tit, X.

Devises to Corporations.—As to these, vide infra, Tit. X; and Chap. XXIV.

Devises for Charitable Uses.— As to these, vide supra, Chap. X. Tit. VIII.

TITLE III. NATURE OF THE ESTATE DEVISED.

Every estate and interest in real property descendible to heirs, may be devised.

2 R. S. 57, § 2; Real Property Law, § 49.

A mere expectancy, or a naked possibility of interest was considered not devisable, or even assignable, before the Revised Statutes, although all possibilities coupled with an interest (as the interest under a contingent remainder, or executory devise, or future or springing use) were devisable.

But not the mere possibility of an expectant heir, nor an interest in an estate settled in the alternative on a contingency of survivorship, the person to take not being ascertained. The testator had to have a legal or equitable to take not being ascertained. The testator had to have a legal or equitable title at the time of making the will, or nothing would pass. A title subsequently acquired was of no avail. 3 Johns. Ch. 307; id. 312. See Jackson v. Waldron, 13 Wend. 178, affg. Pelletreau v. Jackson, 11 Wend. 110, as to the transfer of expectant estates or possible interests before the Revised Statutes. The case of Miller v. Emans, 19 N. Y. 384, however, seems in a measure to have modified or overruled the decisions in those cases, and to hold that a future possible contingent interest might pass, even before the Revised Statutes, at least by release. See also the case of Lintner v. Snyder, 15 Barb. 621. And see *supra*, p. 230, other cases cited.

It has been held that a devise of a right of entry to land held adversely, would pass the right. Jackson v. Varick, 7 Cow. 238; 2 Wend. 166.

The interest of the tenant in a lease in fee is devisable. Vanderzee v. Vanderzee, 30 Barb. 331, affd., 36 N. Y. 231; and see supra, p. 142.

The Statute of 1787, supra, p. 404, gave the power of devise to persons in severalty and to those seized in common of estates of inheritance in lands, rents and other hereditaments in possession, remainder or reversion. The subsequent provisions of statute dropped the word "seized," and gave the power of devising to persons having estates of inheritance, etc., either in severalty or in common.

By the Revised Statutes expectant estates were made descendible, devisable, and alienable in the same manner as estates in possession.

1 R. S. 725, § 35. See Real Property Law, § 49.

A possibility coupled with an interest is devisable, if the person in whom the interest is to vest can be ascertained; and the Revised Statutes in terms declared that every interest which is descendible may be devised, and this embraces all contingent interests.

Lawrence v. Bayard, 7 Paige, 70; Freeborn v. Wagner, 49 Barb. 43, affd., 4 Keyes, 27; Striker v. Mott, 28 N. Y. 82; Upington v. Corrigan, 151 id. 143; Fowler, Real Property Law (2d ed.), 313.

Lands.—The term "lands" in a will is synonymous with real estate, and, unless restrained by something else, embraces future and contingent, as well as present, freehold estates in land, also rent charges. Pond v. Bergh, 10 Paige, 142; Hunter v. Hunter, 17 Barb. 25, 84; Main v. Green, 32 id. 448.

Definition of "Real Estate," and "Lands" by the Revised Statutes .- The terms "real estate" and "lands," as used in the Revised Statutes, Chap. I, Tit. V, Pt. II, shall be construed as coextensive in meaning with "lands, tenements and hereditaments." 1 R. S. 750, § 10.

Real Property.— This term includes real estate, lands, tenements and hereditaments. Laws of 1892, Chap. 677, known as the Statutory Construction Law.

Definition of "Real Property" and "Lands" by the Real Property Law.— The terms "real property" and "lands" as used in this chapter (G. L., Chap. XLVI) are coextensive in meaning with lands, tenements and hereditaments. Real Property Law, § 1.

The Word "Estate."—" Estate," used in a devise, refers to the testator's title, and indicates an intent to give all the estate or interest in the property which the testator can dispose of by will, unless by express terms or by necessary implication it appear that it was used as descriptive of, or referring to, the *corpus* of the property; but it may be controlled by other portions of the will. Terry v. Wiggins, 47 N. Y. 512.

Effect of the Revised Statutes on Vested Interests.— By I R. S. 750, § II, none of the provisions of the chapter, except those converting formal trusts into legal estates, were to be construed as altering or impairing any vested estate, interest or right; or as altering or affecting the construction of any deed, will, or other instrument which should have taken effect at any time before Chap. I. was in force as a law.

This Chap. I refers to real property, estates, etc.

Real Property Law.— Following the above provision of the Revised Statutes it is declared that this chapter (G. L., Chap. XLVI) does not alter or impair any vested estate, interest or right, nor alter or affect the construction of any conveyance, will or other instrument, which has taken effect at any time before this chapter becomes a law.

Real Property Law, § 1.

Conversion by Virtue of a Power.—A conversion of the nature or quality of the subject devised is often operated through a power of sale conferred by the testator upon his executors or trustees.

Lands which have been agreed or directed to be sold, are considered under the rules of equity as money. Money which has been agreed or directed to be laid out in the purchase of land, is considered as land, and therefore, in equity, money directed to be laid out in land will not pass by will, unless devised as if the property were land; but land directed to be converted into money will pass by a will competent to pass money. Where a direction to invest the proceeds of land in land fails from illegality, the fund is still regarded as land, and descends. As a general rule to cause a conversion from real estate to personal, the will should decisively and definitely fix upon the land the quality of money, and leave no option.

A devisor may give to his devisee either the land or the price of the land at his pleasure; and the devisee must receive it in the quality in which it is given, and cannot intercept the purposes of the testator. And if the general scope of a will renders it evident that sales of the whole real estate were intended, this would

amount to a conversion of the same into personalty, to all intents: and the beneficiaries would so take the property.

Meakings v. Cromwell, 5 N. Y. 136; Horton v. McCoy, 47 id. 21; Arnold v. Gilbert, 5 Barb. 190; White v. Howard, 52 id. 296, affd., 46 N. Y. 144; Marsh v. Wheeler, 2 Edw. 156; Bunce v. Vandergrift, 8 Paige, 37; Johnson v. Bennett, 39 Barb. 237; Hays v. Gourley, 3 Supm. 115; Gourley v. Campbell, 66 N. Y. 169; Moncrief v. Ross, 50 id. 431, 434; Hatch v. Bassett, 52 id. 359; Tillman v. Davis, 95 id. 17; Finley v. Bent, id. 364; Hood v. Hood, 85 id. 561; Wetmore v. Parker, 52 id. 450.

In such case the title descends to the heirer, subject to be divested by the execution of the power. Nooner v. Benneyman, 54 Super 227, or the

the execution of the power. Noonan v. Bennerman, 54 Super. 337; or the devisee, Clift v. Moses, 112 N. Y. 426; 116 id. 144.

Direction to invest estate in specified securities operates as an equitable conversion. Asch v. Asch, 18 Abb. N. C. 82; distg. Hobson v. Hale, 95 N. Y. 588, and Gourley v. Campbell, 66 id. 169.

A bequest of proceeds of realty to be sold after death of life-tenant is personalty. Riley v. Diggs, 2 Dem. 184.

Where, however, in the case of a power to sell lands to executors. the exercise of the power is not obligatory, but discretionary, the power does not effect a conversion of the real into personal estate. A mere power to sell, therefore, without a direction so to do, will not operate a change in the subject-matter of the devise, unless the intent of the testator is manifest to the contrary.

Fowler v. Depau, 26 Barb. 224; Dominick v. Michael, 4 Sandf. 374; White v. Howard, 46 N. Y. 144; Harris v. Clark, 7 id. 237; Lovett v. Lovett, 44 Barb. 560; Phelps v. Phelps, 28 id. 121, modified and affd., 23 N. Y. 69; In re Fox, 63 Barb. 158, affd., 52 N. Y. 530; McCarty v. Deming, 4 Lans. 440; Gourley v. Campbell, 66 N. Y. 169; Hobson v. Hale, 95 id. 588; Henderson v. Henderson, 113 id. 1; Trowbridge v. Metcalf, 5 App. Div. 318, 321; Chamberlain v. Taylor, 105 id. 185; Matter of McComb, 117 id. 378; Clements v. Babcock, 26 Misc. 90, 97; Matter of Traver, 161 N. Y. 54, 57; Matter of Tatum, 61 App. Div. 513; Matter of Hammond, 74 id. 547, 557; Russell v. Hilton, 80 id. 178; Matter of Coolidge, 85 id. 295; Phoenix v. Trustees of Columbia College, 87 id. 438, 444.

It is always a matter of intention. Read v. Williams, 125 N. Y. 560.

The equitable conversion theoretically takes place at the time prescribed in the will for it to be made, or, if no time is fixed, from the death of the testator. Chamberlain v. Chamberlain, 43 N. Y. 424; Irish v. Huested, 39 Barb. 411; Arnold v. Gilbert, 5 id. 190; In re Lee, 3 Bradf. 186.

If the testator authorize his executors to sell real estate, and it is apparent, from the general provisions of the will, that he intended such estate to

from the general provisions of the will, that he intended such estate to be sold, the doctrine of equitable conversion applies, although the power of sale is not in terms imperative. Dodge v. Pond, 23 N. Y. 69; Lent v.

Howard, 89 id. 169.

An absolute direction to sell, but at the discretion of the executors as to

An absolute direction to sell, but at the discretion of the executors as to time or manner, effects a conversion. Martin v. Sherman, 2 Sandf. Ch. 341; Harris v. Clark, 7 N. Y. 242; Graham v. Livingston, 7 Hun, 11; Fisher v. Banta, 66 N. Y. 468; Flanagan v. Flanagan, 8 Abb. N. C. 413.

Conversion by implication cannot be made so as to make void the provision of the will. Bonard's Will, 16 Abb. Pr. N. S. 128.

Where the power of sale is restricted to a sale to pay debts, or to raise money for a certain purpose; and then a distribution is to be made of the "avails" of the estate, the power would not work an equitable conversion, but the lands descend to heirs, subject to the exercise of the power. Allen v. Dewitt. 3 N. Y. 276. v. Dewitt, 3 N. Y. 276.

A devise to a wife for life, in lieu of dower, of a part of rents of real estate, so long as it should remain unsold, will not operate a conversion.

Arnold v. Gilbert, 3 Sandf. Ch. 352, revd. in part-in 5 Barb. 190.

Where land is directed to be sold for a specified purpose, and not absolutely, the estate, in equity, is considered controverted pro tanto. In case the purpose fail in whole or part, the entire estate in the one case, and the part in the other, is regarded as undisposed of by the will and so goes to the heir at law; in case of partial failure, however, if the purposes of the will require that the conversion should take place, the part in respect to which the failure occurred goes to the heir as money, and not as land. Bogert v. Hertell, 4 Hill, 492. Vide infra.

A contract of sale of lands devised as such will be held personal estate.

Smith v. Gage, 41 Barb. 60.

A power to executors, if for an invalid purpose, will not make a conversion. McCarty v. Deming, 4 Lans. 440; In re Fox, 63 Barb. 157, affd., 52 N. Y. 530, affd., 94 U. S. 315.

See also as to conversion by a power, supra, p. 379.

Failure of Object.—If the object for which the conversion of lands is directed fails in whole or part, there is no equitable conversion of the whole, and there is a resulting trust in favor of the heirs at law, pro tanto. Hawley v. James, 7 Paige, 213; De Peyster v. Clendenning, 8 id. 295; 26 Wend. 21; McCarty v. Terry, 7 Lans. 236; and see supra.

Election to Prevent Conversion.—The beneficiary may elect to prevent a conversion and hold the property as it is, if the rights of the others are not affected. Van Wart v. Underhill, 12 Barb. 113; Prentice v. Jansen, 79

Heirs, whose lands are directed to be sold, may take them and alien their interests, subject to the power of sale. *Id*.

As to right of beneficiaries entitled to the proceeds to elect to take the land itself, Foote v. Bruggerhof, 84 Hun, 473, and cases cited.

Infants' Estates.—It has been seen above, p. 378, that where the real estate of infants is converted in invitum into personalty, the fund is still in law treated as realty, until there can be a legal election and taking by the infant, when of age. See also Horton v. McCoy, 47 N. Y. 21. But this does not apply to an equitable conversion by virtue of the terms of the will. Hill v. Nye, 17 Hun, 457.

The principles, as gathered from the above cases, appear to be, that where there is an unqualified direction to convert money into land or land into money, the property will have the character so directed even in the case of devolution, before such character has in fact been assumed. But where there is a mere general power or discretion to change the quality of the estate, the succession will take effect according to the nature of the property at the time the succession attaches. In the latter case, until the power is exercised, if the property were real estate it remains and is to be considered as realty; but after it is exercised, and the conversion has been effected, the property must be treated as personalty; and where parties interested die subsequent to the sale, the succession would pass to their next of kin and not to their heirs at law. But if real estate were directed to be sold under a power, and to be distributed as personalty, if the person entitled to the proceeds die

before the execution of the power, such proceeds are to be distributed as the personal estate of the decedent, in the same manner as if the property had been sold before his death.

As to converted property, vide also supra, pp. 376 to 378, and Graham v. Livingston, 7 Hun, 11; Underwood v. Curtis, 127 N. Y. 523.

TITLE IV. EXTENT OF THE ESTATE DEVISED.

Before the Revised Statutes of 1830, a devise to a person generally, without the words "and to his heirs," or other sufficient word of inheritance or perpetuity, did not convey a fee, but merely a life estate, even where the devise was a remainder on a prior life estate.

Jackson v. Embler, 14 Johns. 198; Jackson v. Wells, 9 id. 222; Ferris v. Smith, 17 id. 221; Olmsted v. Harvey, 1 Barb. 102, affd., 1 N. Y. 483; Olmsted v. Olmsted, 4 id. 56; Vanderzee v. Vanderzee, 30 Barb. 331, affd.,

The mere word "assigns" did not carry a fee. Christie v. Phyfe, 19 N. Y. 344.

As great latitude, however, was extended to the construction of wills, in order to carry out the intention of the testator, strict and technical rules of law were made subservient to that intention, if it was clearly apparent that a fee was intended; and courts would look beyond the mere phraseology of the devise, and gather the intention of the testator from the whole instrument; and, in fact, as the enforcement of the rule generally defeated the intention of the testator, the courts have been astute in finding exceptions to it.

Thus if the land were given with a power of disposition, or with the words forever, or to him and his "blood" or his "children."

Also absolute charges imposed on the devisee, in respect to the lands devised, or duties that required a greater than a life estate, raised a fee by implication. Harvey v. Olmsted, 1 N. Y. 483; 1 Barb. 102; 7 id. 221; Olmstead v. Olmstead, 4 N. Y. 56; Mesick v. New, 7 id. 163; Dumond v. Stringham, 26 Barb. 104; Heard v. Horton, 1 Den. 165; King v. Ackerman, 2 Black, 408; Barheydt v. Barheydt, 20 Wend. 576. Though it seems a mere charge on the testator's estate generally, or on the lands, would not do it, unless there were other words showing an intent to devise a fee. Jackson v. Bull, 10 Johns. 148; Spraker v. Van Alstyne, 18 Wend. 200; Olmstead v. Olmstead, 4 N. Y. 56; Van Dyke v. Emmons, 34 id. 186; Chrystie v. Gage, 5 Lans. 139. The word "estate" in a devise passes a fee. Jackson v. De Lancy, 13 Johns. 537. Also "all my estate." Jackson v. Babcock, 12 Johns. 389; Pond v. Bergh, 10 Paige, 140. A devise sufficient to create an estate tail carries a fee since the statute abolishing entails. Grout v. Townsend, 2 Den. 336. Townsend, 2 Den. 336.

Thus, too, other words denoting an intention to pass the whole interest of the testator, a devise of all my estate, all my interest, all my property, my whole remainder, all I am worth or own, all my right, or my title, or all I shall die possessed of, and other like expressions, would carry an estate of inheritance if there be nothing in the other parts of the will to limit or contract the operation of the words. Pond v. Bergh, 10 Paige, 140; Rogers v. Ross, 4 Johns. Ch. 388; 4 Kent, 602; Jackson v. Merrill, 6 Johns. 185.

A fee would not be implied from a charge to "pay debts" on a devise of a life estate. Tanner v. Livingston, 12 Wend. 83. Where land is devised charged generally with debts, good title may be given in three years. White v. Kane, 51 Super. 295.

Where another fund than the devise is plainly indicated as an equivalent for the charge imposed, the devise is not enlarged into a fee by implication. Burlingham v. Belding, 21 Wend. 463.

A devise for life, with power of disposal annexed, would not enlarge the

estate into a fee, but an absolute power of disposition annexed to a general devise would pass a fee, and any subsequent limitation would be void. Jackson v. Robins, 16 Johns. 537; Jackson v. Bull, 10 id. 19; vide "Powers," supra, p. 342; and Terry v. Wiggins, 47 N. Y. 512.

where the introductory clause in a will shows the testator designed to dispose of his whole estate, a subsequent devise of lands, without words of perpetuity, may be held to convey a fee, that is if the subsequent parts of the will confirm such an intention. Vanderzee v. Vanderzee, 36 N. Y. 231.

Also, where it appears that the testator did not suppose words of inheritance to be necessary. Provost v. Colyear, 62 N. Y. 545. Devise to wife for life with remainder to son and his heirs vests an interest in the son and he and the widow can convey. Miller v. Caragher, 35 Hun, 485.

The Revised Statutes of 1830, however, as to wills made thereafter established a new rule in respect to the quantity of interest conveyed. It was declared that every grant or devise of real estate, or any interest therein, thereafter to be executed. should pass all the estate or interest of the grantor or testator, unless the intent to pass a less estate or interest should appear by express terms, or be necessarily implied in the terms of such grant. The word "heirs" or other words of inheritance are stated not to be requisite to create or convey an estate in fee.

1 R. S. 748, § 1; see Real Property Law, § 205. Byrnes v. Baer, 86 N. Y. 210.

This statutory provision does not apply to wills executed before Jan. 1, 1830, although the testator died after that day. Campbell v. Rawdon, 18 N. Y. 412, revg. 19 Barb. 494. Nor where there is no general devise except the intention so indicated. Quinn v. Hardenbrook, 54 N. Y. 83.

Devise to wife "to have and to hold for her benefit and support" carries

a fee. Crain v. Wright, 36 Hun, 74, affd., 114 N. Y. 307.

Lands Embraced in a Power to Devise.—These would pass by a will of all the real property of the testator, unless it were otherwise expressed. Bolton v. De Peyster, 25 Barb. 539.

v. De Peyster, 25 Barb. 539.

Under the above clause, also, all future and contingent interests would pass as well as present freehold estates. Pond v. Bergh, 10 Paige, 140.

But a mere possibility of a right of entry is not assignable, even since the Revised Statutes; they provide for a present right or interest, and a right to re-enter is not such. Nicoll v. N. Y. & E. R. R. Co., 12 N. Y. 121.

See also supra, Tit. IV, "Nature of the Estate Devised." Also Van Rensselaer v. Hays, 19 N. Y. 68, as to an implied enlargement of a devise. Section 205 of the Real Property Law provides: "The term heirs or other words of inheritance are not requisite to create or convey an estate in fee."

words of inheritance are not requisite to create or convey an estate in fee."

Devises Subject to an Incumbrance.— Vide infra, p. 426.

Devise of Lands Subject to a Mortgage.—Where real property, subject to a mortgage executed by any ancestor or testator, de-

scends to an heir, or passes to a devisee, such heir or devisee must satisfy and discharge the mortgage out of his own property, without resorting to the executor or administrator of his ancestor or testator, unless there be an express direction in the will of such testator, that such mortgage be otherwise paid.

Real Property Law, § 215; 1 R. S. 749, § 4.

This statute does not apply to an equitable lien growing out of a contract Ins statute does not apply to an equitable lien growing out of a contract of purchase of real estate; but in case of unpaid purchase money of real estate, the heir or devisee has the right to have the same paid out of the personal estate of the decedent. Wright v. Holbrook, 32 N. V. 587, affg. 18 Abb. 202; Johnson v. Corbett, 11 Paige, 265; see also as to this section, Halsey v. Reed, 9 id. 446, approved in Trotter v. Hughes, 12 N. Y. 74; Mollan v. Griffith, 3 Paige, 402; House v. House, 10 id. 158, 163; Mosely v. Marshall, 27 Barb. 42, revd., 22 N. Y. 200; Rapalye v. Rapalye, 27 Barb. 610; Roosevelt v. Carpenter, 28 id. 426.

A devise of land subject to a mortgage, however, gives no claim to the devisee for payment of the mortgage from the personalty, unless so directed in the will. Matter of Kene, 8 Misc. 102.

Where a decree in a foreign state directed an executor to pay a mortgage on realty of his testator situate in that state, it was held that the executor, acting under the laws of this State, could not be controlled by it. Rice v. Harbeson, 63 N. Y. 493.

Lien of Legacy Charged on Land .- A devise on condition that the devisee pay the legacies creates an equitable lien on land. Zweigle v. Hohman, 75

Hun, 377; Brown v. Knapp, 79 N. Y. 136.

The devisee in such case on accepting becomes personally bound. v. Western, 2 N. Y. 500; Gridley v. Gridley, 24 id. 130; Brown v. Knapp,

As to limitation of action to enforce this equitable lien, see Shannon v. Howell, 36 Hun, 47.

It is provided by § 388 of the Code of Civil Procedure that an action, the limitation of which is not specially prescribed in this or the last title, must be commenced within ten years after the cause of action accrues.

For a case where this section was held applicable and a lien of a legacy charged on land was held enforceable twenty-two years after testator's death, see Quackenbush v. Quackenbush, 42 Hun, 329.

Liability of lands devised to pay debts, see Chap. XIV, Tit. VII, supra.

Crops.—The devise of a farm carries "crops."

Bradner v. Faulkner, 34 N. Y. 347, criticized 2 Con. Surr. 237 at 242. See also Sherman v. Willett, 42 N. Y. 146.

Cemetery Lots.— See L. 1880, Chap. 566; Membership Corporations Law, G. L., Chap. XLIII, L. 1895, Chap. 559, § 49; L. 1898, Chap. 543.

Devise of Land Subject to Contract of Testator.—See infra, p. 424.

TITLE V. LANDS ACQUIRED AFTER THE WILL MADE.

Prior to the Revised Statutes, a will devising all the testator's real estate, would not pass lands subsequently acquired by him.

The rule of the common law was, that the testator must be seized of the lands at the time of making the will, the devise being considered in the nature of a conveyance or appointment of a particular estate.

By the Revised Statutes of 1830, however, it is enacted as follows:

"Every will that shall be made by a testator, in express terms, of all his real estate, or in any other terms denoting his intent to devise all his real property, shall be construed to pass all the real estate, which he was entitled to devise, at the time of his death."

2 R. S. 57, § 5.

This provision, it has been held, does not apply to a will executed before the Revised Statutes took effect, even if the testator had died subsequently to the enactment. Parker v. Bogardus, 5 N. Y. 309; Ellison v. Miller, 11 Barb. 332; Green v. Dikeman, 18 id. 535.

The words "all my real estate," held not to pass land held in trust, unless

an intention otherwise were apparent. Merritt v. The Farmers' Fire Ins. Co., 2 Ed. 547. Nor where the intention was apparent to limit the devise. Havens v. Havens, 1 Sand. Ch. 324.

All the testator's "real estate in a county" would, however, only pass what he owned in the county at the time of making the will. Pond v. Bergh, 10 Paige, 140. So "all lands that I now possess." Quinn v. Hardenbrook, 54 N. Y. 83, distinguished in Lent v. Lent, 24 Hun, 436.

A devise of real state, universal in its terms, would carry after-acquired lands without any language pointing to the period of the testator's death; but in the absence of unlimited terms in the will, there must be language which will enable the court to see that the testator intended it to operate upon real estate which he should afterward purchase. Lyons v. Townsend, 33 N. Y. 558; McNaughton v. McNaughton, 41 Barb. 50, affd., 34 N. Y. 201; Havens v. Havens, 1 Sand. Ch. 324; Quinn v. Hardenbrook, 54 N. Y. 83; Lyman v. Lyman, 22 Hun, 261.

The above provision is very liberally construed now. See Byrnes v. Baer, 86 N. Y. 210; Lent v. Lent, 24 Hun, 436.

Under the above provisions of the Revised Statutes, the rule of law is changed in some particulars in relation to lapsed devises passing to the heir instead of the residuary devisee, and a will whose introductory clause expresses a desire to "make a suitable disposition of such worldly property and estate" as the testator should leave behind him, the residuary clause expressly devising all his real estate not before specifically devised, would carry all after-acquired lands belonging to the testator at the time of his death, including a devise which had not taken effect by reason of the decease of the devisee before the testator.

The above case is distinguished from others establishing the rule above referred to, in that in the former case there is a supposed presumption of intendment in the testator's mind, from the facts of the case, that the prior devise might not take effect. Youngs v. Youngs, 45 N. Y. 254.

The case of Kip v. Van Courtlandt, 7 Hill, 346, also holds that where a codicil revokes a specific devise in a will, without making any further disposition of the property, it will in general pass to the residuary devisee. See also Bowers v. Smith, 10 Paige, 193; Redfield on Wills, Part 2, 444; 1 Jarman on Wills, 590, 591; Doe v. Weatherby, 11 East, 322; Wheeler v. Walroone, Aleyn, 285; James v. James, 4 Paige, 115; and see supra, p. 371, where this question is more fully reviewed; and infra, Title VIII.

TITLE VI. EXECUTION OF WILLS.

As to requisites of the execution of wills under the English statutes, and in this State before the Revised Statutes of 1830—

Vide Watts v. Pub. Admr., 4 Wend. 168; Jauncey v. Thorne, 2 Barb. Ch. 40; 1 Bradf. 291; 27 Barb. 556; Hunt v. Johnson, 19 N. Y. 279; 1 Greenl. 386; 1 Webs. 178; and the statutes of 1787 and 1801, supra, Title I. Also 1 R. L. 364.

A will of real or personal property, to be duly executed as required by the Revised Statutes, before it can be proved and recorded, must conform to the following provisions, it being first shown that the testator was in all respects *competent* to make a will, and not under restraint.

Code Civ. Proc., § 2623; 2 R. S. 58, § 10 (repealed by Laws of 1880, Chap. 245).

As to competency of testator, vide supra, pp. 406-408.

This subject is very voluminous and only a general glance can be had and a few leading cases cited; reference should be had to the volumes of digests of cases on the various point and distinctions relative to the execution of wills.

The requisites of execution, publication, proof, etc., were very fully discussed in the recent case of Matter of Hardenburg, 85 Hun, 580. Also, Matter of Landy, 78 id. 475.

1. It shall be subscribed by the testator at the end of the will.

2 R. S. 63, § 40.

Sisters of Charity v. Kelly, 67 N. Y. 409; Matter of Folts, 71 Hun, 492. Probate should not be refused because of the existence of a blank space before the clause appointing an executor, where the will is all in the testator's handwriting and apparently written at the same time. Matter of Sanderson, 9 Misc. 574.

The Laws of 1787 and 1813 required the will to be in writing, signed by the testator, or by some one in his presence and by his express direction.

The signature of a will at the request of a testator, in his persence, by a third person, is a sufficient execution. Mechan v. Rourke, 2 Brad. 385; Lewis v. Lewis, 13 Barb. 17; 11 N. Y. 220; Robins v. Coryell, 27 Barb. 556. Subscribing by making a mark, and declaring the instrument to be testator's will, immediately thereafter, is sufficient. Keeney v. Whitmarsh, 16 Barb. 141; Chaffee v. Baptist Miss'ry, etc., 10 Paige, 86; Jackson v. Jackson, 39 N. Y. 153; Robins v. Coryell, 27 Barb. 556; Butler v. Benson,

1 id. 526.

The writing of the testator's name, with the words "his mark," done by a third person, to identify the testator's subscription by a mark, is held sufficient. Jackson v. Jackson, 39 N. Y. 153; Hartwell v. McMaster, 4 Redf. 389.

Another paper referred to and described in the will, which serves merely to identify the property devised or to explain the provisions of the will, makes part of it, and need not be subscribed or attached. Tonnele v. Hall, 4 N. Y. 140; Van Wert v. Benedict, 1 Bradf. 114. But this rule does not

apply where the other paper itself contains testamentary provisions.

of O'Neil, 91 N. Y. 516. See also Matter of Brand, 68 App. Div. 225.

The signature of the testator may be after the attestation clause. Younger v. Duffie, 94 N. Y. 535. But other matter cannot follow it. In re Conway's Will, 124 N. Y. 455; Re Blair, 84 Hun, 581. But he must sign before the witnesses do so. Sisters of Charity v. Kelly, 67 N. Y. 409; Rugg v. Rugg, 83 id. 592; Mitchell v. Mitchell, 16 Hun, 97, affd., 77 N. Y. 596, doubted and criticised, 45 Hun, 4.

A will drawn on a printed blank covering one page and signed by testator at the foot of the page, when additional subdivisions written on a separate piece of paper attached to the face of the blank and numbered "third" and "fourth," held not "subscribed" by the testator at the end of the will. Matter of Whitney, 153 N. Y. 259, revg. 90 Hun, 138. See also Matter of Andrews, 162 N. Y. 1; Matter of Donner, 37 Misc. 57.

No seal is necessary. Matter of Diez, 50 N. Y. 88.

2. Such subscription shall be made by the testator in the presence of each of the attesting witnesses, or shall be acknowledged by him to have been so made, to each of the attesting witnesses.

Chaffee v. The Bap. Con., 10 Paige, 86; Hovsradt v. Kingman, 22 N. Y.

372. (See this case as to history of this requirement.)

The subscription of the testator and the publication of the instrument are held independent facts, each of which is essential to the complete execution of a will.

If the signature is written by another, and concealed from the view of the testator and the witnesses, the mere publication of the instrument as his will cannot be deemed an acknowledgment that the unseen subscription was made by his direction.

Held, however, if the testator produces a paper bearing his personal signature, and requests the witness to attest it, and declares it to be his signature, and requests the witness to attest it, and declares it to be his last will and testament, he thereby acknowledges the subscription, within the meaning of the statute. Baskin v. Baskin, 36 N. Y. 416; Willis v. Mott, id. 486, criticised, Matter of Mackay, 110 id. 611 at 615.

An acknowledgment by testator of his signature held equivalent to the witnesses' actually seeing the act of subscription. Hoysradt v. Kingman, 22 N. Y. 372; Kinne v. Kinne, 2 Supm. 391; Gardiner v. Paines, 3 Dem. 98; Taylor v. Brodhead, 5 Redf. 624; Willis v. Mott, 36 N. Y. 486.

But the signature must be specifically acknowledged as such. Rumsey v. Goldsmith, 3 Dem. 494; Matter of Booth, 23 Wkly. Dig. 248; Mitchell v. Mitchell, 16 Hun, 97, affd., 77 N. Y. 596; Wooley v. Wooley, 95 id. 231.

The witnesses must see the testator's signature, either while or after it is written. Lewis v. Lewis, 11 N. Y. 220; Tyler v. Mapes, 19 Barb. 448; Will of McKay, 110 N. Y. 611.

Publication of the will and acknowledgment of the signature may be one act. Matter of Shaffer, 2 How. Pr. N. S. 494; Kinne v. Kinne, No. 1, 2 Supm. 391. A request to witness his will by testator is sufficient for

2 Supm. 391. A request to witness his will by testator is sufficient for

publication. Darling v. Arthur, 22 Hun, 84.

Where it appears in a proceeding for the probate of an instrument as the last will and testament of u testator that one of the subscribing witnesses to such instrument neither saw the testator subscribe his name at the end thereof, nor saw his signature at the time of or before subscribing his name as an attesting witness, there is not such an execution as the statute requires, and the instrument should not be admitted to probate. Matter of McDougall, 87 Hun, 349.

By 2 R. S. 64, § 41, every person who shall sign the testator's name to any will, by his direction, shall write his own name as a witness to the will.

3. The testator, at the time of making such subscription, or at

the time of acknowledging the same, shall declare the instrument so subscribed, to be his last will and testament.

Equivalent words or acts are sufficient. Brown v. De Selding, 4 Sandf. 10; Equivalent words or acts are sufficient. Brown v. De Selding, 4 Sandf. 10; Seymour v. Van Wyck, 6 N. Y. 120; Torrey v. Bowen, 15 Barb. 304. The publication of some kind is essential. Brinckerhoff v. Remsen, 26 Wend. 325; Chaffee v. The Bap. Con., 10 Paige, 86. That is, the testator must in some manner declare the instrument to be his will, although the declaration need not precede his subscription. Tyler v. Mapes, 19 Barb. 448; Jackson v. Jackson, 39 N. Y. 153; Baker v. Woodbridge, 66 Barb. 261; Belding v. Lenhardt, 2 Supm. 52, affd., 56 N. Y. 680; Lane v. Lane, 95 N. Y. 494.

The signing and the declaration should be at the same time, and not on different occasions. Doe v. Roe. 2 Barb. 200. Walsh v. Laffan, 2 Dom. 408

The signing and the declaration should be at the same time, and not on different occasions. Doe v. Roe, 2 Barb. 200; Walsh v. Laffan, 2 Dem. 498. But the publication may be made in any form whereby the testator makes known to the witnesses that he means the instrument to take effect as his will. There must be a mutuality of knowledge as to the nature of the transaction. Torry v. Bowen, 15 Barb. 304; Seguine v. Seguine, 2 id. 385; Hunt v. Mootrie, 3 Bradf. 322, affd., 26 Barb. 252; Nipper v. Groesbeck, 22 id. 670; Coffin v. Coffin, 23 N. Y. 9; Lane v. Lane, 95 id. 494; Will of Phillips, 98 id. 267; Taylor v. Brodhead, 5 Redf. 624; Matter of Hardenburg, 85 Hun. 580 85 Hun, 580.

He may declare it his will just before he signs it. Leavcraft v. Simmons.

3 Bradf. 35; Gamble v. Gamble, 39 Barb. 373.

He must declare it to be a will, and the witnesses are to so understand. The Trustees, etc., v. Calhoun, 62 Barb. 381, revd., on other grounds, in 25 N. Y. 422; Brinckerhoff v. Remsen, 8 Paige, 488; 26 Wend. 325; Hunt v. Mootrie, 3 Bradf. 322, affd., 26 Barb. 252; Ex parte Beers, 2 Bradf. 163; Brown v. DeSelding, 4 Sandf. 10; McKinley v. Lamb, 64 Barb. 200; Porteous v. Holm, 4 Dem. 14; Matter of Beckett, 35 Hun. 447, affd., 103 N. Y. 167; Larrabee v. Ballard, 1 Dem. 496; Baker v. Woodbridge, 66 Barb. 261.

The declaration must be made in the presence of both witnesses. Seymour v. Van Wyck, 6 N. Y. 120; or acknowledged by the testator, in their presence, as his will. Lewis v. Lewis, 13 Barb. 17; 11 N. Y. 220. The witnesses need not be in each other's presence. Barry v. Brown, 2 Dem. 309; Matter

of Diefenthaler, 39 Misc. 765.

The declaration is required to show knowledge in the testator that it was his will, and that may be shown in contradiction to the testimony of subscribing witnesses. The Trustees, etc., v. Calhoun, 25 N. Y. 422, revg. 38 Barb. 148; Troup v. Reid, 2 Dem. 471.

The reading of the attestation clause in testator's presence and his assent thereto is a good publication. Radley v. Kuhn, 28 Hun, 573, modified.

97 N. Y. 26.

As to declaration by testator of holographic will, see Buckout v. Fisher. 4 Dem. 277.

The formalities are the same in the case of holographic wills. Matter of Turrell, 166 N, Y. 330.

Held, however, that the rule in respect to holographic wills as to the manner and method of publication is not so close and severe. Matter of Akers, 74 App. Div. 461.

Presentation of the will with the signature in plain sight, and a request to the witnesses to sign as such, is sufficient acknowledgment of the signa-

ture. Matter of Lang, 9 Misc. 521.

The exhibition to the witnesses of a piece of blank paper with no signature or writing apparent upon it, with a statement that it is a will or "I have made my will, I want you to sign it," is not an acknowledgment of a subscription thereto of the testator within the meaning of the statute. Matter of Eakins, 13 Misc. 557.

4. There shall be at least two attesting witnesses, each of whom shall sign his name as a witness at the end of the will, at the request of the testator.

Conboy v. Jennings, 1 Supm. 622.

Will held invalid where testator died before second witness signed. Matter of Fish, 88 Hun, 56.

Before the Revised Statutes three witnesses were required. 1 R. L. 361.

The sufficiency of the attestation of wills in this State is much considered in Jauncey v. Thorne, 3 Barb. Ch. 158; Butler v. Benson, 1 Barb. 527; 13 id. 17; Coffin v. Coffin, 23 N. Y. 9.

If they sign it in an adjoining hall, and not in the immediate presence of the testator, it has been held sufficient. Lyons v. Smith, 11 Barb. 124;

Ruddon v. McDonald, 1 Bradf. 352.

They may sign by making their mark. Morris v. Kniffen, 37 Barb. 336. But they must sign after the testator has subscribed it. Jackson v. Jackson, 39 N. Y. 153; see also Jauncey v. Thorne, 2 Barb. Ch. 40; Knapp

v. Reilly, 3 Dem. 427.

Signature of testator and subscription of witnesses must both be at end of will. Re Blair, 84 Hun, 581; Heady's Will, 15 Abb. N. S. 210, revd., 6 Hun, 278; Sisters, etc., v. Kelly, 67 N. Y. 409; Matter of Case, 4 Dem. 124; Will of Hewitt, 91 N. Y. 261. Matter of Dayger, 47 Hun, 127, affd., 110 N. Y. 666.

An attestation clause is not essential. Burk's Will, 2 Redf. 239.

The request to sign is sufficient if made by the person superintending the execution of the will in the hearing of the testator and with his silent Matter of Nelson, 141 N. Y. 152, and cases cited; permission and approval. Matter of Hardenburg, 85 Hun, 580; Matter of Menge, 13 Misc. 553.

Miscellaneous. The above various provisions are generally incorporated in what is called the testatum clause at the end of a will over the signatures of the witnesses, the signature of whom under the clause is thus made generally satisfactory evidence, at least to their own minds, that the requisitions of the statute have been complied with, and on the death of the witnesses it may be prima facie evidence that the formalities which it recites have been performed. Chaffee v. Bap. Con., 10 Paige, 86; Jackson v. Jackson, 39 N. Y. 153; Grant v. Grant, 1 Sandf. Ch. 235; Brinckerhoff v. Remsen, 8 Paige, 488; 26 Wend. 325; Will of Kellum, 52 N. Y. 517, but compare Porteous v. Holm, 4 Dem. 14.

Where there are three witnesses, if two of them act in compliance with the statute it is sufficient. Lyon v. Smith, 11 Barb. 124; Thompson v. Stevens, 62

N. Y. 634.

And a third is not incompetent to take under the will who does not join in

proving it. Caw v. Robertson, 5 N. Y. 125.

The witnesses need not sign in presence of each other. It is sufficient if each subscribe in the presence of the testator, and at his request. But they must sign with the intention of being witnesses to the will at the time. Nor need they see the subscription of the testator. Hoysradt v. Kingman, 22 N. Y. 372; Ex parte LeRoy, 3 Bradf. 227; Willis v. Mott, 36 N. Y. 486, criticised, 110 id. 615; Will of Phillips, 98 id. 267; Dodworth v. Crow, 1 Dem. 256; Matter of Diefenthaler, 39 Misc. 765.

The declarations of the decedent are not competent to prove the existence

or execution of a will. Grant v. Grant, I Sandf. Ch. 235.

Reading over the testatum clause to the testator, and his assent to it on the interrogatory of another present is sufficient. McDonough v. Loughlin, 20

The request must be part of the res gestæ, i. e., made at the time of signing, etc. Seguine v. Seguine, 2 Barb. 385; contra, Brady v. McCrosson, 5 Redf.

Where one of the subscribing witnesses to a will swears positively that the will was executed with the requisite formalities, that is sufficient. Newhouse v. Godwin, 17 Barb. 236.

The request to the witnesses may be implied from acts and declarations at the time. Brown v. De Selding, 4 Sandf. 10; Gamble v. Gamble, 39 Barb. 373; Torry v. Bowen, 15 Barb. 304; Doe v. Roe, 2 Barb. 200. See also 13 Abb. 359; 20 Barb. 238; Hoysradt v. Kingman, 22 N. Y. 372; Coffin v. Coffin, 23 id. 9; Thompson v. Leastedt, 3 Hun, 395; Stewart's Will, 2 Redf. 77.

But request or knowledge of the testator is essential. Neugent v. Neugent, 2 Redf. 369; Heath v. Cole, 15 Hun, 100; Burke v. Nolan, 1 Dem. 436.

The following points have been determined by the Court or Appeals, as to the above formalities: 1st. The publication by a testator of a will may be made in any form of words whereby he makes it known to the witnesses that he intends the instrument to take effect as his will. 2d. Where the attendance of two witnesses is procured by the testator for the purpose of attesting his will, and one of them inquires if he wishes him to sign the will as a witness, to which the testator answers in the affirmative, this may be taken as a request to each of them. 3d. No precise form of communicating the request is necessary, and the publication and request may both be embraced in a single formula of words; and both the requisites are satisfied by answering affirmatively a question put by the witnesses whether he wishes them to sign the will as witnesses. Coffin v. Coffin, 23 N. Y. 9. See also Lewis v. Lewis, 11 N. Y. 220; Brinckerhoff v. Remsen, 8 Paige, 488; 26 Wend. 325; Gilbert v. Knox, 52 N. Y. 125.

It is not indispensable that each witness should be able to swear to all the requisites of the statute. The court may form its conclusion from all the evidence in the case. Jauncey v. Thorne, 2 Barb. Ch. 40; 3 id. 158; The Trustees, etc., v. Calhoun, 62 Barb. 381; Cornwell v. Wooley, 47 How. 475;

Buckhout v. Fisher, 4 Dem. 277.

Substantial compliance with the statute is sufficient. McMillen v. McMillen, 13 Wkly. Dig. 350; Lane v. Lane, 95 N. Y. 494; Matter of Hardenburg, 85 Hun, 580; Matter of Voorhis, 125 N. Y. 705. But there must be such a substantial compliance, or probate will be refused. Matter of Turrell, 166 N. Y.

For general discussion of requisites of declaration, proof necessary, etc. See Matter of Hardenburg, 85 Hun, 580.

Alteration or erasure after execution will not invalidate, if original intention can be ascertained. Matter of Lang, 9 Misc. 521.

It is not necessary to the valid execution of a will that any particular form be followed. The statute is satisfied if there be a substantial compliance with its requirements. A denial by one of the subscribing witnesses that the usual formalities were observed is not necessarily fatal to the probate of a will. Where there is a contest as to what took place at the time of execution, the attestation clause must be given some weight in determining the controversy. Matter of Menge, 13 Misc. 553.

Where there is a full and complete attestation clause, it is competent for the court to find that there was a due publication, although but one of the witnesses testifies to the essential facts and they are denied by the other. Matter of Bernsee, 141 N. Y. 389; Matter of Nelson, id. 152.

Surrogate may find due execution, even against the positive testimony to the contrary of the subscribing witnesses, where a regular attestation clause is shown to have been signed by witnesses, and there is corroboration in surrounding circumstances. Matter of Cottrell, 95 N. Y. 329.

TITLE VII. REVOCATION.

It will be necessary to ascertain whether the will has been revoked or canceled in fact or in law. The statutes provide that in these cases, and no others, a will may be altered or revoked in whole or in part, viz.:

By another will or writing executed with the same formalities as required by law for the will, and declaring such revocation or alteration; by being intentionally burnt, torn, canceled, obliterated,

or destroyed by the testator, or in his presence by his direction or consent, with the intent and for the purpose of revoking the same: when destroyed by another, the testator's assent is to be proved by two witnesses, and also the direction and consent of the testator thereto, and the injury or destruction.

2 R. S. 64, § 42.

These were substantially provisions of the English Statute of Frauds, and the Law of February 20, 1801; also 1 R. L. 365.

Condition upon which a devise is made, held a covenant.

See Graves v.

Deterling, 120 N. Y. 447; Cunningham v. Parker, 146 id. 29.

Testimony of an expert that certain straight lines drawn through signature to will were not made by testator held inadmissible. Matter of Hopkins, 172

The testator does not revoke a will by writing in the margin "this will and codicil is revoked" and signing it. Matter of Akers, 74 App. Div. 461, affd.,

Cross marks in lead pencil drawn across codicil with the word "cancelled" held sufficient canceling. Matter of Alger, 38 Misc. 143.

It is also provided that if, after the making of any will, the testator shall duly make and execute a second will, the destruction. canceling, or revocation of such second will shall not revive the first will, unless it appear by the terms of such revocation, that it was his intention to revive and give effect to his first will: or unless, after such destruction, canceling, or revocation, he shall duly republish his first will.

2 R. S. 65, § 53.

A subsequent will not executed with the forms requisite to pass real estate is not a revocation of a will duly executed, and both instruments may be admitted to probate, the one as a will of personalty and the other as a will of

realty. McLoskey v. Reid, 4 Bradf. 334.

A subsequent will or codicil does not revoke a prior one, unless it contains a clause of revocation, or is inconsistent with it; and there may be such a revocation, pro tanto, where it is inconsistent with a former will in some of its provisions only. A will which makes a full disposition of all a testator's property revokes all wills previously executed. Nelson v. McGiffert, 3 Barb. Ch. 158; Brant v. Wilson, 8 Cow. 56; Gaines v. City of New Orleans, 6 Wall. 642; Simmons v. Simmons, 26 Barb. 68; Ludlum v. Otis, 15 Hun, 410; Newcomb v. Webster, 113 N. Y. 191.

A codicil to a will which has been revoked by a later will is held to revive

and republish the earlier will. Matter of Campbell, 170 N. Y. 84.

The intention of a testator to cancel or revoke a will or a clause in his will, however strongly expressed, whether in writing or not, will not do so unless there be acts sufficient in law to constitute a revocation. Clark v. Smith, 34 N. Y. 140; Nelson v. The Pub. Ad., 2 Bradf. 210; Delafield v. Parish, 25 N. Y. 9; Barry v. Brown, 2 Dem. 309.

Destruction of second will and statement to several persons, not, however, witnesses to first will, that latter was his will, held not to be sufficient republication by testator. Matter of Stickney, 31 App. Div. 382, affd., 161 N. Y. 42.

A will which makes a full disposition of all the testator's property is inconsistent with the valid existence of any prior will; and, therefore, amounts to a revocation of all wills previously executed. Simmons v. Simmons, 26 Barb. 68, and vide infra, p. 427.

As to what constitutes a fraudulent destruction of a will under the Revised Statutes, and what testimony may be given, vide Timon v. Claffy, 45 Barb.

438, affd., 41 N. Y. 619.

An intended destruction frustrated by fraud, has been held a virtual destruction and cancellation. Where a testator was sick in bed and called for his will, and was deceived by one of the legatees, who handed him an old letter, which he destroyed, intending to revoke his will and supposed he had destroyed that, the will was held revoked. See, as to this subject, Pryor v. Coggin, 17 Geo. 444; White v. Casten, 1 Jones' Law (N. C.), 197; Marsh v. Marsh, 3 id. 77; Doe v. Harris, 6 Ad. & El. 209; Kent v. McCaffey, 10 Ohio St. 204; Sawyer v. Smith, 8 Mich. 411; Smiley v. Gambill, 2 Head, 164.

A lunatic cannot revoke a will by its destruction or otherwise. There must be an intent to revoke by a competent person. Smith v. Waite, 4

Barb. 28.

There cannot be a partial revocation by mere obliteration, interlineation or erasure, without re-execution and reattestation. Quinn v. Quinn, 1 Supm. 437; Lovell v. Quitmann, 88 N. Y. 377; Dyer v. Erving, 4 Dem. 160; Matter of Prescott, 4 Redf. 178; Gugel v. Vollmer, 1 Dem. 484. See also cases collected in 33 Moak Eng. 63.

Interlineation in will before execution is allowable. Matter of Hardenberg,

85 Hun, 580.

There may be revocation of a will by its "destruction" by the testator; and proof of the mode of destruction is not required, when the instrument was last in the testator's possession and cannot be found. Bulkley v. Redmond, 2 Bradf. 281.

Where a will is shown to have been last in the testator's possession the presumption is that he revoked it by destroying it animo revocandi. Idley v. Bowen, 11 Wend. 227; Bulkley v. Redmond, 2 Bradf. 281; Matter of Nichols, 40 Hun, 387; Hamersley v. Lockman, 2 Dem. 524; Collyer v. Collyer, 110 N. Y. 481.

The legal existence of a destroyed will may be proved by circumstantial testimony. Schultz v. Schultz, 35 N. Y. 653. See also Code Civ. Proc.,

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The prevention of the execution of a codicil by improper means cannot operate to revoke the will. Leacraft v. Simmons, 3 Bradf. 35.

A conjoint mutual will is revocable as a will, but not as a contract. Exparte Day, 1 Bradf. 476.

As to mutual wills and revocability. See Edison v. Parsons, 85 Hun, 263.

A will executed in pursuance of an agreement to devise made upon consideration which has been received is irrevocable. Mutual L. I. Co. v. Holladay, 13 Abb. N. C. 16.

A revoked will is not admissible to supply provisions omitted from the will

probated. Brown v. Quintard, 177 N. Y. 75.

Upon the question of revocation of a will, no declarations of the testator are competent evidence, except those which accompany the alleged act of revocation. Waterman v. Whitney, 11 N. Y. 157.

Codicil as Republication.—A codicil to a will of real estate, when executed in the mode prescribed with respect to devises, is considered to operate as a republication, and make the will speak from the date of the codicil. Moffett v. Elmendorf, 82 Hun, 470. The codicil need not be actually annexed to or indorsed on the will to operate as a publication. Brown v. Clark, 77 N. Y. 369, and cases cited.

Cancellation of Codicil.— Cancellation of codicil construed to be a cancellation of will. Matter of Brookman, 11 Misc. 675.

Provisions as to Revocation.—The provisions of the title of the Revised Statutes in relation to the revocation of wills are to apply to all wills made by any testator, who shall be living at the expiration of one year from the time the chapter relative to wills should take effect. (Said Chap. took effect Jan. 1, 1830.)

2 R. S. 68, § 69.

As to wills executed before the Revised Statutes went into effect, by a testator who was living at the expiration of a year after they went into effect, held the provisions of the Revised Statutes relative to revocations are applicable only in respect to revocations made subsequent to that time. These provisions are held prospective, and not retrospective, and cannot be applied so as to invalidate a previous revocation, good at the time it was made, but not conformable to those statutes. Sherry v. Lozier, 1 Bradf. 437. See also as to the above provisions, Parker v. Bogardus, 5 N. Y. 310; In the Matter of Roberts' Will, 8 Paige, 446.

Revocation in Law.—By the common law, either an intention to revoke, or an alteration of the estate without such intention. would work a revocation. An alteration of the testator's interest from what it was at the time the will was made, would work a revocation. Thus a sale of real estate would be a revocation of a devise of it; and if land was turned into personalty, the proceeds passed with the personal estate.

A change in the property of the testator would operate also as a revocation of the devise pro tanto.

The Revised Statutes provide that a bond, agreement, or covenant made for a valuable consideration by a testator, to convey any property devised or bequeathed in any will previously made, shall not be deemed a revocation of such previous devise or beguest. either at law or in equity; but such property shall pass by the devise or bequest, subject to the same remedies on such bond, agreement, or covenant, for a specific performance or otherwise, against the devisees or legatees, as might be had by law against the heirs of the testator, or his next of kin, if the same had descended to them.

2 R. S. 64, § 45. Knight v. Weatherwax, 7 Paige, 182.

By the Revised Statutes, also, a charge or incumbrance upon any real or personal estate, for the purpose of securing the payment of money, or the performance of any covenant, shall not be deemed a revocation of any will relating to the same estate, previously executed; but the devises and legacies therein contained shall pass and take effect subject to such charge or incumbrance.

2 R. S. 65, § 46.

"A conveyance, settlement, deed, or other act of a testator, by which his estate or interest in property previously devised or bequeathed by him, shall be altered, but not wholly divested, shall not be deemed a revocation of the devise or bequest of such property; but such devise or bequest shall pass to the devisee or legatee the actual estate or interest of the testator, which would otherwise descend to his heirs, or pass to his next of kin; unless, in the instrument by which such alteration is made, the intention is declared that it shall operate as a revocation of such previous devise or bequest."

2 R. S. 65, § 47.

"But if the provisions of the instrument by which such alteration is made, are wholly inconsistent with the terms and nature of such previous devise or bequest, such instrument shall operate as a revocation thereof, unless such provisions depend on a condition or contingency, and such condition be not performed, or such contingency do not happen."

2 R. S. 65, § 48.

In our courts it has been decided that if a testator, after the execution of a will by which he has devised land, sell and convey the land, it works a a will by which he has devised land, sell and convey the land, it works a revocation of the devise, even though he take back a mortgage to secure the purchase money; but if the land be reconveyed to the testator by an absolute deed, and he be the owner at the time of his decease, the devise will not be revoked and republication of the will is not necessary. It is also held that a change in the property of the testator subsequent to the execution of his will, operates as a revocation of devises in the will so far as the alteration places the property beyond the operation of the provisions of the will, and no further. A conveyance for example made subsequent to a devise of land, would not be a revocation or satisfaction of a devise of other lands to the grantee. But, if the conveyance be of a portion of the same land, that is a revocation pro tanto. Monroe v. Cox, 5 Johns. Chan. 441; Notbeck v. Wilks, 4 Abb. 315; Adams v. Winne, 7 Paige, 97; Brown v. Brown, 16 Barb. 569; Vandemark v. Vandemark, 26 Barb. 416; McNaughton v. McNaughton, 34 N. Y. 201; Arthur v. Arthur, 10 Barb. 9; 23 How. 410; Beck v. McGillis, 9 Barb. 35; Barstow v. Goodwin, 2 Bradf. 413.

If the testamentary gift were of proceeds of realty, the sale might not

If the testamentary gift were of proceeds of realty, the sale might not revoke the devise, if the avails are separable. McNaughton v. McNaughton, 34

An exchange of lands will not prevent the implied revocation, and the devisee will not take the exchanged lands under a devise of the original lands. Gilbert v. Gilbert, 9 Barb. 532.

If land converted were reconveyed to the testator, it would pass under the

prior devise without republication. Brown v. Brown, 16 Barb. 569.

A subsequent conveyance would be a revocation only so far as necessary to carry out the purposes of the conveyance as declared therein, e. g., a trust created for a certain purpose. Livingston v. Livingston, 3 Johns. Ch. 148.

It has been held also in the English courts that inoperative conveyances

would amount to a revocation of a devise, pro tanto, if there were evidence of an intention to convey and thereby to revoke the will—also, even if the testator convey the estate, and then take it back. The strict rule is, that either an intention to revoke or an alteration of the estate without such intention would work a revocation. The rule would not apply to mortgages and charges. The above rules of the English courts have not been retained here, at least to their full extent, as seen by the cases stated from the reports of this State, and the above statutory provisions under this title.

Before the Revised Statutes a contract to convey land was held, in equity, an implied revocation of a devise thereof. Knollys v. Alcock, 5 Vesey, 654;

Walton v. Walton. 7 Johns. Ch. 258.

In the case of Gaines v. Winthrop, 2 Ed. Ch. 571, it is held that a contract

to sell lands is a revocation, pro tanto, of a prior will; but the latter remains

to sell lands is a revocation, pro tanto, of a prior will; but the latter remains in force as to the legal estate; the title passes to the devisee; and he will be a trustee for the purchaser and compelled to convey.

A physical act of revocation of a clause in a will must concur with the animus revocandi, or some act amounting in law to an actual cancellation or revocation. Clark v. Smith, 34 Barb. 140.

Before the Revised Statutes, if devise of land be once revoked, whether expressly or by implication, it cannot be restored without a republication of the will. Walton v. Walton, 7 Johns. Ch. 258. But see contra, Brown v. Brown, 16 Barb, 569 sunra.

Brown, 16 Barb. 569, supra.

An election to take dower in lieu of a provision in the place thereof causes the devise to fail. Hawley v. James, 5 Paige, 318; 16 Wend. 61; and supra, p. 160. An inconsistent devise in the second of two wills, is a revocation of the first, otherwise apparently if they were in the same will, when the devisees might take jointly or in common. Barlow v. Coffin, 24 How. Pr. 54; vide infra, Tit. IX.

Though an exchange of lands has been held not to prevent the implied revocation (Gilbert v. Gilbert, 9 Barb. 532), it is held that where a testator devised "all my real estate now possessed by me," and before death sold the land and bought other land, the last bought land passed under the devise.

Lent v. Lent, 24 Hun, 436.

Revocation by Marriage and Birth of Issue.—The Revised Statutes also provide that if, after making a will disposing of the whole estate of the testator, he shall marry, and have issue of his marriage, born either in his lifetime or after his death, and the wife or the issue of such marriage shall be living at the death of the testator, such will shall be deemed revoked, unless provision shall have been made for such issue by some settlement, or unless such issue shall be provided for in the will, or in such way mentioned therein, as to show an intention not to make such provision; and no other evidence to rebut the presumption of such revocation, shall be received.

2 R. S. 64, § 43.

This was also the law before the Revised Statutes. Brush v. Wilkins, 4 Johns. Ch. 506. Except that the implied revocation might be repelled by circumstances. Havens v. Vanderburgh, 1 Den. 27; Bloomer v. Bloomer, 2 Bradf, 339.

A child so born after the making of a will, has equal rights to distribution and to bring partition, and is liable to the claims of creditors in the same manner as are heirs and next of kin, and may recover his proportionate share from devisees and legatees. Code Civ. Proc., § 1868; 2 R. S. 456, §§ 62, 63.

Revocation pro tanto by Birth of a Child.—Whenever a testator shall have a child born after the making of a last will, either in his lifetime or after his death, and shall die leaving such child, so after born, unprovided for by any settlement, and neither provided for, nor in any way mentioned in such will, every such child shall succeed to the same portion of such parent's real and personal estate, as would have descended or been distributed to such child, if such parent had died intestate, and shall be entitled to recover the same portion from the devisees and legatees, in proportion to and out of the parts devised and bequeathed to them by such will.

2 R. S. 65, § 49, as amd. by L. 1869, Chap. 22. See also infra, Chap. XIV,

The provision making the birth of a child subsequent to the making of the will, a revocation was held applicable to the case of married women testratrices. Plummer v. Murray, 51 Barb. 201. But this decision was over-ruled in Cotheal v. Cotheal, 40 N. Y. 405. By Laws of 1869, however, Chap. 22, the provision was made applicable to married women, the word "parent" being substituted for father in the statutes.

The rule applies as to illegitimate child in case of female parent. Bunce

v. Bunce, 14 N. Y. Supp. 659.

A power of sale is revoked pro tanto by birth of a child. Smith v. Robert-

son, 89 N. Y. 555.

Under the above provision of the statute, it will be seen how necessary it is, when title is made under a devise, to ascertain if children have been born subsequent to the making of the will. See also supra, p. 398.

But a will made in ignorance of the existence of a living child is not revoked by discovery of its existence. Ordish v. McDermott, 2 Redf. 460.

A will which fails to provide for a child born thereafter is valid except as to such child. Luce v. Burchard, 78 Hun, 537.

The after-born child takes under the statute as heir at law and next of kin, subject to the widow's dower in the real estate and her share in the per-

sonalty. Herriot v. Prime, 155 N. Y. 5, 8.

Where the reversion, subject to widow's life estate, is given to those persons who would be testator's heirs at law by blood if his death occurred at the time of her death, held, an after-born child acquired a vested interest under the will at his father's death (subject to be divested in the event of his death before his mother) and the case is not one of a child "and was not unprovided for by any settlement and neither provided for, nor in any way mentioned in such will." Minot v. Minot, 17 App. Div. 521.

Under the above provision all the devisees and legatees must contribute

ratably, in proportion to the value of the real and personal estate devised or bequeathed to them respectively, to make up the distributive share of

such post-testamentary child. Mitchell v. Blain, 5 Paige, 588.

Revival of First, When. When revived or not revived by destruction, etc., of later will, etc., vide supra, p. 424.

Marriage of a Female.—A will executed by an unmarried woman shall be deemed revoked by her subsequent marriage.

2 R. S. 64, § 44; Lathrop v. Dunlop, 4 Hun, 213; Brown v. Clarke, 77 N. Y. 369.

This was also the law before the Revised Statutes, and has not been revoked by the Married Woman's Act of 1849, supra, Chap. III, Tit. III.

Same rule held to apply in case of remarriage of a widow. Re Kauffman Will, 131 N. Y. 620. But see In re McClarney, N. Y. Surrogate, as to revocation of a will by a remarriage.

The will of a feme-covert made during marriage under a power, is held not revoked by her surviving her husband. Mormen v. Thompson, 3 Hagg.

Ecc. 289.

Agreement by Heirs.—Agreement by heirs to share equally conveys no title. Strong v. Harris, 84 Hun, 314.

TITLE VIII. LAPSE OF THE DEVISE.

Where a devise fails for want of title in the devisor, the devisee cannot be relieved out of other parts of the estate — the gift totally fails. A general rule also is that the devise shall be deemed lapsed. if the devisee is incompetent to take, or dies in the lifetime of the testator. The lapsed or void devise, however, passes to the residuary devisee, as in the case of a lapsed legacy.

Matter of Allen, 151 N. Y. 243; Cruikshank v. Home for the Friendless, 113 N. Y. 337; Youngs v. Youngs, 45 id. 254; Hillis v. Hillis, 16 Hun, 76. See on this subject the following cases discussing the difference that existed formerly between lapsed devises and lapsed legacies. Van Kleeck v. The Ministers, etc., 20 Wend. 457, affg. 6 Paige, 600; Adams v. Perry, 43 N. Y. 488; Manice v. Manice, id. 303; Downing v. Marshall, 23 id. 366; Beekman v. Bonsor, 27 Barb. 200; 23 N. Y. 298; Craig v. Craig, 3 Barb. 76.

The same rule would apply if a contingency upon which a devise was to take effect did not happen. Waring v. Waring, 17 Barb. 553.

Otherwise, where the specific devisee is also the residuary devisee, and he takes under the residuary clause. Tucker v. Tucker, 5 N. Y. 408.

The modern rule that, if the devisee is incompetent to take, the void devise

The modern rule that, if the devisee is incompetent to take, the void devise passes to residuary devisees, is inconsistent with the former rule, that the heir is not to be disinherited without an express devise or by necessary implication. See Jarman's Rule IV; Scott v. Guernsey, 48 N. Y. 106; Brown v. Quintard, 177 id. 75, 84; Oakes v. Massey, 94 App. Div. 165.

The modern rule relating to void and lapsed devises is sometimes affected by statute; e. g., the provision of the Revised Statutes which makes devises to aliens void (2 R. S. 57, § 4), provides that the interest so devised shall descend to the testator's heirs, and if there be none, to the residuary devisees. This provision is inconsistent with the present rule relating to lapsed devises. As to when void provisions fall into the residuary, see Carter v. Board of Education, etc., 144 N. Y. 621, and cases cited.

The court will not favor a lapse, even where the residuary clause is ambiguous. Matter of Miner, 146 N. Y. 121.

When, by reason of a legal incapacity, but one of the persons of a class can take, that one takes all the estate which the devise by its terms gives to the whole class. Downing v. Marshall, 23 N. Y. 366.

Use of words "and his heirs" does not prevent lapse. Kimball v. Chappell, 18 N. Y. Supp. 30.

As to lapse of residuary to corporation. Simmons v. Burrell, 8 Misc. 388.

As to lapse of residuary to corporation. Simmons v. Burrell, 8 Misc. 388.

Where executors are directed to divide the residuum, after the death of the life tenant, and to give the same to certain legatees named, the gift to each of such legatees is direct and immediate. and the share of one of such legatees does not lapse upon his death before the time of distribution arrives.

Matter of Gardner, 140 N. Y. 122.

Devises in Certain Cases not to Lapse.—Whenever any estate, real or personal, shall be devised or bequeathed to a child or other descendant of the testator, and such legatee or devisee shall die during the lifetime of the testator, leaving a child or other descendant who shall survive such testator, such devise or legacy shall not lapse, but the property so devised or bequeathed shall vest in the surviving child or other descendant of the legatee or devisee, as if such legatee or devisee had survived the testator and had died intestate.

2 R. S. 66, § 52.

Downing v. Marshall, 23 N. Y. 366; Van Beuren v. Dash, 30 id. 393.

This section applies only where the devise is to a child or lineal descendant of the testator, and does not embrace collateral relations. Van Beuren v. Dash, 30 N. Y. 393; Armstrong v. Moran, 1 Bradf. 314.

Issue of a child desceased before will was made giving property to testa-

tor's children as a class, held not entitled under this section. Pimel v. Bet-

jeniann, 183 N. Y. 194, revg. 99 App. Div. 559.

Failure of issue construed; lapse when dependent thereon. Smith v. Smith, 141 N. Y. 29.

TITLE IX. GENERAL RULES OF CONSTRUCTION OF DEVISES.

It will be impossible to do more than allude to a few of the leading principles applicable to the construction of wills. The law applicable to the nature and efficacy of devises involves important principles, and is extensive and intricate. The construction of devises in a will is much regulated by the context; and the attending circumstances of each case will often govern the construction.

As to jurisdiction of court, see Drake v. Drake, 41 Hun, 366.

Wills — What Constitutes.—An instrument conveying land, which is not intended to take effect until after the death of the person executing it, is properly construed to be a will and not a deed, where there is nothing in the language of the instrument and in the circumstances under which it was executed to indicate that it was intended as anything else than a will; and hence such instrument is subject to revocation by the person executing it at any time during her life. Perry v. Perry, 21 N. Y. Supp. 133.

See distinction as to delivery of instrument in escrow. Campbell v. Morgan, 68 Hun, 490.

A paper containing disposing clauses, not sufficiently identified, cannot be

A paper containing disposing clauses, not sufficiently identified, cannot be made a part of a valid will by referring to it in the will. Matter of Sanderson, 9 Misc. 574; In re Will of O'Neil, 91 N. Y. 516.

Law of Domicile and Locality.— It may be stated in brief, that the law of the testator's domicile governs the disposition of his personal estate, and that any testamentary disposition of, as well as the succession on, his real estate, is controlled by the laws of the locality of such real estate, and the probate in one State or country is of no validity as affecting the title to lands in another.

Vide supra, fully on this point, Chap. IV, and Wood v. Wood, 5 Paige, 596; Stewart v. McMartin, 5 Barb. 438; McCormick v. Sullivant, 10 Wheat. 192; Knox v. Jones, 47 N. Y. 389; White v. Howard, 52 Barb. 294; 46 N. Y. 144; Bloomer v. Bloomer, 2 Bradf. 339; Monroe v. Douglas, 5 N. Y. 447; Kerr v. Moon, 9 Wheat. 565; Caulfield v. Sullivan, 85 N. Y. 153; Vogel v. Lehritter, 139 N. Y. 223; Matter of Klett, 3 Misc. 385. The law of the testator's domicile controls as to the formal requisites essential to the validity of the will, the capacity of the testator, and the construction of the instrument, as far as personalty is concerned, but the law of the domicile of the devisee or legatee governs his capacity to take, and the validity of a trust of personalty. Chamberlain v. Chamberlain, 43 N. Y. 424; Kennedy v. Palmer, 1 Supm. 581; Despard v. Churchill, 53 N. Y. 192; Cross v. U. S. Trust Co., 131 id. 330; Hope v. Brewer, 136 id. 126; N. Y. L. I. & T. Co. v. Viele, 161 id. 11.

While, it seems, our courts may, in certain cases, decline to administer the gift and remit the property to the testator's domicile, they may not divest the title of one or transfer it to another contrary to the law of the domicile. Dammert v. Osborn, 140 N. Y. 130, 141 id. 564.

A testamentary disposition of personal property made by a citizen of another country, valid at the domicile of the testator, is valid here, and it may not be questioned when jurisdiction has been obtained by courts of this State over the property disposed of or the parties claiming it, save when the disposition is contrary to public policy. Dammert v. Osborn, supra.

The decree of the court of the State in which the testator resided and the will was probated, establishing a trust for the benefit of remaindermen, is

will was probated, establishing a trust for the benefit of remaindermen, is binding upon the courts of New York. Putnam v. Lincoln Safe Dep. Co., 66

App. Div. 136.

From what Time the Will Speaks.— It is a general rule that the will speaks from the death of the testator, but if it refers to an existing state of things, it is held to speak from its date.

Wetmore v. Parker, 52 N. Y. 450, affg. 7 Lans. 121. See also Moffet v. Elmendorf, 82 Hun, 470.

The execution, after the Revised Statutes, of a codicil to a will made before they took effect, renders the construction of the will subject to the provisions of these statutes. Ayres v. The Methodist Church, 3 Sandf. 351.

What Law Governs as to Time.—The Revised Statutes enact that the provisions of the title relating to wills (Title I, Chap. VI, Part II) shall not be construed to affect the validity of the execution or the construction of any will made before the chapter takes effect. As a general rule, a will does not take effect until the testator dies; and a statute affecting wills, enacted after the will made, but before the testator's death, takes effect on the will.

2 R. S. 68, § 70.

Root v. Stuyvesant, 18 Wend. 257; De Peyster v. Clendenning, 8 Paige, 295; 26 Wend. 23; Doubleday v. Newton, 27 Barb. 431; Sherman v. Sherman, 3 id. 385.

Changes in the law do not affect wills going into effect before such changes. Stewart v. McMartin, 5 Barb. 438; Tallmadge v. Gill, 21 id. 34.

It is held, therefore, that if the will was made before the Revised Statutes, but the testator died after they went into operation, the validity of the trusts and provisions of the will are determined by the law existing at his death.

The validity of the execution of a will executed before the Revised Statutes

Brown, I Bradf. 291; Jauncey v. Thorne, 2 Barb. Ch. 40.

A will executed previous to the Revised Statutes, although attested by only two witnesses, if the testator died after the statute went into effect, is sufficiently attested as a will of real estate. The mode of proof must be according to the law in force at the time of probate. Lawrence v. Hebbard, 1 Bradf. 252; Jauncey v. Thorne, 2 Barb. Ch. 40.

It is held, however, that a will executed before the Revised Statutes were passed, devising all the testator's real estate, though the testator died after those statutes took effect, disposes only of such real estate as the testator had at the time of the execution of the will. Subsequently acquired lands would not pass by it. Parker v. Bogardus, 5 N. Y. 309. Vide supra, p. 416, as to this.

Intention of Testator.— It is also a leading principle, that in the construction of a will, the intention of the testator, gathered from the whole will, provided it be not inconsistent with rules of law, is the first great object of inquiry; and to this object technical rules are, to a certain extent, made subservient and, as a general rule, those technical words are not required in a devise which in a deed would be necessary. To effectuate the intention, words may have their ordinary or legal meaning changed, sentences be struck out or transposed, and omissions supplied; and provisions are to be construed not only with reference to contexts, but to the entire contents of the instrument. A devise may also arise by implication.

The rule in Shelly's Case even (supra, p. 231) has been held subservient to the plain intention of the testator. Rogers v. Rogers, 3 Wend. 503.

Definition of words "descendants" and "issue." Hillen v. Iselin, 144

If so intended by testator, word "bequest" will be construed "devise." Wyman v. Woodbury, 86 Hun, 277, 282, and cases cited; Montignani v. Blade, 145 N. Y. 111; Cramer v. Cramer, 35 Misc. 17.

The word "children" has been held to include grandchildren in order

to carry out supposed intent. Patchen v. Patchen, 49 Hun, 270, revd., however, 121 N. Y. 432.

ever, 121 N. Y. 432.

Punctuation may be disregarded, Lewisohn v. Henry, 92 App. Div. 532.

Parol or external evidence may also be admitted where there is uncertainty as to the devise or thing devised; but not where the ambiguity is apparent from the face of the instrument, and no parol evidence can be received to prove an additional or different subject-matter or some other donee. Du Bois v. Ray, 35 N. Y. 162; Hyatt v. Pugsley, 23 Barb. 285; Gardner v. Hyer, 2 Paige, 11; Brown v. Quintard, 177 N. Y. 75; Matter of Knoblauch, 31 Misc. 418. See also Pritchard v. Hicks, 1 Paige, 270.

But the identity of legatees may be proved by parol. Matter of Woods, 33 Misc. 12; Jay v. Lee, 41 Misc. 13.

See also, as to the intention of the testator, and how it will be effectuated, and a devise raised by implication and a devise upheld as valid, if

See also, as to the intention of the testator, and how it will be effectuated, and a devise raised by implication and a devise upheld as valid, if possible. Kendall v. Case, 84 Hun, 124; Lasher v. Lasher, 13 Barb. 106; Post v. Hover, 30 id. 312, affd., 33 N. Y. 593; Campbell v. Rawdon, 18 id. 412, revg. 19 Barb. 494; Mason v. Jones, 2 id. 229; Rathbone v. Dyckman, 3 Paige, 9; Parks v. Parks, 9 id. 107; De Kay v. Irving, 5 Den. 646; Van Vechten v. Van Vechten, 8 Paige, 105; Butler v. Butler, 3 Barb. Ch. 304; Clark v. Lynch, 46 Barb. 68; Lytle v. Beveridge, 58 N. Y. 592, affg. Prindle v. Beveridge, 7 Lans. 225; Floyd v. Carow, 88 N. Y. 560; Avery v. Everett, 36 Hun, 6, affd., 110 N. Y. 317; Neaves v. Neaves, 37 Hun, 438; Lent v. Lent, 24 Hun, 436; Leonard v. Kingsland, 12 Daly, 485; Searles v. Brace, 19 Abb. N. C. 10.

Devise of one of two pieces of land in the alternative is good though

Devise of one of two pieces of land in the alternative is good, though the alternative plot be otherwise expressly devised. Platt v. Withington, 47 Hun, 558, revd., 121 N. Y. 138.

Devise over, in case of the death of a prior devisee without issue—time of happening of the contingency, with reference to the testator's death. Stokes v. Weston, 69 Hun, 608, affd., 141 N. Y. 558; Matter of Stafford, 11 Misc. 436; Smith v. Smith, 141 N. Y. 29.

Where a will is the subject of construction, the intention of the testator, as disclosed by the will, not a general rule of construction, is to govern, when they come in conflict. Matter of James, 146 N. Y. 98; Johnson v. Brasington, 86 Hun, 106.

All the provisions, void as well as valid, may be considered in determining intent. Marks v. Halligan, 61 App. Div. 179.

Though a revoked will cannot be received in evidence to determine it. Brown v. Quintard, 177 N. Y. 75.

Held where testator devised parcel of real estate owned by him in fee to one of his grandchildren, and attempted to devise to another grandchild another parcel or equal value, in which testator had, however, only a life estate, that former grandchild could not accept devise with knowledge of all the facts, without being precluded from asserting claim to the other property. Beetson v. Stoops, 186 N. Y. 456, affg. 108 App. Div. 366.

The intent to be discovered is not whether testator intended to make a valid disposition of his catter but whet previous the infant intended to have been been all the catter but whet previous the infant intended to have been all the catter but whet previous the infant intended to have been all the catter but whet previous the infant intended to have been all the catter but whether the state in fant intended to have been been all the catter but whether the state in fant intended to have been all the catter but whether the state in fant intended to have been all the catter but whether the state in fant intended to have been all the catter but whether the state in fant intended to have been all the catter but whether the state in fant intended to have been all the catter but whether the state in fant intended to have been all the catter but whether the state in the state of the catter but whether the state of t

disposition of his estate, but what provisions he in fact intended to make a valid when that is found, it is for the court to determine whether they are valid or not. Herzog v. Title G. & T. Co., 177 N. Y. 86; Central Trust Co. v. Egleston, 185 id. 23.

In accordance with the views enunciated in the above cases, it is held to be the duty of the courts to give to the language used by a testator such a construction as will make the instrument or limitation legal or valid, if it can be done in harmony with well settled rules, rather than such construction as will render them illegal and nugatory, or create a virtual intestacy.

Cowen v. Rinaldo, 82 Hun, 479. See, however, Herzog v. Title G. & T. Co., 177 N. Y. 86; Central Trust Co. v. Egelston, 185 id. 23, supra.

Indefiniteness. See p. 309.

Reference to Other Documents. Locke v. Farmers' L. & T. Co., 21 N. Y. Supp. 524, revd., 140 N. Y. 135.

Inconsistent Devises.—Another rule is that where the latter part of a will is inconsistent with a prior part, the latter part will prevail; although restrictions totally repugnant to an estate created will be held void; as, for example, one creating a remainder on a fee absolute.

Schermerhorn v. Negus, 1 Den. 448; Jackson v. Robins, 16 Johns. 537; McLean v. McDonald, 2 Barb. 534; Bradstreet v. Clark, 12 Wend. 602; Trustees of Theolog. Seminary v. Kellogg, 16 N. Y. 83; Brewster v. Striker, 2 id. 19; 4 Kent, 131; Van Nostrand v. Moore, 52 N. Y. 12; Hermance v. Mead, 18 Abb. N. C. 90.

This rule, however, that the last clause of a will supersedes prior inconsistent ones, is only applied where it is impossible to reconcile the two provisions with each other; and never until every attempt to give to the whole a sensible construction has failed (Burns v. Stillwell, 103 N. Y. 453; Thompson v. Hill, 87 Hun, 111; Benson v. Corbin, 145 N. Y. 351.) A material qualification. therefore, of an antecedent devise or bequest, which would otherwise be absolute, is often upheld, and an absolute estate in fee simple is frequently cut down to a defeasible interest, in wills.

Morris v. Beyea, 13 N. Y. 273; Tyson v. Blake, 22 id. 558; Everitt v. Everitt, 29 id. 39; Taggart v. Murray, 53 id. 233; Van Vechten v. Keator, 63 id. 52; Parsons v. Best, 1 Supm. 211; Roseboom v. Roseboom, 81 N. Y. 356; Greyston v. Clark, 41 Hun, 125; Matter of Fernbacher, 17 Abb. N. C.

An interest given in one clause of a will cannot be affected by raising doubts from other clauses, but only by express words or undoubted impli-cation. Freeman v. Coit, 96 N. Y. 63; Matter of Mack, 13 Misc. 368.

Where an estate is given in one part of a will in clear and decisive terms, such an estate cannot be taken away or cut down by any subsequent words that are not as clear and decisive. Roseboom v. Roseboom,

The provisions of a will for the support and maintenance of a wife will receive the most liberal construction. Thurber v. Chambers, 66 N. Y. 42–48;

Matter of Mack, 13 Misc. 368.

Devises to widow, with full power of disposal, and of what she may

Devises to window, with full power of disposal, and of what she may leave to another, are not inconsistent. Wells v. Seeley, 47 Hun, 109; Thomas v. Wolford, 49 id. 145.

A devise to two persons "as joint tenants and tenants in common" held the words "and tenants in common" should be stricken out or made to read "not as tenants in common." Walter v. Ham, 68 App. Div. 381.

Language of a codicil will not be permitted to disturb will, further than to extent necessary to give effect to codicil. The codicil will not operate as a reversition of previous testamentary dispositions, unless there he plain a revocation of previous testamentary dispositions, unless there be plain direction or clear import in its language. Matter of Manning, 50 App. Div. 407. See also Griggs v. Griggs, 80 App. Div. 339.

As regards powers of sale to executors being inconsistent with the estate devised, vide infra, Chap. XVII.

Void Provisions.—A void direction or provision in a will does not invalidate its other provisions, nor defeat a prior devise, and the whole will fail only when the valid and invalid parts are so connected as not to admit of separation without subverting the intention of the testator. The courts will lean in favor of the preservation of all such valid parts of a will as can be separated from those that are invalid without defeating the general intent of the testator, and constructions will be favored which tend to establish the validity of the will.

See cases supra, p. 279. Sanford v. Goodell, 82 Hun, 369; Cowen v. Rinaldo, 82 id. 479; Post v. Hover, 33 N. Y. 593, affg. 30 Barb. 312; De Kay v. Irving, 5 Den. 646; Vernon v. Vernon, 53 N. Y. 351; Henderson v. Henderson, 113 id. 1.

Where there is an absolute devise, a subsequent void provision or a lapsed devise will not defeat it. Martin v. Ballou, 13 Barb. 119; Campbell v. Rawdon, 18 N. Y. 412, revg. 19 Barb. 494. But see Van Nostrand v. Moore, 52 N. Y. 12.

Nor where there is a valid devise for life, will it be made invalid by an illegal disposition of the remainder. Willams v. Conrad, 30 Barb. 524.

Devise in fee with condition against alienation held repugnant. Potter v. Couch, 141 U.S. 296.

Lands When Charged With Legacies.— See "Title by Dissent," supra, also Scott v. Stebbins, 91 N. Y. 605; Shannon v. Howell, 36 Hun, 47; Wiltsie v. Shaw, 100 N. Y. 191; McCorn v. McCorn 100 id. 511; Brill v. Wright, 112 id. 129. As to priority of charges under will, vide Bennett v. Akin, 38 Hun, 251.

What Will Carry a Fee, etc .- Devise of an estate for life and after death to her heirs and assigns, construed a fee. Goetz v. Ballou, 64 Hun. 490. See also Campbell v. Beaumont, 91 N. Y. 465.

As to when a fee is not created. Bumpus v. Bumpus, 79 Hun, 526.

Where in a will there is a clear and certain devise of a fee, about which

the testamentary intention is obvious, the estate thus given will not be cut down or lessened by subsequent words which are ambiguous or of a doubtful meaning. Benson v. Corbin, 145 N. Y. 351.

No form of words is necessary to pass a fee. See § 205 Real Property Law; The Long Island R. R. Co. v. Conklin, 29 N. Y. 572; King v. Peck, 113

id. 222, 229.

Gift of Rents.— Construed a life estate. Matter of Hoyt, 71 Hun, 13.

Description of Land .- Error in description of land devised; when it will not frustrate devise. Fletcher v. Barber, 82 Hun, 405.

Lands when Charged with Debts.—As to liability of devised and descended lands to be charged with the debts of the testator. vide supra, Chap. XIV, "Title by Descent."

Illegitimate Children would not take under a devise to "children," unless such intention were manifest.

Collins v. Hoxie, 9 Paige, 81; and supra, p. 409.

Illegitimate Children Legitimated by marriage of parents. Law of 1895, Chap. 531.

"Issue," "Children," etc., Defined and Construed. Re Truslow, 140 N. Y. 599, Patchen v. Patchen, 49 Hun, 270, revd., 121 N. Y. 432; Chwatal v. Schreiner, 3 Misc. 192; Daly v. Greenberg, 69 Hun, 228; Matter of Devoe, 66 App. Div. 1.

"Issue." Dying without. Smith v. Smith, 141 N. Y. 29; and see, also,

supra, p. 249.

- "Our Children" or their heirs held not to include a nephew whom testator had treated as an adopted child, though not adopted.—Hamlin v. Stevens, 177 N. Y. 39.
- "Issue" held to mean descendants, as used by testator. Matter of U. S. Trust Co., 36 Misc. 378.
- "Wife."- The word "wife" in a will is to be construed as meaning a woman who is legally married, and the word "children" as meaning legitimate descendants. Miller v. Miller, 79 Hun, 197.
- "Heirs."- Newcomb v. Lush, 84 Hun, 254; Johnson v. Brasington, 86 Hun, 106; Bisson v. West Shore R. R. Co., 143 N. Y. 125.
- "Unmarried."- Matter of Oakley, 67 App. Div. 493; Matter of Union Trust Co., 179 N. Y. 261.

"Will and Codicil."— The term "Will," as used in Chap. VI of the Revised Statutes, is to include all codicils, as well as wills.

2 R. S. 68, § 71.

Ademption.— Payment by a father to an heir apparent in satisfaction of his expectation from the father's estate, will not extinguished an uncanceled devise in his will, though it might a legacy or intestate share. The rule of ademption is predicable of legacies of personal estate and is not applicable to devises of realty.

Burnham v. Comfort, 37 Hun, 216, affd., 108 N. Y. 535.

Agreement to Devise. - An agreement to devise is within the Statute of Frauds, and must be in writing.

Gooding v. Brown, 35 Hun, 148. As to revocability, see *supra*, p. 423. Parol evidence to prove agreement to devise held inadmissible. Henning v. Miller, 66 Hun, 588; but see Kominsky v. Kominsky, 2 Misc. 138. See Fowler's Real Property Law (2d ed.) 656.

Construction.—The surrogate has power, on accounting by executors, to construe the will. Matter of Havens, 8 Misc. 574; Matter of Metcalfe, 6 Misc. 524; see Russell v. Hilton, 80 App. Div. 178; Beetson v. Stoops, 186 N. Y. 456.

Where a devise is limited to take effect on a condition annexed to a pre-

ceding estate, which estate never arises, the remainder over will nevertheless take place, the first estate being considered a preceding limitation, not a preceding condition. U. S. Trust Co. v. Hogencamp, 191 N. Y. 281.

As to construction of Devises, see, also, Chap. IX, Expectant Estates. Chap. X, Trusts. Chap. XI, Joint Interests. Chap. XII, Powers. Chap. XVII, Powers of Executors. Chaps. V and VI, Estates.

TITLE X. DEVISES TO CORPORATIONS.

Corporations were excepted out of the English statutes of wills. By the Revised Statutes a devise to a corporation is invalid, unless it is expressly authorized by its charter or by statute to take by devise.

2 R. S. 57, § 3.

This is not a mortmain act. Amherst College v. Ritch, 151 N. Y. 282. See

L. 1860, Chap. 360.

Previous to the Revised Statutes a legacy to a corporation, payable out of real estate directed to be sold, was held valid, although the corporation was not authorized to take by devise. Theo. Sem. v. Childs, 4 Paige, 419.

See supra, p. 308, as to the law before the Revised Statutes.

Previous to the Revised Statutes corporations could not take by devise. White v. Howard, 46 N. Y. 144.

It must be authorized at the time the devises take effect, and the law authorizing it must be a law of this State. White v. Howard, 52 Barb. 294; 46 N. Y. 144.

The right of a corporation to take by purchase held not to include the right to take by devise. McCartee v. Orphan Asylum, 9 Cow. 437.

The general right of corporations to take by devise is now regulated by the General Corporation Law of 1890, Chap. 563, as amended. The said general law as amended allows corporations (including foreign corporations, for a certain period) to acquire such property as the purposes of the corporation may require. through devise. Foreign corporations are entitled to hold for a period of five years. (Vide, the statutes as to further details, and Chap. XXIV.) This chapter 563, Laws 1890, as amended, repeals all of Chap. 18, Pt. 1, of the Revised Statutes, which embraced general provisions as to corporations, their general powers, privileges and liabilities, and also a large number of other laws as specified.

Devises Under a Power or Trust.- In the case of Inglis v. Trustees, etc., 3 Pet. 99, it was held that a devise to trustees of a corporation to be created so, as to hold real estate, was good as an executory devise. See also Miller v. Chittenden, 4 Iowa, 252. Vide fully, supra, p. 307.

The above prohibition would extend to a devise of any estate and interest

in real property descendible to heirs, as well as real estate itself. So also a devise of the rents and profits of lands to them would be void. Wright v. Trustees, etc., 1 Hoff. Ch. 225; Downing v. Marshal, 23 N. Y. 366; 37 id. 380.

A gift, however, of the proceeds of land would be good. Id.

It has been decided that where a devise made directly to a corporation not authorized to take by devise, is accompanied with a trust, it is void as to the trust as well as the legal estate. Ayres v. Meth. Ch., 3 Sandf. 351;

Goddard v. Pomeroy, 36 Barb. 546.

A devise of real property in trust for a corporation held void, unless the corporation is authorized to take by devise. Theo. Sem. v. Childs, 4 Paige, 419; and the Revised Statutes held applicable, as to their restrictions on devises to corporations, to those in existence as a class before the passage of said statutes. Ayres v. Meth. Ch., 3 Sandf. 351; and vide infra, p. 441.

See, however, Gen. Corp. Law, L. 1890, Chap. 563, § 11, as am'd. An enabling act cannot be retroactive. Bonard's Will, 16 Abb. Pr. N. S. 128. The rights of a corporation are subject to general laws of the State, existing or passed subsequent to its incorporation. Kerr v. Dougherty, 79 N. Y. 327.

The Statute of Uses has been held, in some cases, to be repealed, where benevolent and charitable corporations, duly authorized, are concerned. Lawrence v. Elliott, 3 Redf. 235, citing Holmes v. Mead, 52 N. Y. 332; Bascom v. Albertson, 34 id. 584.

But see fully, "Charitable Trusts," supra, pp. 300 to 314, and Dammert v. Osborn, 140 N. Y. 30; 141 id. 564.

A corporation held competent to take a remainder by legacy, if it be competent to take when it falls in by the terms of the gift, though it may have been incompetent at testator's death. Philson v. Moore, 23 Hun, 152; Shipman v. Rollins, 98 N. Y. 311.

But if the corporation has not power to take at the time of the testator's death, no subsequent power conferred will make valid the devise. Nor can a devise to an unincorporated association take effect on its subsequent incorporation. Leslie v. Marshall, 31 Barb. 562; White v. Howard, 52 id. 294; 46 N. Y. 144. Vide also supra, p. 308.

The authority to take by devise held to be such only as was granted by this State. White v. Howard, 46 N. Y. 144, 167. See Boyce v. City of St. Louis, 29 Barb. 650.

Devises to Religious Societies Formed Under the Act of 1784 .- Since the

Revised Statutes such societies cannot take by devise; and semble, not before, Ayres v. Trustees, etc., 3 Sandf. 351.

Devises to Religious Societies Formed Under the Act of 1813.-As to these vide, supra, p. 311.

Charitable Uses.— The history of the law of charitable uses and trusts, and how far they are valid in this State, is fully reviewed, supra, Chap. X, Tit. VIII.

Devises to Churches.-An unincorporated church cannot take directly by will. Riley v. Diggs, 2 Dem. 184; Marx v. McGlynn, 88 N. Y. 357; Leonard v. Davenport, 58 How. Pr. 384.

As to the right of incorporated churches to take by devise, see Religious Corporations Law, L. 1895, Chap. 723.

Certain Restrictions, Benevolent, Charitable, Literary, Scientific, Religious and Missionary Societies.—Law of April 13, 1860, Chap. 360. By this law, no person having a husband, wife, child, or parent, shall, by will, devise or bequeath to any benevolent, charitable, literary, scientific, religious or missionary society, association or corporation, in trust or otherwise, more than one-half of his or her estate, after payment of debts, and the devise or bequest shall be valid to the extent of one-half, and no more.

All inconsistent laws are repealed.

The widow's dower and all debts are to be deducted before the one-half is computed. Chamberlain v. Chamberlain, 43 N. Y. 424.

Neither can more than one-half be given two or more corporations in

the aggregate. Id.

The one-half is to be computed with reference to the estate at the time of testator's death; and the statute may be insisted on by any one interested. Harris v. Am. Bib. Soc., 4 Abb. N. S. 421; s. c., 2 Abb. Ct. of App. Dec. 316, revg. 46 Barb. 470; Hollis v. Drew Theol. Sem., 95 N. Y. 166; Wardwell v. Home for Incurables, 4 Dem. 473.

V. Home for Incurables, 4 Dem. 473.

Only the persons protected may enforce this statute. It may also be waived, as not being a mortmain statute. Amherst College v. Ritch, 151 N. Y. 282; Frazer v. Hoguet, 65 App. Div. 192, 201; Matter of Stilson, 85 id. 132.

A bequest of more than one-half of an estate may be made to a municipal corporation. Matter of Crane, 12 App. Div. 271.

Right of purchaser to question title of corporation in such cases. Hornberger v. Miller, 28 App. Div. 199.

Devise of all testator's real estate to charitable institutions without provision for widow held invalid as to one-half. Jones v. Kelly, 170 N. Y. 401.

vision for widow, held invalid as to one-half. Jones v. Kelly, 170 N. Y. 401.

Benevolent, Charitable, Literary, Scientific, Historic, Mission, Missionary, or Sabbath-School Societies.—Such societies "shall be capable of taking, holding or receiving any property, real or personal, by virtue of any devise or bequest contained in any last will or testament of any person whatsoever, the clear annual income of which devise or beguest shall not exceed the sum of ten thousand dollars; provided, no person leaving a wife or child or parent, shall devise or bequeath to such institution or corporation more than one-fourth of his or her estate, after the payment of his or her debts, and such devise or bequest shall be valid to the extent of such one-fourth, and no such devise or bequest shall be valid, in any will which shall not have been made and executed at least two months before the death of the testator."

Law of April 12, 1848, Chap. 319, amd. L. 1872, Chap. 649; vide 27 Barb. 304; Riker v. Society of the New York Hospital, 66 How. Pr. 246; 2 Dem.

The provisions of the above act were extended to other societies. But they do not apply to corporations not created thereunder. Hollis v. Drew Theo.

Sem., 95 N. Y. 166; Matter of Norton, 39 App. Div. 369.

Unless made expressly subject thereto. Stephenson v. Short, 92 N. Y. 433.

A devise to a charitable corporation whose charter makes it subject to all provisions of law in relation to devises is subject to L. 1848, Chap. 319. Fairchild v. Edson, 77 Hun, 298.

Where one of several such charitable corporations named as residuary devisee cannot take, its share lapses. Simmons v. Burrell, 8 Misc. 388.

The restriction by the acts of 1848 and 1872 supra, to the amount of ten thousand dollars to be received by such corporations is subject to the modifications of the General Corporation Law (see § 12), Supra, p. 438, and also to the laws cited. Infra, Chap. XXIV. Tit. IV.

The Act of 1860, Chap. 360, does not repeal nor affect this provision. Lefevre v. Lefevre, 59 N. Y. 434; Kerr v. Dougherty, 79 id. 327; Stephenson v. Ont. Orph. Asylum, 27 Hun, 380, disapproved 46 Hun, 530. See also Hollis v. Drew Theo. Sem., 95 N. Y. 166; Harris v. Am. Bapt. Home Miss. Soc., 33 Hun, 411.

A devise to the trustees is a devise to the society. Currin v. Fanning, 3

L. 1848, Chap. 319, incorporated in later private revision of the Revised Statutes, binds a corporation organized under Laws 1853, Chap. 184, which makes corporations organized under it subject to Revised Statutes. Re Kavanagh's Will, 125 N. Y. 418; Brusnahan v. Manhattan College, 5 N. Y. Supp. 643.

The provision of the statute as to execution two months before death applies, whether testator leaves wife or children, or not. Stephenson v. Ontario Orphan Asylum, 27 Hun, 380; disapproved, 46 Hun, 530. But see

Lawrence v. Elliott, 3 Redf. 235.

Provision applies to foreign corporations. Hollis v. Hollis, 29 Hun, 225. Land as such could not be devised to foreign corporation. Draper v. Harvard College, 57 How. Pr. 269. Distinguished as to legacies. Doty v. Hendrix,

16 N. Y. Supp. 284.

But not to an unincorporated institution. Effray v. Foundling Asylum, 5 Redf. 557. But such could not take anyway. Marx v. McGlynn, 88 N. Y. 357, 376. And land in New York State could not be devised, as such, to a foreign corporation. Draper v. Harvard College, 57 How. Pr. 269; see Cross v. U. S. T. Co., 131 N. Y. 330, 347; White v. Howard, 46 id. 144. Cf. U. S. v. Fox, 94 U. S. 315; and infra.

It has been held that foreign corporations could take under wills of residents of this State, where they were empowered to acquire by the laws of the State creating them; even though they could not take it if incorporated under the laws of this State. Riley v. Diggs, 2 Dem. 184, citing Chamberlain v. Chamberlain, 43 N. Y. 424, and other cases. But see contra, White v. Howard, 46 N. Y. 144, 164, 165.

And see as to present modifications, the General Corp. Law, as amended, allowing foreign corporations to take by devise and hold for five years land in this State; and infra, Chap. XXIV.

Law of 1855 Relative to Ecclesiastics and Religious Societies and Purposes.—A law passed April 9, 1855, Chap. 230, entitled "Of Conveyances and Devises of Personal and Real Estate for Religious Purposes," forbade conveyances and devises to ecclesiastics, and to any but corporations organized under the acts incorporating religious societies and free churches. The said act was repealed by Act of April 8, 1862, Chap. 147.

Devisees in Trust for Corporations.— In the case of McCartee v. The Orphan Asylum (o Cow. 437), although a direct devise to a corporation was held void (under the Statute of Wills then existing), it was intimated that a devise to a natural person, in trust for a corporation, would be good.

See also Theo. Sem. v. Childs. 4 Paige, 419; and supra, p. 438.

In the case of Downing v. Marshall (23 N. Y. 366), however, in construing the prohibitory clause of the Revised Statutes, the court holds that any devise of any interest in land to a corporation, whether through a trust or power, would be void. The court expresses the view that the technical character of the limitation is immaterial, and that which the law forbids to be done at all, cannot be accomplished by a mere formal change in the mode of arriving at the result. . The court, however, held that a direction to sell real estate and pay over the proceeds to a corporation, would be valid, although the question was not free from doubt. As seen above (Chap. X), a devise to a corporation which is invalid from the incapacity to take by devise, cannot be sustained as a charitable or public use to be executed by a court of equity, nor can trusts in favor of corporations be upheld as for religious or charitable uses, if they are in conflict with the general provisions of any statute law.

A devise to executors to be applied to prayers, in such Roman Catholic church as they may select, for souls in purgatory, is invalid. Holland v. Alcock, 108 N. Y. 312, revg. Holland v. Smyth, 40 Hun, 372.

A bequest to a charitable corporation providing against expending any of the principal of the sum bequeathed, is valid. Wetmore v. Parker, 52 N. Y. 450.

See further as to devises to corporation in trust, Chap. X, Tit. VIII.

A corporation entitled by law to take by purchase or otherwise may take by devise. Downing v. Marshall, 23 N. Y. 366.

As to devise to the Federal or a State government, vide supra, Tit. II.

There were various special statutes affecting particular religious and charitable societies which cannot be here given in detail, and as to which the Session Laws will have to be consulted.

Devises for Parks, Libraries, etc.—Devises, etc., in trust to create and maintain public parks, authorized. See L. 1840, Chap. 318, § 2; L. 1841, Chap. 261, § 1. See also L. 1890, Chap. 160, amd. L. 1892, Chap. 25.

CHAPTER XVI.

PROOF AND RECORD OF WILLS.

TITLE I .- WILLS PROVED BEFORE THE REVISED STATUTES.

II .- WILLS PROVED SINCE THE REVISED STATUTES.

III .- VALIDITY OF THE WILL, HOW ESTABLISHED.

IV .- RECORD AND EXEMPLIFICATION OF WILLS.

To make a full title of record to real estate, under a devise, the will creating it should be proved before the surrogate having jurisdiction (or the Supreme Court, if so provided), and recorded in the county where the real estate is situated.

Title to land by devise can be acquired only under a will duly executed and proved according to the laws of the State or country where the land lies

This statement requires some modification, as a will of real estate without probate is good as a conveyance to support ejectment. Corley v. McElmeel, 149 N. Y. 228, 235. See however, Thom v. Thiel, 15 Abb. N. S. 81, to the effect that a purchaser will not be compelled to take land passing under a will which has not been proved and recorded.

As to the lex loci governing probate, see the cases quoted, supra, pp. 111, 112; and McCormick v. Sullivant, 10 Wheat. 192; Darby v. The Mayor, 10 id. 465; Mills v. Fogal, 4 Edw. Ch. 559; In re Stewart, 11 Paige, 398.

In Doolittle v. Lewis, 7 Johns. Ch. 45, it was held that proof here of a

foreign will was unnecessary for the exercise by the executors of a power of sale in a mortgage.

For a case of admission here and rejection elsewhere, see Bloomer v. Bloomer, 2 Bradf. 339.

The effect of a decree admitting to probate a will of real property is presumptive only against party duly cited or his privies as to the matters determined. Code Civ. Proc., § 2627, amd. Laws of 1881, Chap. 535; Corley v. McElmeel, 149 N. Y. 228; Baxter v. Baxter, 76 Hun, 98; Matter of Merriam, 136 N. Y. 58.

A surrogate does not decide that the instrument in fact passes title to any real estate and he is not charged with any inquiry of that character. Matter of Merriam, 136 N. Y. 58.

Necessity of Proving Wills by Devisees .- By the Code of Civil Procedure, § 2628, following substantially the earlier provisions of Laws of 1830, Chap. 320, § 12 (1 R. S. 748, § 3), it is enacted:

"The title of a purchaser in good faith, and for a valuable consideration, from the heir of a person who died seized of real property, shall not be affected by a devise of the property made by the latter, unless within four years after the testator's death the will devising the same is either admitted to probate and recorded as a will of real property in the office of the surrogate having jurisdiction, or established by the final judgment of a court of competent iurisdiction of the State in an action brought for that purpose. But if, at the time of the testator's death, the devisee is either within the age of twenty-one years, or insane, or imprisoned on a criminal charge, or in execution upon conviction of a criminal offense for a term less than for life; or without the State; or if the will was concealed by one or more of the heirs of the testator, the limitation created by this section does not begin until after the expiration of one year from the removal of such a disability, or the delivery of the will to the devisee or his representative, or to the proper surrogate."

(The provisions of the Revised Statutes were repealed by L. 1880, Chap. 245.)

A purchaser will not be compelled to take land passing under a will which has not been proved and recorded before the proper surrogate. Thorn v. Shiel, 15 Abb. N. S. 81.

It is the duty of the executors to have the will proved and recorded where the land is situated. Young v. Brush, 28 N. Y. 667.

The second subdivision only applies where the concealment keeps the devisees in ignorance of their rights. Cole v. Gourlay, 79 N. Y. 527.

This section held not to apply to children born long after the death of the testator. Fox v. Fox, 167 N. Y. 44.

TITLE I. WILLS PROVED BEFORE THE REVISED STATUTES.

The following provisions of the earlier statutes it may be desirable to refer to:

The probate of last wills and testaments, and granting of administration of intestates' estates, was declared, by an act of the General Assembly of the Colony, on the 11th of November, 1692, to be vested in the Governor, "or in such persons as he should delegate under the seal of the Prerogative Court." 1 Bradf. 14, 16.

Previous to this the Court of Sessions acted as a Court of Probate (vide Daly's Sketch, infra; In re Brick's Estate, 15 Abb. Pr. 18), and subsequently the Governor established the Prerogative Court. Hunt v. Johnson, 19 N. Y.

This right continued down to the Revolution, and on the 16th of March, 1778, an act declared the powers of the judge of probate nearly in the language adopted in the first section of the Revised Act of 1813. 1 R. L. 444; see 1 Greenl. 18.

The Act of February 20, 1801, 1 Webs. 178, made provision for the proof of wills concerning land, before the Court of Common Pleas of the county where the real estate was situated; and the will, when proved, was to be recorded in a book by the clerk thereof, and the record is to be evidence in certain cases. If the lands were in several counties, the will was to be proved before the Supreme Court, and recorded by the clerk thereof.

By the Revised Laws (1 R. L. 444) the judge of the Court of Probate of the State was to have same powers and jurisdiction in testamentary matters as theretofore exercised by the Governor of the late Colony, except as modified. Before the Revised Statutes the jurisdiction of the surrogates' courts was

limited to the probate of wills of personal property.

Wills devising real estate were, by Law of April 4, 1786, Chap. 27 (repealing Chap. 51 of the 13th session), 1 Greenl. 236; also Act of April 5, 1790, Chap. 51, 2 Greenl. 325, to be proved, if thought desirable, in the Court of Common Pleas, where the land was situated, and recorded therein; if in several counties, then to be proved in the Supreme Court. By Act of February 20, 1801, wills might be proved before the Court of Common Pleas of different counties, or in the Supreme Court. By Law of April, 1813, 1 R. L. 444, embracing previous laws, surrogates' courts for each county were appointed, and were directed to record in books to be provided by them, all wills proved before them respectively. An Act of February 20, 1787. Chap. 38, had made similar provisions. Surrogates were also empowered to issue letters testamentary, etc., by said acts. See also the Act of March 3, 1787, 1 Greenl. 386, as to various provisions relating to wills and their probate, etc.

By Laws of 1829, Chap. 180, all probate records in the Secretary of State's office, deposited under the Act of March 21, 1823, were to be deposited with

the register in chancery.

Lost or destroyed wills must be proved by the Chancery Court, and the decree establishing them recorded with the surrogate. See Bowen v. Idley, 6 Paige, 46, 49; 2 R. S. 67, § 63.

Exemplified copies of record of wills proved before judges of probate, and recorded in their offices before January 1, 1785, were made evidence if the will cannot be found. 1 R. L. 368.

In the Revised Laws of 1813, April 8, 1813, Chap. 79, Vol. I, 364, 444, will be found embodied all the laws then in force relative to the Court of Probates, the office of surrogate, and the granting of administration, and as to the sale of real estate of intestates for the payment of debts, also as to the appointment of guardians for infants. Under these laws, and up to 1830, when the Revised Statutes went into effect, the jurisdiction of surrogates' courts was confined to the probate of wills of personal property.

Transfer of Records of Court of Probates .- Act of March 21, 1823, Chap. 70 .- This act abolished the Court of Probates, and all its writings, records, and proceedings were ordered to be deposited in the office of the Secretary of State, also copies of wills of nonresidents; and appeals were to be taken to the Court of Chancery, and provision was made as to the appointments of surrogates. This act was abolished by the General Repealing Act of 1828.

By Act of April 18, 1829, Chap. 180, all papers and records deposited with the Secretary of State, under the above act, were transferred by him

to the office of the register in chancery.

Rule of the United States Supreme Court. The Supreme Court of the United States has held that the probate of a will, duly received to probate by a State court of competent jurisdiction, is conclusive of the validity and contents of the will in that court. Gaines v. New Orleans, 6 Wall. 642.

Wills Proved Under the Dutch Government .- Under the Dutch government, Vice-Director and Council, or associates; then in the Court of "Burgomasters and Schepens." The process and rules of probate administration authority for the probate of wills was at first vested in the Director or under the Roman Dutch Law.

See following authorities: 1 Col. Doc. of N. Y.; Daly's Historical Sketch of the Judicial Organization of N. Y., 1 E. D. Smith's Rep. (C. P.), Preface.

As to the Roman Dutch Law as administered in the Dutch Colony, see Domat's Civil Law, Cushing's edition; Grotius' Dutch Jurisprudence; Van Leeuwen's Commentaries; Van der Linden's Institutes.

TITLE II. WILLS PROVED SINCE THE REVISED STATUTES.

By the Revised Statutes the will might be proved before the surrogate of the county having jurisdiction as respects personal property as specified, and if there were no such surrogate, then by the surrogate of the county where any real estate devised might be situated. The examinations and will were to be recorded in a book to be provided by the surrogate, and the record thereof was to be signed and certified by him. The will, proved and certified. the record, or an exemplification of the record, were made evidence. but might be repelled by proof. By the Revised Statutes, the provisions thereof relative to the probate of wills thereafter to be had. and the jurisdiction of the surrogate and his proceedings thereon, were to apply to wills already made as to those thereafter to be made.

2 R. S. 57, § 7; id. 60, § 23; id. 58, §§ 14, 15; id. 68, § 68. As to the above provisions, see Jauncey v. Thorne, 2 Barb. Ch. 40.

The provisions of the Revised Statutes relative to the jurisdiction of surrogates and the proof of wills were extensively modified by the Law of May 16,

By said Law of 1837 the surrogate of a county had jurisdiction to prove wills in certain cases as specified; among them where any real estate devised by the testator should be situated in the county of such surrogate.

As regards the proof of wills under said Law of 1837, its specific provisions

should be consulted.

This Act of 1837 was repealed by L. 1880, Chap. 245.

By § 2476 of the Code of Civil Procedure the surrogate of each county has exclusive jurisdiction on probate of a will; 1st, where the decedent was, at his death, a resident of that county; 2d where the decedent, not being a resident of the State, died in that county, leaving personalty in the State or which has come into the State since his death and remains unadministered; 3d, where the decedent was not a resident of the State and died without the State, leaving personalty in that county only, or which has come into that county only since his death and remains unadministered; 4th, where the decedent was not a resident of the State, and no petition for probate has been filed with any other surrogate, but real property to which the will relates is situate in that county only.

This provision replaces section 1 of the Act of 1837.

Jurisdiction cannot be conferred on surrogate by consent of all parties. Matter of Zerega, 58 Hun, 505.

As to what constitutes domicil. Graham v. Public Administrator, 4 Bradf.

Residence and domicil not synonymous. Bartlett v. Mayor, 5 Sandf. 44; Haggart v. Morgan, 5 N. Y. 422.

Sworn statement in petition as to inhabiting held sufficient to confer jurisdiction. Bolton v. Schriever, 135 N. Y. 65.

By § 2477 of the Code of Civil Procedure, where there is personalty in more than one county, in a case covered by subdivision 3 or realty in more than one county, in a case covered by subdivision 4 of § 2476, the surrogates of those counties have concurrent iurisdiction, exclusive of other surrogates, and the surrogate obtaining the first jurisdiction retains it.

A surrogate acquiring jurisdiction under this section cannot be ousted. Matter of Buckley, 41 Hun, 106.

Citations.—Section 1 of L. 1863, Chap. 362, repealing section 6 and amending § 8 of the Act of 1837, was repealed by L. 1880, Chap. 245. The provisions of law now in force regulating service of citation, are found in §§ 2520-2527, Code Civ. Proc., which replaced the provisions of a great number of acts containing various regulations on the subject.

The 3d subdivision of section 8 of the Act of 1837 was amended by Laws of 1840, Chap. 384, as to the publication of the citation. Repealed by

Laws of 1880, Chap. 245.

The details of these statutes cannot be here considered more fully.

As to publication of citations in counties other than New York and

Kings, vide L. 1874, Chap. 437. Repealed by L. 1880, Chap. 245.

Probate cannot be attacked collaterally for irregularity in service of citation. Wetmore v. Parker, 52 N. Y. 450.

Parties to be Cited to the Probate of a will are specified in § 2615, Code Civ. Proc.

Citations to Infants, Lunatics and Idiots.—By Law of May 14, 1872, Chap. 693, on any proceeding before surrogates, citations were to be served on the lunatic, etc., as specified. The provisions now regulating such service are contained in Co. Civ. Proc., §§ 2526, 2527 and 2530.

An infant not served with citation, by accepting benefits under the will after he becomes of age, so ratifies the probate thereof as to be estopped from maintaining an action to revoke it. Matter of Richardson, 81 Hun, 425.

Where the Surrogate is Interested .- As to the provisions of statute authorizing a county judge or the district attorney of a county to act where the surrogate is interested, and to record will so proved under his hand, in the surrogate's books, vide Laws of 1830, Chap. 320; also, Law of May 6, 1834, Chap. 305; L. 1877, Chap. 285, repealed, L. 1880, Chap. 245; Code Civ. Proc., §§ 2484-2487.

As to the general powers of surrogates and county courts, see also the Code of Procedure, § 37; also Laws of 1847, Chap. 280, 470; as to the county judge or district attorney, acting in place of the surrogate; also, Law of April 13, 1843, Chap. 121, amending § 49, Art. III, Tit. II, Chap. VI, Part II of Revised Statutes; also Law of April 28, 1870, Chap. 467; Laws of 1879, Chap. 311. See also as to the election of a separate officer to perform the duties of surrogate in certain counties. Act of April 15, 1851, Chap. 175; Act of 1834, Chap. 308; 1837, Chap. 465. All these acts were repealed by L. 1880, Chap. 245, either expressly or in general terms. See as to present provision, L. 1893, Chap. 686; Code Civ. Proc., § 2484.

The Testimony.— By said Law of May 16, 1837, Chap. 460, § 17, provision

was made as to testimony, etc., to be given.

This Act of 1837, also constituted the 10th, 11th, 14th and 15th sections of Title I, Chap. VI, of Part II of the Revised Statutes, applicable to wills of real and personal estate or either; and the 10th section was also to apply to proceedings on citations, as well as notice. Sections 14 and 15 are referred to above, and applied to the proof and record.

By Laws of 1837, Chap. 460, §§ 10-16, two, at least, of the witnesses, if living in the State, must have been examined, if of sound mind, etc., or their absence must have been satisfactorily accounted for. Provision was made as to such examinations where the witnesses were disabled, absent, etc.

If one or more of the witnesses were deceased, out of the State, or incompetent, proof might be taken of the handwriting of the testator, and witnesses so dead, absent or insane. Vide Jauncey v. Thorne, 2 Barb. Ch. 40, 52; Jackson v. Vickory, 1 Wend. 406; 45 Barb. 450; 30 How. 234.

As to proof by a single subscribing witness when other is dead. Matter

of Wilson, 76 Hun, 1.

Or is absent from the State. Matter of Clark, 75 Hun, 471.

Similar provisions were contained in the Revised Statutes, 1 R. S. 58, § 13. Where one subscribing witness testified to due execution, which the other denied, there being an attestation clause, the will might be admitted. v. Kinne, 2 Supm. 391.

As to the force of the attestation clause, etc., see Matter of Contested

Will of Leaird, 58 Misc. 477.

The Act of 1837, and this part of the Revised Statutes having been repealed as above noted, these matters are now regulated by Co. Civ. Proc., §§ 2618-2623. Two witnesses are enough, but if there be more any contestant may require the examination of all and of any other person whom the surrogate approves. § 2618. The surrogate must inquire into all the facts and circumstances and must be satisfied. He may require such proof as he thinks fit. § 2622. If the will appears to him in all respects valid, he must admit it to probate as a will of real or personal property or both, as he determines. § 2623.

Where one of the subscribing witnesses is dead and the other has disappeared and has not been heard of in six or seven years, held the will might be admitted to probate on proof of the handwriting of the testator and the subscribing witnesses, and of other circumstances which in the judgment of the surrogate, would be sufficient to prove the will on the trial of an action. Code Civ. Proc., § 2620; Matter of Oiver, 13 Misc. 466.

One who is physically unable to see the testator's signature at the time of the execution of the will is incompetent to be an attesting witness.

ter of Losee, 13 Misc. 298.

Where doubt arises from the evidence in regard to the genuineness of an alleged will, it is the duty of the surrogate to refuse probate. of Way, 6 Misc. 484.

Devisee or legatee may witness will, but if such will cannot be proved without the testimony of such witness, the devise or legacy is void. And such

person may be compelled to testify. 2 R. S. 49, § 50.

One named as executor in a will may testify to its execution, if witnessed by him. Society v. Loveridge, 70 N. Y. 387, followed, Matter of Gagan, 21 N. Y. Supp. 350.

An executor is a competent witness to prove due execution, though not a subscribing witness. Rugg v. Rugg, 83 N. Y. 592.

In an action in the Supreme Court relative to land only, in a devise, the execution of the will may be proven prima fàcie by a single witness. Upton v. Bernstein, 76 Hun, 516.

When All the Witnesses are Deceased .- It was also provided by the Revised Statutes, that if it appeared to the satisfaction of the surrogate, that all the subscribing witnesses were dead, insane, or resided out of the State, the surrogate would take such proof of the handwriting of the testator, and of either or all of the subcribing witnesses, and of other facts, as would be proper to prove the will at law. 2 R. S. 58, § 16; see 1 R. L. 365.

By Law of May 16, 1837, Chap. 460, § 20, if all the witnesses were dead,

insane, out of the State, or incompetent, proof of the handwriting of the testator and witnesses might be taken, and any other proper facts, and if the same were satisfactory to the surrogate, he might admit the will to probate and record, as a will of personal property only, and so as to affect

only the personal estate of the testator.

This matter is now regulated by Code Civ. Proc., § 2620. The provisions of this section are similar to those above, except that they cover cases of forgetfulness of subscribing witnesses and do not limit the operation of wills so proved to personal property.

As to the proof in the above case, vide Lawrence v. Norton, 45 Barb. 450;

30 How. 232; Briggs' Will, 47 App. Div. 47.

By Law of 1841, Chap. 129, certain sections of the Law of 1837, as to the examination of witnesses, were made applicable to all witnesses, whether subscribers to the will or not. This act was also repealed by L. 1880, Chap. 245. By the Revised Statutes, the record or exemplification of the proof of any

will proved, where all the subscribing witnesses are dead, was to be evidence in an action, etc., concerning the will after it had been proved that the lands therein mentioned had been uninterruptedly held under such will for twenty years before the commencement of the action, and such record was to have the same effect as if taken in open court in such action or controversy. Modified from Law of April 5, 1790; 2 R. S. 59, § 18. (Repealed L. 1880. Chap. 245.)

Section 2627 of the Code of Civ. Procedure now governs. originally made the decree presumptive evidence of the facts found by the surrogate after proof of the twenty years' holding. It was amended by L. 1881, Chap. 535, by omitting the requirement as to proof of possession.

In the case of a decree refusing probate, though not provided for under this section, a devisee is entitled to have the validity of the will tried by

jury. Corley v. McElmeel, 149 N. Y. 228.

In case of refusal of probate on the ground that testator was of unsound mind, while decree may be prima facie evidence that deed executed at same time as will is invalid, it is not conclusive. Baxter v. Baxter, 76 Hun, 98,

Supreme Court.—Chapter 316, Laws of 1879, providing for the establishment and probate of wills in the Supreme Court, was repealed, and is now regulated by Code Civ. Proc., §§ 1866, 1867. Colby v. Colby, 81 Hun, 221; Horton v. Caulwell, 108 N. Y. 255.

One who claims as purchaser simply cannot maintain action.

Mellen, 139 N. Y. 210.

The validity of the disposition, not the validity of the will, is in issue.

Anderson v. Anderson, 112 N. Y. 104.

As to the former rule, see Wager v. Wager, 89 N. Y. 161. The heir or devisee could not go into equity where there was no trust.

Proof of Foreign Wills.—See Russell v. Hart, 87 N. Y. 19.

Probate of foreign will may be had though the original will is retained by the foreign court and cannot be produced. Est. Delaplaine, 19 Abb. N. C.

36; s. c., 45 Hun, 225.

Laws 1894, Chap. 731, provide for citing on probate only the beneficiaries under the will of a citizen of the United States, dying, domiciled or resident in Great Britain and Ireland, and recording copy of the will and proofs taken by the foreign jurisdiction.

See Code Civ. Proc., § 2611 (as amd. L. 1893, Chap. 686); also § 2694.

Recording Wills Proved in Another State or Territory .- The Law of 1864, Chap. 311, on this subject, was repealed by Laws of 1880, Chap. 245. on this subject, Code Civ. Proc., § 2703.

An action to prove and establish the will of a resident of another State which has been proved in such State is not authorized by Code Civ. Proc.,

§ 1861; Clark v. Poor, 73 Hun, 143; 144 N. Y. 699.

The statutory presumption raised by such record may be overcome. Meiggs v. Hoagland, 68 App. Div. 182.

Proof of Lost or Destroyed Wills.—If a will of real or personal estate be lost or destroyed, the Supreme Court may take proof of the execution and validity of the same, and if established, the will shall be recorded with the surrogate, and letters issued thereon, and prior executors or administrators be restrained. The law was made applicable to past and future wills alike. But no will of any testator dying after the law took effect was to be proved as lost or destroyed, unless it were proved to have been in existence at the time of the decease of the testator, or were shown to have been fraudulently destroyed in the lifetime of the testator; nor unless its provisions could be clearly proved by two credible witnesses, a correct copy or draft being equivalent to one witness. See 2 R. S. 67, §§ 63, 64, 65; 2 R. S. 68, §§ 66, 67.

These provisions were repealed by L. 1880, Chap. 245, but are substantially re-enacted in Code Civ. Proc., §§ 1861 to 1867, inclusive. See also § 2621, providing that a lost or destroyed will can be admitted to probate in a Surrogate's Court, but only in a case where a judgment establishing the will could be rendered by the Supreme Court, as prescribed in § 1865.

As to proof of lost will, vide Grant v. Grant, 1 Sandf. Ch. 235; Keesv v.

Dimon, 91 Hun, 642.

As to destroyed or lost will. Collyer v. Collyer, 17 Abb. N. C. 328, affd..

110 N. Y. 481.

The provision of the Revised Statutes in relation to probate of a lost will in the Court of Chancery, requiring two witnesses to establish it, relates only to that special proceeding, and does not abolish the common law rule of evidence, which allowed the proof of a lost will in the same manner as that of a deed, by a single credible witness. Harris v. Harris, 26 N. Y. 433.

Held, defendants in a partition suit claiming under lost will may establish same by testimony of a single credible witness, but must show that the will was duly executed and the testator free from undue influence and of

sound mind. Hard v. Ashley, 88 Hun, 103.

The following cases may be also consulted as to the above provisions relative to lost or destroyed wills, viz. Harris v. Harris, 26 N. Y. 433; 26 Barb. 253; 2 Bradf. 281; Schultz v. Schultz, 35 N. Y. 653; 36 Barb. 95; 2 Bradf. 334; Knapp v. Knapp, 10 N. Y. 276; 18 How. 208; 41 Barb. 332; Korminsky v. Korminsky, 2 Misc. 138.

By Lew of April 22, 1870 Char 250, 41

By Law of April 22, 1870, Chap. 359, the surrogate of New York county was given the same power to take proof of lost or destroyed wills, in case

within his jurisdiction, as was vested in the Supreme Court.

This act was repealed twice - by L. 1880, Chap. 245, and by L. 1881, Chap. 537. All surrogates have now power to take proof of lost and destroyed wills by Code Civ. Proc., § 2621. See Hatch v. Sigman, 1 Den. 519, on lost and destroyed wills.

Likewise the Supreme Court. See Hook v. Pratt, 8 Hun, 102. As to proof required, see Collyer v. Collyer, 17 Abb. N. C. 328.

To sustain an action to establish a lost will, the proof must be clear and convincing, not only in respect to its provisions and execution, but also that it was in existence at the time of the alleged testator's death. Kahn v. Hoes, 14 Misc. 63.

No presumption as to continued existence of will arises from proof of its

execution. Matter of Kennedy, 167 N. Y. 163.

Actual fraud must be shown. Matter of De Groot, 18 Civ. Proc. R. 102. A will destroyed by testator, under undue influence, and in belief of a fraudulent statement, is a will "fraudulently destroyed" within the statute. Voorhees v. Voorhees, 39 N. Y. 463. As also Perry v. Perry, 21 N. Y. Supp. 133.

As to the proof required, record and evidence. Laws of 1894, Chap. 89.

Wills Proved by Commission. - Where witnesses were out of the State, a will duty executed by the laws of this State, or a duly exemplified or authenticated copy thereof (when the original was in the possession of a court in another State or country, and cannot be obtained), might be proved in the Supreme Court (formerly chancery) by commission, according to a notice to be directed by the court. The will or copy was to be recorded with the clerk, and the will or record or exemplification was made evidence. Laws of 1829, Chap. 300; Laws of 1830, Chap. 320. See 2 R. S. 58. Repealed by L. 1880, Chap. 245.

By Laws of 1837, Chap. 460, § 77, also, it was provided that, on any proceeding or matter in controversy before a surrogate, he might issue a commission to take testimony of witnesses in any other State, territory, or foreign place, as was done in courts of record. Repealed by the same act.

Provision was also made in the Revised Statutes as to the proof by commission of wills of personal estate, by persons out of the State, and the issuing of letters thereon. 2 R. S. 62. Repealed by the same act.

For present law, vide Code Civ. Proc., § 2538.

A commission may issue to examine by commission before hearing. Matter of Plumb, 135 N. Y. 661.

Creditors.—Act of April 18, 1843, Chap. 172, amending section 72 of the above Act of 1837, Chap. 460, so as to allow creditors to obtain orders for the mortgaging, leasing or selling of the real estate of decedents, and as to judgments or decrees obtained against the excutor, etc. Repealed, L. 1880, Chap. 245.

The latter part of this section is found in Code Civ. Proc., § 2757.

The general proceedings for selling or mortgaging a decedent's realty are regulated by Code Civ. Proc., §§ 2749-2776, inclusive.

Revocation of Probate.—A petition for revocation may be made within one year from recording decree for probate (extended as to certain persons under disabilities). Code Civ. Proc., § 2648 (amended L. 1881, Chap. 535). This applies only to wills in so far as they affect personalty. § 2647; Matter of Will of Kellum, 50 N. Y. 298; Matter of Gouraud, 28 Hun, 560, revd., 95 N. Y. 256; Matter of Becker, 28 Hun, 207.

The time limit begins to run from the filing of the decree with the clerk and not from the time it is actually recorded. Matter of Ruppauer, 9 App.

Div. 422.

Repeal of Parts of the Revised Statutes.— L. 1837, Chap. 460, § 71, repealed the 7th, 8th, 9th, 12th, 23d, 24th, 25th, 26th, and 27th sections of Tit. I, Chapter VI, Part II, of the Revised Statutes. These sections applied to the jurisdiction of surrogates, citation to heirs, etc., and minors, examinations of witnesses, and to proof of wills of personalty.

Also the 2d, 38th, and 39th sections, of Tit. II, of said Chap. VI, that

letters should not be granted within thirty days after proof of will; and as to

appointment of collector by special letters.

Also the 56th section of Tit. IV, of said Chap. VI, which required sales

by executors to be public or private, except in the city of New York.

Also so much of the 1st section of Tit. I, Chap. II, of Part III, of the Revised Statutes, as states that the surrogate shall not exercise any juris-

diction not expressly given by statute.

L. 1837, Chap. 460, § 74, also repealed § 48, Tit. IV, Chap. VI, Part II, of the Revised Statutes, as to application by creditors for sale of realty; and § 42, Tit. III, Chap. VIII, Part III, that heirs shall not be liable at law, but only jointly in equity. This Law of 1837 was repealed by Law 1880, Chap. 245.

Act of May 13, 1846, Chap. 288, providing for the revocation of the letters of nonresident or absent executors or administrators, who refuse to

attend on citation. Repealed, Laws 1880, Chap. 245.
Act of September 21, 1847, Chap. 298, amending Act of 1837, Chap. 460, by substituting "Title Third" for Tit. IV, in § 72 of said act as amended.

Repealed, Laws 1880, Chap. 245.

Law of May 2, 1863, Chap. 362. By this act, § 6 of said Law of 1837, Chap. 460, was repealed, and § 8 amended as to service on minors and by publication; also amending § 7, as to minors; also amending § 27, of Tit. II, Chap. VI, Part II, of the Revised Statutes, as to administration; also amending § 62, of Tit. III, as to service by publication on creditors. Provision was also made as to the service of minors in proceedings to sell real estate, and as to orders in such proceedings, and as to fees and compensation of surrogates and administrators. Repealed, Laws 1880, Chap. 245. Vide infra, Chap. XVIII, as to "Surrogates Sales."

Surrogate's Decision.—By the Law of 1837, Chap. 460, § 21, the surrogate was to enter in his minutes the decision which he might make against the sufficiency of the proof or validity of any will, and the grounds thereof if required. By Code Civ. Proc.,

§ 2625, this provision is re-enacted and extended so as to cover decisions respecting "the construction, validity or legal effect of any provision" of a will; but his decision as to questions affecting realty is presumptive, only. Code Civ. Proc., § 2627 (amd. 1881, Chap. 535).

See In re Merriam's Will, 136 N. Y. 58.

A will may be read in evidence as an ancient instrument, when it has sufficient age and possession has been in accordance with it, without proof of its execution, the same as a deed. Greenleaf's Ev., § 21; Jackson v. Blanshan, 3 Johns. 292, 294; Corley v. McElmeel, 87 Hun, 23, affd., 149 N. Y. 228. Probate of a will is of no avail except to supply presumptive evidence of its validity, and that may be repelled at any time by contrary proof.

2 R. S. 58, § 15.
Wills of real property may be used to establish a title, which they create in the same manner as a deed. If fact, they have sometimes been called

statutory conveyances.

They may be introduced in evidence upon proper proof in any action to recover the property devised, or to defend the possession thereof. Norris v. Norris, 32 Hun, 176; Corley v. McElmeel, 87 Hun, 23, affd., 149 N. Y. 228.

New Counties. - By Law of February 18, 1870, Chap. 20, amending Act of April 18, 1843, it was provided that where a new county was created, the surrogate of such county might take proof of wills, and grant letters, where the deceased at his death resided in the territory of the new county; and where, before the erection of the new county, any will of such deceased person should have been proved, or letters granted, but the accounts had not been settled, the surrogate of the new county should have exclusive jurisdiction thereafter on all questions thereafter arising upon any such will or estate, including the settlement thereof.

The surrogate of any county in which such will had been proved was required to make certified copies of proceedings or records in his office, and on being filed in the new county they had the same effect as originals. This act was repealed by L. 1880, Chap. 245.

The Law of April 18, 1843, Chap. 177, also provided that in all cases of the erection of a new county thereafter, the surrogate thereof might take proof of wills and grant letters in cases where the deceased, at the time of his death, resided in the territory embraced therein. Repealed L. 1880, Chap. 245

The Code of Civil Procedure (§§ 2479, 2480) contains similar regulations, with the additional provision that if letters were granted upon any other ground than that of residence the matter shall remain in the court which issued them. McGuinness Estate, 13 Misc. 714.

Wills Evidence Under the United States Constitution .- As to the probate being evidence as between the several States, under Art. IV, § 1, of the Constitution of the United States, vide Darby v. Mayor, 10 Wheat. 465.

Provisions of the Revised Statutes, how far Applicable.—By the Revised Statutes, the provisions of the Tit. I, Art. III, Chap. VI, Part II, relative to the proof and probate of wills, thereafter to be had, and the jurisdiction of the surrogate and his proceedings thereon, were to apply as well to wills made previous as to those made subsequent to the time when the chapter took effect. S. 68, § 68.

The provisions of the Revised Statutes as to the revocation of wills were to apply to those made by testator who should be living at the expiration of one year from the time the chapter (Chap. VI) took effect.

The provisions of the title were not to impair the validity of the execution of wills made before the chapter took effect, or to affect the construction of any such will.

Corresponding provisions are now contained in Code of Civil Procedure, § 2482, (amd. L. 1893, Chap. 686).

The term "will," as used in the chapter, was to include codicils as well as wills. 2 R. S. 68, § 71; 1 R. L. 368; see now Code Civ. Proc., § 2514, subd. 4. What wills may be proved, Code Civ. Proc., § 2611, amd. L. 1893, Chap. 686; also § 2694.

Law of testator's domicile prevails in the interpretation of a will. N. Y. L. Ins. & T. Co. v. Viele, 161 N. Y. 11.

Generally as to the above provisions, vide In the Matter of Roberts' Will, 8 Paige, 446; 4 How. 139; Parsons v. Lyman, 20 N. Y. 103; 41 Barb. 392; 11 id. 332; 18 How. Pr. 200; Parker v. Bogardus, 5 N. Y. 309; Jauncey v.

Thorn, 2 Barb. Chan. 40.
All of Tit. I, of Chap. VI, part II, of the Revised Statutes, except sections 1, 2, 3, 4, 5, 21, 22, 40 to 53, both inclusive, and 69, 70 and 71, is repealed by L. 1880, Chap. 245.

See also Code Civ. Proc., § 2482, supra, as to signing and certifying record

of former surrogates.

TITLE III. VALIDITY OF WILLS, HOW ESTABLISHED.

Before the enactment of the Code of Civil Procedure it was held that the determination by the surrogate of the validity of a will of real estate merely established it as presumptive evidence of its execution, existence and validity, and that its validity, or that of a devise thereunder, could only be judicially set at rest by an issue and trial at law.

Even where a surrogate had jurisdiction, and the probate of the will was Even where a surrogate had jurisdiction, and the probate of the will was valid, probate was no more than prima facie evidence of the due execution and validity of the will. See Bolton v. Jacks, 6 Roberts, 166; Clemens v. Clemens, 37 N. Y. 59; Bogardus v. Clark, 1 Ed. 266; 4 Paige, 623; Will of Kellum, 50 N. Y. 298; Bailey v. Hilton, 14 Hun, 3; Corley v. McElmeel, 87 id. 23, affd., 149 N. Y. 228; De Bussiere v. Holloday, 4 Abb. N. C. 111. The last case holds also that a court of equity may question probate and set aside a will in a suit brought for that purpose.

See 2 R. S. 59, § 18; 1 R. L. 365, § 7.

The Code of Civil Procedure formally declares that the decree admitting to probate a will of real property establishes the matters determined by the surrogate, but only presumptively, as against parties to the proceeding, duly cited, and their privies, or in controversies concerning the will; or where the decree is produced in evidence; and where the decree is produced in evidence, the testimony on which it is based is also admissible.

Code Civ. Proc., § 2627 (L. 1881, Chap. 535); In re Merriam's Will, 136 N. Y. 58.

Corley v. McElmeel, 87 Hun, 23, affd. 149 N. Y. 228.

As originally enacted the decree was not evidence in a controversy about the will unless the land had been held twenty years under it, but this re-

striction is now repealed. 2 R. S. 59, § 18; 1 R. L. 365, § 7.

Before the Code appeals from the surrogate's decision might be had within three months after his decision, to the circuit judge (Supreme Court), and issues might then be framed to try the validity of the will, and the will could not be recorded until the appeal was determined, on such appeal being filed with the surrogate. The appeal also stayed all proceedings of the executor or administrator, and feigned issues might be ordered to try the questions arising. 2 R. S. 66, §§ 55, 57; L. 1830, Chap. 460; L. 1847, Chap. 280; L. 1848, Chap. 185.

Under the Code a party must appeal within thirty days of service on him or his attorney of the decree or order appealed from. One not a party has three months from the entry of the decree unless he be an assignee or grantee of a party, in which case he has only the time which his assignor or grantor had. Code Civ. Proc., § 2572. The details and effect of the appeal are elaborately provided by Code Civ. Proc., Art. 4, Tit. 2, Chap. 18. Under the Revised Statutes the final determination of such issue was

Under the Revised Statutes the final determination of such issue was conclusive as to the facts therein controverted, in respect to wills of personal estate only, upon the parties to the proceedings. If such determination were in favor of the validity of such will, either of real or personal estate, or in favor of the sufficiency of the proof thereof, the surrogate to whom such determination was to be certified was to record such will, or admit the same to probate, as the case might be. If the determination was against the validity of the will, or against the competency of the proof thereof, the surrogate was to annul and revoke the record or probate thereof, if any had been made. 2 R. S. 67, §§ 59, 60.

By Act of 1853, Chap. 238, the validity of a devise or a will might be determined in the Supreme Court, in an action to be brought for that purpose; and thereupon any party might be enjoined from setting up or from impeaching such devise, as justice might require. Issues of fact were to be framed and tried as the court might direct.

By said law, also, heirs claiming lands by descent might prosecute for the partition thereof, notwithstanding any apparent devise by the ancestor, and any possession held thereunder, provided the heirs alleged and established the devise to be void. Repealed, L. 1880, Chap. 245.

See now §§ 1537, 1866, Code Civ. Proc.

Killing of testator by devisee does not render devise void and proof of same does not entitle heir at law to recover in partition. Ellerson v. Westcott, 148 N. Y. 149.

As to new trials under Code Civil Proc., § 1866, vide Marvin v. Marvin, 11 Abb. N. S. 102. See also as to when the action may be brought, Woodruff v. Cook, 25 Barb. 505. As to who might sue under Act of 1853, see Merserole v. Merserole, 11 Abb. N. S. 10.

Law of 1879, Chap. 316, makes provision for the trial of the validity of wills by the Supreme Court, at the instance of interested parties. See now Code Civ. Proc., § 1866.

By Law April 19, 1871, Chap. 603, letters might be issued during the appeal, but did not confer on the executors power to sell real estate, pay legacies, or distribute, until the final determination of the appeal. Repealed, L. 1880, Chap. 245. See now Code Civ. Proc., § 2582.

On such appeals the Court of Appeals may review decisions of fact. Howland v. Taylor, 53 N. Y. 627.

The preference of such appeals is maintained by Code Civ. Proc., § 791.

Validity of Probate of Will may be attacked for two years after probate, and in cases of infancy or incompetency within two years after the same shall cease. L. 1892, Chap. 591, to be known as Code Civ. Proc., § 2653a (amd. L. 1896, Chap. 943; L. 1897, Chap. 701).

This act was originally construed as applicable only to persons interested in a will to quiet title to the real estate devised thereby. Long v. Rodgers, 79 Hun, 441; Lewis v. Cook, 150 N. Y. 163, overruling Snow v. Hamilton, 90 Hun, 157; Johnson v. Cochrane, 91 id. 163; Wallace v. Payne, 9 App. Div. 34; Thomas v. Thomas, Id. 487.

L. 1897, Chap. 701, however, amended the section so as to give heirs at law the right to maintain such action. See Reid v. Curtin, 51 App. Div. 545.

Held applicable where testator died before statute. Lewis v. Cook, 89

Hun, 183.

The burden of establishing incompetency rests with contestant. Dobie v. Armstrong, 27 App. Div. 520, affd., 160 N. Y. 584.

The act does not require submission to jury in all cases. Dobie v. Arm-

strong, 160 N. Y. 584; Hawke v. Hawke, 82 Hun, 439.

But where different inferences may be drawn by jury the question of fact must be submitted to the jury, as in other cases. Hagan v. Sone, 174 N. Y. 317, revg. 68 App. Div. 60; Byrne v. Byrne, 109 App. Div. 476; Smith v. Holden, 128 App. Div. Memo.

The effect of the judgment is conclusive while it stands. Henriques v. Yale

University, 28 App. Div. 354.

See also Johnson v. Cochrane (No. 2), 91 Hun, 165; Smith v. Holden, 116 App. Div. 867, as to practise under Code Civ. Proc., § 2653a.

Impeaching Probate.—Probate cannot be attacked in a collateral proceeding for an irregularity. Wetmore v. Parker, 52 N. Y. 450; Caulfield v. Sullivan, 85 id. 153; Bolton v. Schriever, 135 id. 65.

By Code Civ. Proc., § 2624, any surrogate, if the validity or construction of any provision of any will of a resident, executed within the State, is put in issue in proceedings for probate, must decide the point, unless he dismiss the petition for defect of formal proof of any of the matters specified in § 2623. See formerly Laws of 1870, Chap. 359.

Matter of Bartholick, 141 N. Y. 166.

No question of title, however, is before the surrogate under this section.

Matter of Will of Walker, 136 N. Y. 20.

The provision of the Code of Civil Procedure (§ 2622) requiring a surrogate, before admitting a will to probate, to "inquire particularly into all the facts and circumstances," and that he "must be satisfied of the genuineness of the will and the validity of its execution," applies equally to wills of real and of personal property, and the same proof is required as to each

upon the questions stated.

When, upon presentation for probate of an instrument purporting to be a will of real and personal property, the question as to its genuineness and the validity of its execution is properly presented by a person having the right to raise it in some capacity, it is the right and duty of the surrogate to wholly refuse to probate, if he becomes satisfied and finds that the testator had not mental capacity to make a will, or that the instrument offered for probate was obtained by fraud and undue influence; he is not required to admit it as a will of personal property, although the only person contesting the probate is interested solely as heir at law, and is not one of the next of kin. Matter of Bartholick, 141 N. Y. 166.

In re Kellum, 50 N. Y. 298, distinguished.

See Law of April 22, 1870, Chap. 359, as regards surrogates in New York county, allowing the appointment of a receiver during contests relative to a will of realty. Repealed L. 1880, Chap. 245.

A temporary administrator in any county may be authorized to control real

estate. Code Civ. Proc., § 2675.

TITLE IV. RECORD AND EXEMPLIFICATION OF WILLS.

By the Revised Statutes, as seen above (Tit. II), the will and the proofs and examinations taken were to be recorded in books to be provided by the surrogate, and the record thereof was to be signed and certified by him; and the will as proved, or the record or an exemplification of the record, was made evidence.

Similar provisions are contained in the Code of Civil Procedure.

The Testimony. Testimony taken on the proof of wills, or as to letters testamentary, or of administration, or revoking the same, are entered in books by the surrogate, and also all wills and letters as above. Certified copies under seal are to be evidence in courts as to wills of personal estate. 2 R. S. S0, §§ 57, 58. See now Code Civ. Proc., §§ 2541, 2542, 2543 and 2629.

The proofs and examinations taken under 2 R. S. 59, § 16, where the witnesses are deceased, insane or reside out of the State, are to be signed, certified, and recorded by the surrogate, as provided, and the will is to be deposited with him. 2 R. S. 59, § 17. See now Code Civ. Proc., § 2620.

The record of proofs and examinations taken under these §§ 16 and 17, where all the subscribing witnesses are deceased, absent, etc., and the exemplification thereof by the surrogate having custody thereof, shall be received as evidence on any trial, etc., concerning the will, after proof on such trial, etc., that the lands devised have been uninterruptedly held under the will for twenty years before suit brought; and shall have the same effect as if taken in open court. This has been much altered by the Code and Acts amendatory thereof. 2 R. S. 59, § 18. Vide ante, Tit. II.

Wills Proved Before 1785 .- Exemplifications of records of wills proved and recorded with the former court of probates before January 1, 1785, certified under the seal of the officer having custody, shall be evidence, after proof of diligent and fruitless search for the will. 2 R. S. 59, § 20; Code Civ. Proc., § 2631.

Further Record of Exemplified Copies of Records of Wills .- By L. 1837, Chap. 460, § 68, clerks of the Supreme Court and surrogates may make exemplified copies of wills of real estate and notices, citations, and proofs concerning the same, and they may be recorded with the wills of real estate by the surrogate of the county where the lands lie. Repealed, Laws 1880, Chap. 245. As to present provision see Code Civ. Proc., § 2630.

Record in Clerks' Offices in Other Counties.—By Law of May 11, 1846, Chap. 182, any will of real estate duly proved in the State (with the proofs taken on the proof thereof), and the certificate of proof may be recorded in the clerk's office of any county, as are conveyances of real estate. Any exemplification of the record of such will may also be so recorded and the record of exemplification may be read in evidence. Such will is to be indexed by the clerk with deeds. The words within parentheses above were stricken out by law of May 8, 1869, Chap. 748. Repealed, Laws 180, Chap. 245.

By Law of June 24, 1851, Chap. 277, the provisions of the above act were extended to apply to the register of New York county. Repealed, Law 1880,

This whole matter is now regulated by Code Civ. Proc., § 2633 (amended, L. 1881, Chap. 535 and L. 1882, Chap. 399).

Wills Proved Before 1830 and 1865, etc.—By Laws of March 25, 1850, Chap. 94, and March 24, 1857, Chap. 173, exemplifications of records of wills proved before January 1, 1830, before surrogates in the State, or a surrogate

or judge of probate of any other State, certified under seal of the officer having custody, are made evidence. Both acts repealed, Laws 1880, Chap 245. This provision was in substance re-enacted in Code Civ. Proc., § 2632.

By Laws 1881, Chap. 705, it is extended to wills probated before 1840, and an exemplified copy of the will alone, if it had been probated in this State, without regard to whether the proofs were recorded or not, is made evidence, the record being required in case of wills probated without the State.

By Laws 1894, Chap. 89, this section was further amended to provide that exemplified copies of certain wills shall be admitted in evidence without the proofs taken on probate and making the record evidence of due probate, by

making the same apply to wills probated before January 1, 1865.

The section was further amended to read in its present form, making an exemplified copy of a will, recorded in the office of a surrogate admissible in evidence without the proofs, when thirty years have elapsed since probate. L. 1901, Chap. 540.

But this probably does not cure improperly probated instruments. See

Blackmon v. Riley, 18 N. Y. Supp. 476, 479, affd., 138 N. Y. 318.

Record of Will Here When the Testator Lived Out of the State .- By Laws of 1864, Chap. 311, as amended by Law of May 14, 1872, Chap. 680, where real estate situated in this State has been or shall be devised by any person residing out of the State, and within any other State or Territory of the United States, and the will has been proved and filed therein, an exemplified copy of the will, or of the record, and of the proofs, may be recorded with the surrogate of the county where such real estate is situated, which record in said surrogate's office, or an exemplified copy, where the original cannot be produced, shall be presumptive evidence of said will and its due execution, in all actions or proceedings relating to the lands so devised. This statute, however, would not dispense with the necessity of the will being made and proved in accordance with the laws of this State, if the real estate is situated therein.

Therefore a will passing real estate here should appear not only to have been attested but proved by at least two witnesses (unless the decease or disqualification of the witnesses, or some or one of them, is shown), before it can become here a valid instrument of record transferring real estate; and the other requisites connected with the execution of the instrument by the laws of this State must also appear to have been complied with, whether the testator was an inhabitant of the State or not. Lockwood v. Lockwood, 3 N. Y. Supp. 887. See supra, Chap. IV, as to the lex loci.

Amended by Laws 1878, Chap. 324 (as to the proofs) and repealed by Laws

1880, Chap. 245.

This act of 1864 as amended, makes such record of wills and proofs equivalent, in all cases, to probate in this State. Bromley v. Miller, 2 Supm. 575. This subject is now covered by Code Civ. Proc., § 2703, amd. L. 1888, Chap. 495. Also see Estate of Shearer, 1 Civ. Proc. R. 455.

Before recording is allowed it must appear that the will was executed in

conformity to the laws of this State. Matter of Nash, 37 Misc. 706.

Record of Foreign Wills .- See Code Civ. Proc., §§ 2694, 2695, 2696, 2703. Also Estate of Langbein, 2 Civ. Proc. R. 226; Matter of Hudson, 5 Redf. 333. To record a foreign will of real estate it must appear by the probate that it was executed according to New York law and a defect in the proof cannot be supplied. Matter of Langbein, 1 Dem. 448; Lockwood v. Lockwood, 3 N. Y. Supp. 887; Matter of Nash, 37 Misc. 706.

Previous Unsigned Records and Proofs May be Completed .- 2. R. S. 221. Law of March 16, 1870, Chap. 74, amd. by Laws 1874, Chap. 9, and Laws 1890, Chap. 155, repealed and now regulated by Code Civ. Proc., § 2481. See also Code Civ. Proc., § 2482 as amended, Laws of 1893, Chap. 686, confirming previous acts. As to former records in Rensselaer county, see Laws 1871, Chap. 424.

Authentication of Wills, Letters Testamentary, etc., to be recorded here. Code Civ. Proc., § 2704.

Clerk of the Surrogate's Court. - By L. 1877, Chap. 274, the clerk of the Surrogate's Court in the city and county of New York was authorized to make all certificates and orders of course which the surrogate might make, subject to the surrogate's control. The surrogate might at any time deprive him of this power.

This act was repealed by Laws 1880, Chap. 245, and by Code Civ. Proc., § 2509, this power was given to all clerks of Surrogates' Courts, subject to the same restrictions. Amd. L. 1893, Chap. 686; L. 1900, Chap. 651; L. 1903, Chap. 42.

But such an act of the clerk is valid though done in disobedience of the

surrogate's prohibition. Code Civ. Proc., § 2509.

A surrogate's clerk cannot, however, file an unsigned decree and make it valid. McNaughton v. Chave, 5 Abb. N. C. 226.

Proof of Heirship.— Code Civ. Proc., §§ 2654 et seq.; supra, p. 371.

CHAPTER XVII.

POWERS AND DUTIES OF EXECUTORS AND ADMINISTRATORS OVER THE REALTY.

TITLE I. THE APPOINTMENT OF THE EXECUTORS AND ADMINISTRATORS.

II. ASSETS SAVOBING OF THE REALTY.

III. POWERS TO EXECUTORS TO DISPOSE OF THE REALTY.

IV. MISCELLANEOUS PROVISIONS AS TO EXECUTORS, ETC.

TITLE I. THE APPOINTMENT OF THE EXECUTORS AND ADMINIS-TRATORS.

Letters testamentary are granted by the surrogate to the persons named in the will or nominated under a power conferred by the will if competent by law to serve, and they elect to qualify (i. e., take the requisite oath to act faithfully), and take upon themselves the execution of the will.

Code Civ. Proc., §§ 2636 and 2640; 1 R. L. 445; 2 R. S. 69, as amended Law of 1837, Chap. 460. These earlier acts (now repealed by L. 1880, Chap. 245) did not provide for executors appointed under a power.

For such a case, see Hartnett v. Wandell, 60 N. Y. 346. See also Code Civ. Proc., § 2641.

As to who may act when the surrogate is disqualified, vide supra, Chap. XVI.

The following are some of the most important statutory provisions relating to executors:

As to Who are Disqualified from being executors. Code Civ. Proc., § 2612,

amd. L. 1893, Chap. 686. See 2 R. S. 69, § 3, amd. L. 1873, Chap. 79; L. 1867, Chap. 782; Haley's Estate, 21 Misc. 777 (as to exercise of discretion in case of person unable to read or write).

Married Women .- By the Revised Statutes no married woman could act unless her husband consented in writing; he then became jointly responsible

for her acts. 1 R. S. 69.

By Law of April 25, 1867, Chap. 782, married women were enabled to be executrices, administratrices and guardians, and to give bonds for security, as if sole. See also Law of 1863, Chap. 362.

See now as to persons competent to act as executors and administrators.

Code Civ. Proc., §§ 2612, 2661.

An executor might, even before the Code, on removal of his coexecutor retract his renunciation and take out letters, if no administrator with the will annexed has been appointed. Coddington v. Newman, 3 Supm. 364, affd., without opinion, 63 N. Y. 639.

The record of a foreign will under L. 1864, Chap. 311, did not entitle

creditors to compel the executor to qualify here or be deemed to have renounced. Estate of Haywood, 1 Month. L. Bul. 32.

A declaration in open court may be effective as renunciation. Baldwin, 27 App. Div. 506.

To Have no Power until Letters Granted.— Every person named in a will as executor, and not named as such in the letters testamentary, or in letters of administration with the will annexed, shall be deemed to be superseded thereby, and shall have no power or authority whatever, as such executor, until he shall appear and qualify; and no executor named in a will shall, before the letters testamentary are granted, have any bower to dispose of any part of the estate of the testator, except to pay funeral charges, and to protect the estate. Code Civ. Proc., § 2613.

2 R. S. 71, § 15, 16,

Administrators with Will Annexed.—Administrators with the will annexed have the same rights and powers, and are subject to the same duties as if named executors in the will. (2 R. S. 72. § 22; Code Civ. Proc., § 2613.) They are appointed in default of the executors who may not qualify, or who may renounce, or if none be named in the will, or under a power, or on the decease of the executors, or their removal. (Code Civ. Proc., §§ 2643, 2693, amended L. 1889, Chap. 503. Those sections make important provisions as to the appointment of administrators with the will annexed and successors.)

As to the powers of such administrators to make sales under powers in the will, vide infra, Tit. III.

2 R. S. 71, § 14, 17 and 2 R. S. 78, § 45 were repealed by L. 1880, Chap. 245, but the subjects of which they treated are covered by Code Civ. Proc., §§ 2643 and 2693, as amended.

Incapacity or Removal of one Executor.—In case one of several executors or administrators shall die, become lunatic, convicted of an infamous offense, or otherwise become incapable, or if letters are revoked as to him, then the remaining executors, etc., shall act and complete the execution of the will. No successor shall be appointed unless the will expressly require it.

Code Civ. Proc., § 2692; 2 R. S. 78. The Revised Statutes on this point are repealed by L. 1880, Chap. 245.

As to when executors may be removed, vide infra, and also, 19 Barb. 663; 37 id. 194.

Removal, etc., of Executors .- Provision was also made for the removal of executors, on their or their sureties becoming insolvent or removing from the

State, by Laws of 1837, Chap. 460; L. 1862, Chap. 229. Also in cases of improvidence, drunkenness or want of understanding, or in case of marriage

of an executrix. Id. Both these acts were repealed by L. 1880, Chap. 245.

See also Law of April 13, 1871, Chap. 482, as to security and removal; also Underhill v. Dennis, 9 Paige, 202. The act of 1871, Chap. 482, was

repealed by L. 1880, Chap. 245. See also Law of May 19, 1846, Chap. 288, as to removal of nonresident and other executors, who refuse to obey citations. Repealed, L. 1880, Chap.

See also Laws of 1837, Chap. 460, as to removal on the ground of incompetency, or for not giving security. Also Law of 1862, Chap. 229. Both these acts were repealed by Law 1880, Chap. 245. Also L. 1879, Chap. 406 as to revocation of letters and appointment of successors on petition of executors. This act has never been formally repealed, but it is undoubtedly within the general repealing provisions of L. 1880, Chap. 245.

Provision for revocation of letters for lack of proper bond is now made by

Code Civ. Proc., §§ 2597, 2598 and 2599. By Code Civ. Proc., § 2685, provision is made for revocation for disqualifica-

tion, misconduct, etc. In these cases the surrogate has discretionary power to revoke or not, as he sees fit. Code Civ. Proc., § 2687.

Revocation on petition of the executor is provided for by Code Civ. Proc., § 2680, 2690. Revocation of the letters of an executor, who is also a testamentary trustee, does not revoke his authority as trustee. Code Civ. Proc., § 2688. But the two proceedings may be combined and the decree may remove him from both positions, if proper cause appear. Code Civ. Proc., § 2819.

Where there is an absolute direction to sell but the time is discretionary no wise delay will justify removal of executors. Haight v. Brisbin, 96 N. Y.

132.

Renunciation.— If the executor named renounce, he shall do so by an instrument in writing, proved like a deed or attested by one or more witnesses and proved to the satisfaction of the surrogate; or if he do not qualify or renounce within thirty days after proof of will, he shall be held to have renounced, unless he give excuse after a notice served. A formal renunciation may be revoked by a similar instrument, if no other letters have issued or if, for any reason, no person holds valid letters at the time.

Code Civ. Proc., §§ 2639 and 2642. The latter section amended, L. 1883, Chap. 401. See 2 R. S. 70, 71.

The earlier law required a formal renunciation to be attested by two witnesses. 1 R. L. 449; 2 R. S. 70.

County of New York .- See a special act relative to the surrogate of said county as to appointment and removal of executors, guardians and trustees, by him, and the appointment of successors, as to the accounting by trustees, guardians, etc., the construction of the validity of wills by him, and as to the appointment of receivers during a contest over a will of real estate. Laws of 1870, Chap. 359. Repealed L. 1880, Chap. 245. Most of this act was substantially re-enacted in the Code, and extended to all counties. Vide supra.

Acts Done by Superseded Executor, etc.—All sales made in good faith, and all lawful acts done by executors or administrators before notice of citation to revoke, or by executors or administra-

tors who may be removed or superseded, or who may become incapable, shall remain walid, and shall not be impeached on any will afterwards appearing; nor by any subsequent revocation or superseding of the authority of such executors or administrators. Code Civ. Proc., § 2603. See also § 2684.

See formerly 2 R. S. 62, 78. A removed executor, as long as he is liable for assets that have come into his hands, is amenable to process from the surrogate calling him to an account. Gerould v. Wilson, 81 N. Y. 573.

Letters Conclusive.— The letters testamentary or of administration, granted by the court or officer having jurisdiction, shall be conclusive evidence of the authority of the executors, etc., until reversed or revoked. Code Civ. Proc., § 2591; 2 R. S. 80, § 56, repealed by L. 1880, Chap. 245; Abbott v. Curren, 98 N. Y. 665.

Letters on Estate of Nonresidents .- Whenever the will of a person domiciled without this State, has been admitted to probate. Code Civ. Proc., §§ 2696, 2697, 2698 and 2699 (replacing Act of May 4, 1863, Chap. 403, which was repealed by L. 1880, Chap. 245).

Receivers in Place of Executors.— Where, in an action of partition, distribution, or for the construction or establishment of a will, an estate has been brought within the jurisdiction, direction, or control of the Supreme Court, and all the executors are deceased, the court may, during the proceedings, and until they are carried into effect, appoint a receiver of the estate.

Such receiver is to carry into effect the orders and decrees of the court in relation to the estate, and be the successor in interest of the surviving executor; and shall have the same power and authority as have administrators with the will annexed, but subject to the orders of the court. Code Civ. Proc., § 1869, as amd. Laws of 1895, Chap. 496.

This substantially re-enacts 2 R. S. 78, § 45, as amended by L. 1863, ap. 466. This portion of the Revised Statutes was repealed by L. 1880, Chap. 466. Chap. 245.

Before the Code the power of appointing such receivers was confined to the Supreme Court, and actions to establish a will were not within the law. Such receiver cannot execute a discretionary power of sale. Cooke v. Platt, 98 N. Y. 35.

Executors Need Not Sign as Such, if so Described .- Myers v. Mutual Life Ins. Co., 99 N. Y. 1,

See also supra, Chap. XVI, as to other provisions affecting executors in connection with the probate of wills.

TITLE II. ASSETS SAVORING OF REALTY.

As a general principle of the common law executors as such have not to do with real property unless the will gives them an estate or a power of sale. Fowler Real Property (2d ed), 390.

But the Revised Statutes prescribed what assets savoring of the realty should go to executors and administrators; they took as personal estate to be distributed and applied as such:

1. Leases for years; lands held by the deceased from year to year; and

estates held by him for the life of another person. See I R. L. 365, § 4.

2. The interest which may remain in the deceased, at the time of his death, in a term for years, after the expiration of any estate for years therein granted by him or any other person.

3. The interest in lands devised to an executor for a term of years for the

payment of debts. 4. Things annexed to the freehold or to any building for trade or manufacture, and not fixed into the wall of a house so as to be essential for its

5. The crops growing on the land of the deceased at the time of his death. 6. Every kind of produce raised annually by labor and cultivation, except

grass growing, and fruit not gathered.

7. Rent reserved to the deceased, which had accrued at the time of his death. See 1 R. L. 365, 439, 443. See changes as to this, supra, p. 375.

Subdivisions 8 and 9 refer purely to personal property.

2 R. S. 82, § 6.

These provisions are now contained in the Code of Civ. Proc., § 2712 (amd.

L. 1893, Chap. 686).

Things annexed to the freehold or to a building, shall not go to the executor, but shall descend with the freehold, to heirs or devisees except such fixtures as are mentioned in the 4th subdivision above.

The right of an heir to any property not enumerated in this section, which,

The right of an heir to any property not enumerated in this section, which, by the common law would descend to him is not impaired by the general terms of this section. Code Civ. Proc., § 2712, subd. 9; 2 R. S. 83, §§ 7, 8.

As to the interpretation of these provisions, vide Murdock v. Gifford, 18 N. Y. 28; Ford v. Cobb, 20 id. 344; Potter v. Cromwell, 40 id. 287; 1 Barb. 372, and supra, pp. 116, 198, 374.

By 2 R. S. 83, §§ 9, 10, certain other exceptions are made with reference to personal property, which have no application to the realty, and are now embodied in Code Civ. Proc., § 2713 (amended 1893, Chap. 686).

Crops.— Notwithstanding the above provisions of statute, the devise of a farm, without modifying words, would carry to the devisee crops growing on the farm, instead of their passing to the executors, etc. Bradner v. Faulkner, 34 N. Y. 347, criticised 2 Con. Surr. 237, at 242. See also Sherman v. Willet, 42 N. Y. 146.

The crop in such case is like a chattel specifically devised, and may be sold for debts by the executor if other funds fail: Stall v. Wilbur, 77 N. Y. 158. Vide supra, p. 376.

Rents Collected .- Must be applied to pay rent due. Miller v. Knox, 48 N. Y. 232.

TITLE III. POWERS OF SALE TO EXECUTORS.

Unless a special power be given to executors to mortgage, lease, or make sales of land, by the will, they have no authority so to do. As a general rule they have nothing to do with the realty, and an unauthorized sale of real estate by them is a nullity.

Barker v. Crosby, 32 Barb. 184; Lahens v. Dupassent, 56 id. 266; Smith v. Cornell, 111 N. Y. 554, s. c., 113 N. Y. 320.

But where they have power of sale they many the title deeds. Mills v. Mead, 7 Hun 36. 7 Hun, 36.

When executors do not take title to real estate - power in trust. Matter

of Spears, 89 Hun, 49.

A devise of land to executors in trust to sell the same and divide the proceeds and distribute them as directed, while void as a trust because the executors are not authorized to receive rents and profits, held valid as a power under section 56 of the statute of uses and trusts. Reynolds v. Denslow, 80 Hun, 359.

Implied Power.—A power will sometimes be implied, from the terms of a will and the apparent intention of the testator, where a sale of the real estate would be necessary to carry out that intention. Thus, a devise of realty to executors, with direction to pay debts out of it, or to invest, and to accumulate or pay over the proceeds or income, would carry with it a power to sell. So, also, if a will be silent as to the persons who should sell lands directed to be sold, a power of sale is implied in the executors who qualify, to make the sale. So a prohibition of a sale by executors, except under certain circumstances carries a power under those circumstances.

Fowler, Real Property (2d ed.), 392; Dominick v. Michael, 4 Sandf. 374; Davoue v. Fanning, 2 Johns. Ch. 252; Dorland v. Dorland, 2 Barb. 63; Bogert v. Hertell, 4 Hill, 492; Meakings v. Cromwell, 2 Sandf. 512, affd., 5 N. Y. 136; Morton v. Morton, 8 Barb. 18; Livingston v. Murray, 39 How. 102; Messenger v. Casey, 8 Week. Dig. 71; Stewart v. Hamilton, 37 Hun, 19; Siegel v. Anger, 13 Abb. N. C. 362; Byrnes v. Baer, 86 N. Y. 210; Officer v. Board of Missions, 47 Hun, 352.

But a power to sell will not be implied from charging lands with debts. Will of Fox, 52 N. Y. 530, affd., 94 U. S. 315.

As to when heirs are estopped under a void power, see Favill v. Roberts, 3 Lans. 14, affd., 50 N. Y. 222.

A direction to pay debts, followed by a general devise to executors, carries

A direction to pay debts, followed by a general devise to executors, carries an implied power of sale. Coogan v. Ockerhausen, 55 Super. 286.

Where the intention of the testator to give a power of sale clearly appears, inapt and inartistic language used by him in his attempt to do so should be construed liberally in furtherance of such intention. Lesser v. Lesser, 11 Misc. 223.

Where the will is silent as to the person who is to execute the power of

sale, the power is implied in the executor. Id.

The above implication of a power to sell, in the executors, results from the apparent necessity of the case, and in order to effectuate the intention of the testator, which is generally held to have a controlling effect in the interpretation of wills.

4 Kent, 334.

4 Ment, 334.

Formal words are not necessary to create a power, and if it appears by a will that a power of sale was intended, a sale will be supported, however obscurely the intention may be expressed. Cahill v. Russell, 140 N. Y. 402; Hubbard v. Gilbert, 25 Hun, 596. Compare Martin v. Pine, 79 Hun, 426.

Where a will gives a legacy which is equal to the personal estate and directs the division of the residue between certain children named, and also gives the executor full power to sell the estate "to his best knowledge,"

a general power in trust to sell the real estate is confided to the executor,

with a clearly implied duty to divide the proceeds among the children named.

Strube v. Leutzback, 12 Misc. 216.

Where there is a power to sell in order to distribute among heirs, the heirs may elect to take the estate in land notwithstanding the power. Reed v. Van Wart, 12 Barb. 113; and see *supra*, p. 379, as to equitable conversion under a power. Also, infra.

Lands taken on foreclosure of mortgage may be sold without an express power of sale, and is like land converted by the will. Cook v. Ryan, 29

Where a will gave the widow a life interest in all the estate with privi-lege of unlimited expenditure, and with power to sell the realty for the purposes of the will after the personalty was exhausted, conferred upon her as executrix; it was held that the executrix took a general beneficial power of sale. Leonard v. Am. Bapt. Home Miss. Soc., 35 Hun, 290. Power to sell after acquired property not implied from a power to sell testator's realty and reinvest. Hatt v. Hagaman, 12 Misc. 171.

Power to continue and to sell testator's business does not confer authority to sell real estate not connected with the business. O'Reilly v. Platt, 80 App. Div. 348.

Power to Divide.—A power to divide gives executors no power to sell. Craig v. Craig, 3 Barb. Ch. 76; and see, supra, "Powers," pp. 353, 354, as to when a power is implied to be included in another power.

A devise to widow for life, and remainder, if any to the children, implies a power of sale. Thomas v. Woolford, 49 Hun, 145.

The Estate of the Executors or Trustees.— Under the common law, a devise of lands to executors to sell, passed the interest to them; a devise, on the contrary, that executors should sell, or that the lands should be sold by them, gave them but a power, and the lands descended subject to the power.

Vide Fowler, Real Property, 388, 389; Patton v. Crow, 26 Ala. 426; Fontain v. Ravenel, 17 How. (U. S.) 369; 4 Kent, 320. Also, supra, p. 413.

Since the Revised Statutes, where lands are devised to executors to be sold or mortgaged, without authority to receive the rents and profits, no estate vests in them, but the trust is valid as a power, and the lands descend to heirs or pass to devisees, subject to the execution of the power. If there is a trust estate, the cestui has no estate.

1 R. S. 729, § 56; Real Property Law, § 77.

Reed v. Van Wart, 12 Barb. 113; Boynton v. Hoyt, 1 Den. 53; Quin v. Skinner, 49 Barb. 128; 43 N. Y. 99; Tucker v. Tucker, 5 id. 408; Hutchins v. Baldwin, 7 Bosw. 236; Germond v. Jones, 2 Hill, 569; In re McLaughlin, 2 Bradf. 107; Jackson v. Jansen, 6 Johns. 73; Sharpsteen v. Tillou, 3 Cow. 651; Noyes v. Blakeman, 6 N. Y. 567; Bouton v. Thomas, 46 Hun, 6; Potter v. Hodgman, 81 App. Div. 233.

If they might be entitled to the rents, etc., under a contingency which never occurs, the authority remains a mere power in trust. Reed v. Van

Wart, 12 Barb. 113.

When the executors have merely a naked power, not coupled with any interest or trust, on the decease of the executors, the power does not survive, but the estate vests in the heirs absolutely. And the court will not interpret powers as in trust unless necessary. Catton v. Taylor, 42 Barb. 578; Martin v. Martin, 43 id. 172; Vernon v. Vernon, 53 N. Y. 351, modifying 7 Lans. 492.

An authority to receive rents and profits will sometimes be implied, e. g., where a duty is imposed to apply them. Vernon v. Vernon, 53 N. Y. 351, modifying 7 Lans. 492; Bouton v. Thomas, 46 Hun, 6.

But such authority, even when express, does not necessarily carry a fee. Robert v. Corning, 23 Hun, 299, affd., 89 N. Y. 225.

A power of sale may effect an equitable conversion even when there is a discretion, and the executors will be entitled to rents. Lent v. Howard, 89 N. Y. 169. See also as to the estate of trustees, Chap. X, Tit. IV, supra.

If not exercised, the fee descends to the heirs. The power should be exercised within a reasonable time, otherwise it may become inoperative.

See Chap. XII, supra.

Executors having power of sale to pay debts cannot exercise same after lapse of ten years. Butler v. Johnson, 41 Hun; 206, affd., 111 N. Y. 204. Compare 41 Hun, 434; also Putnam v. Lincoln Safe Deposit Co., 66 App. Div. 136.

As to when an estate in the executors will be implied, vide Brewster v. Striker, 2 N. Y. 19; Striker v. Mott, 28 id. 82; Bennet v. Garlock, 79 id. 302. Courts have power to control the exercise of the power in behalf of infant devisees. Martin v. Martin, 43 Barb. 172; Robert v. Corning, 23 Hun, 299, affd., 89 N. Y. 225; Farrar v. Alexander, 16 Hun, 477. Also when not discretionary in executor or trustee. Van Boskerck v. Herrick, 65 Barb.

But equity will not interfere to compel the execution of a power after its purpose has been accomplished without its exercise, Prentice'v. Janssen, 79 N. Y. 478; or the beneficiaries of the proceeds have taken the land itself. Hetzel v. Barber, 69 id. 1.

As to power of sale to executor in his personal capacity, who had not qualified in this State. Pollock v. Hooley, 67 Hun, 370.

A deed from only one executor where two have qualified and are acting, is void. Lynch v. Buckley, 82 App. Div. 614.
Otherwise, however, where deed was mere formality, and both executors

joined in sale. Brown v. Doherty, 185 N. Y. 383.

It has also been seen, under the chapter on Powers that when the object of a power is illegal, the power is void; and when it is void, or the objects of the power fail, or no appointment is made, the future estates limited take effect as if the power had not been given. And where no estate is given to the executors, the estates limited are held to be vested, subject to the execution of the power, if valid. Chap. XII, supra.

Power Inconsistent with Devise.—There has been a question whether a power to sell land by executors given after a direct and absolute devise in fee, was valid.

The general rule is, that a power shall not be exercised in derogation of a prior grant by the appointor. It is held, however, that a power of sale may be exercised, notwithstanding a prior devise of the land in question, in case the power appears necessary to carry out the intention of the testator. The following is a review of the latest cases on the subject in the courts of this State:

Crittenden v. Fairchild, 41 N. Y. 289; Clift v. Moses, 116 id. 144; Miller v. Miller, 139 id. 210; Taber v. Witteks, 1 App. Div. 289; Cruikshank v. Cruikshank, 39 Misc. 401.

In the case of Quin v. Skinner, 49 Barb. 128, on the construction of a will, the court held that the power of sale under consideration was a general power in trust, and was repugnant to a direct and absolute prior devise, and that such a general power could not be allowed to operate to defeat the apparent intention of the testator. This case was reviewed in 43 N. Y. 99, and reversed; the court holding that the power to sell given to the executor was legal and valid as a power in trust, and not inconsistent with or executor was legal and valid as a power in trust, and not inconsistent with or repugnant to the residuary devise. The court put its decision on the ground that the intention of the testator, as apparent from the will, was to give to the so-called devisee a pecuniary legacy consisting of the *proceeds* of the estate, and not to devise the real estate at all.

In the case of Kinnier v. Rogers, 55 Barb. 85, it was determined that a general power of sale could be exercised by the executors after a specific devise of the residuum of the testator's estate. The court held that the power under review was good, as imposing a duty upon the executors to pay debts and legacies, and, on a certain contingency, to pay money to the testator's daughters; the dissenting opinion, however, claimed the power to be repugnant to the estate granted, relying upon the case of Lovett v.

Gilender, 35 N. Y. 617.

In the latter case it had been held that, after a devise of a residuum absolutely, certain restrictions upon the apportionment of the property were inoperative and void, as repugnant to the absolute and unqualified gift.

A general power to sell had been given at the end of the will. It was considered that the only authority given to the executors to sell was for the purpose of effecting a division of the estate upon the death of the testator's daughters, and that as the law made that division upon the death of the testator, the provision was inoperative and had nothing to support it. That in any event it was a mere passive trust, and the estate vested in the devisees, without the necessity of a conveyance by the executors. The above case of Kinnier v. Rogers, was affirmed, as below stated.

In the case of Conover v. Hoffman (Court of Appeals), reported in 15 Abb. 100, a general power had been given by the will, the residuum of the estate to be distributed according to law. By a codicil the residuum was given, in trust, for certain purposes. It was claimed that the codicil was a revocation of the discretionary power of sale given by the will.

The court held that there was nothing inconsistent in the will and codicil with the continuance of the power. That the continuance of the power was obviously important with reference to the payment of the debts and legacies, and the carrying out the other parts of the codicil, and that it was clearly the intention of the testator that it should remain.

In the case of Crittenden v. Fairchild, 41 N. Y. 289, question arose as to the construction of a will, where, after certain bequests, the residuum, real and personal, was to be divided into portions, and was so devised and be-

queathed specifically.

A general power to sell was given to the executors, except that certain real estate was not to be sold without written consent of testatrix's husband.

In its decision, the court held the power to be valid, as a power in trust, to enable executors to make a division; and that its exercise was absolutely necessary to make distribution; the purposes of the testatrix being so clearly expressed as to leave no reasonable doubt of her wishes; that it was evident that she did not intend that her residuary estate should vest immediately and absolutely in the devisees without a division, and that there was no objection to the power in trust taking effect, as such, leaving the title in the heirs subject to the execution of the power.

In the above case of Kinnier v. Rogers, reported on appeal in 42 N. Y. 531, the court holds that the testator probably acted in giving the power of sale in reference to the facts and circumstances connected with his family and the ages of his children, and that the exercise of the power would secure a division of the avails among parties in interest, without the delay and expense of an action in partition or other judicial proceedings, and that the devise was subject to the power; and until it was exercised, the title to the land vested in the children, and after its exercise they would take it in its substituted form.

The power of sale was also held necessary, inasmuch that there was a lien upon the residuary estate for the payment of debts, legacies and annuities. Quoting Reynolds v. Reynolds, 16 N. Y. 257, 261; Tracey v. Tracey, 15 Barb. 503; Brudenell v. Boughton, 2 Atk. 268.

The court also held that it was evidently the intention of the testator to authorize his executors to sell his real estate, to enable them to discharge the duties and trusts imposed by the will, and thereby facilitate the settlement of the settle

ment of the estate.

See also Lovett v. Kingsland, 44 Barb. 560, holding a power of sale void

See also Lovett v. Kingsland, 44 Barb. 560, holding a power of sale void when inconsistent with a direct present absolute gift.

The recent case of Mullen v. Banning, 72 Hun, 176, held that the power could not be exercised against the election of the devisees to partition between themselves, and the purposes of the will did not require its exercise. And in Landon v. Walmuth, 76 Hun, 271, a general power of sale was cut off as to a prior specific devise. Cf. Cotton v. Burkelman, 142 N. Y. 160.

A power to divide given in a codicil would not necessarily revoke a power to sale given in the will. Convert v. Hoffman, 1 Resw. 214, 15 Abb. 100.

to sell given in the will. Conover v. Hoffman, 1 Bosw. 214; 15 Abb. 100. See also infra, as to cessation of such powers of sale.

But it has been held in Smith v. Robertson, 89 N. Y. 555, that the power would be revoked pro tanto by the birth of an after-born child, and that he might set aside the sale and recover the land itself on arriving at

Power to executors to sell "all the vacant and unproductive lots" left by testator, construed to be such as existed at time of death of testator. Kip v. Hirsch, 18 Abb. N. C. 167; 103 N. Y. 565, revg. 53 Super. 1. See also Chap. XII, "Powers."

Undue Suspension of Power of Alienation by Power. See supra, Chap. IX, Tit. IV.

Who May Execute.—As to trustees generally, and their power and duties in the execution of trusts, also as to their removal, decease, etc., and the appointment of their successors, see Tit. VII, Chap. X, supra; also p. 296, as to executors as trustees.

Powers of sale cannot be delegated by an executor having a power such as is above referred to, and an agent cannot make even a valid contract of sale; and sale cannot be made through attorney. It may be made valid, however, by a subsequent ratification.

Berger v. Duff, 4 Johns. Ch. 368; Newton v. Bronson, 13 N. Y. 587; Hawley v. James, 5 Paige, 318, at 487; 16 Wend. 61; Sinclair v. Jackson, 8 Cow. 543; Matter of Walker, 70 App. Div. 263.

Executor cannot delegate discretionary power of sale to agent. Newton v. Bronson, 13 N. Y. 587.

Executor may, however, after he has exercised the judgment and discretion with which he is invested, appoint an agent to execute the formal contract of sale. Gates v. Dudgeon, 173 N. Y. 426.

See supra, p. 298, as to delegation of powers in trust, and the transfer of such powers; and infra, Chap. XIX, as to contracts of sale made by Agents.

As seen above (p. 297), where there are several executors, one has, in many cases, the power of the whole number, to dispose of property which they take as executors. This is not so when they act as trustees, they then have but a joint interest, and must act

together in a sale, receipt, or release. It is a general rule of law, also, that where a power is confided to several for a private purpose, all must unite and concur in its exercise.

Where two executors have power of sale both must join in agreement to convey. Wilder v. Ranney, 95 N. Y. 7; Whitlock v. Washburn, 17 N. Y. Supp. 61; s. c., 62 Hun, 369; Lynch v. Buckley, 82 App. Div. 614; and see cases infra.

Exception made however where the executors have both joined in sale, but on account of death only one can execute the deed. Held the execution of the deed was merely formal. Brown v. Doherty, 185 N. Y. 383.

Sales of Qualifying Executors.— Where a will gives power to executors, ratione officii, and only by their official name, it has been doubted whether its exercise should not be limited to those who prove the will; but a power to executors by their individual names. or to executors named, is a joint power, and the executors take by force of the will, and not by the probate; and they would take whether they proved the will or not, and might act even after renunciation.

Dominick v. Michael, 4 Sandf. 374. See, however, the cases cited infra,

and p. 348, supra.

Execution by two acting executors, there being no proof of renunciation by the remaining executor, held good after the lapse of years. Fleming v. Burnside, 36 Hun, 456. See also Brown v. Doherty, 185 N. Y. 383; see, however, Lynch v. Buckley, 82 App. Div. 614.

See also as to deed by foreign executor not qualifying here. Pollock v. Hooley, 67 Hun, 370.

It has been considered, therefore, that a trustee in a testamentary power may execute it, though he has not qualified as executor; and the court will not appoint another in his place until he refuses to do so.

Williams v. Conrad, 30 Barb. 524; Edgerton v. Conklin, 25 Wend. 224; Ogden v. Smith, 2 Paige, 195; Green v. Green, 4 Redf. 357. See also Pollock v. Hooley, 67 Hun, 370.

By the Code of Civil Procedure, where any powers to sell, mortgage or lease real estate, or any interest therein, are given executors as such, or as trustees, or as executors and trustees, and any of such persons named as executors shall neglect to qualify, then all sales, mortgages and leases under said powers made by the executors who shall qualify, shall be equally valid as if the other executors or trustees had joined in such sale. Code Civ. Proc., § 2642, amd. by Laws 1883, Chap. 401.

Formerly so by 2 R. S. 70, 71. §§ 9-12, which, however, applied only to sales. Kerr v. McAneny, 2 Daily Transcript, May 17, 1883; Matter of Application of Dolan, 88 N. Y. 309.

The Code of Civil Procedure also provides that where one of two or more executors or administrators dies or becomes a lunatic, convicted of an infamous offense, or becomes otherwise incapable of discharging the trust; or where letters are revoked as to him, then the remaining executors shall act, and complete the execution of the will, and no successor shall be appointed unless the will expressly require it. § 2692. (See 2 R S, 78, § 44; L. 1837, Chap. 460, § 33.

The above provision as to the action of the executors taking upon themselves the execution of the will was also contained in Laws of March 3, 1787, 1 Greenl. 386; Feb. 20, 1801, 1 Webs. 178; March 5, 1813; 1 R. L. 364; and 2 R. S. 78; Niles v. Stevens, 4 Den. 399; see as to this provision also, supra, p. 295

A general power given to the executors, as such, and not by their names as individuals, is not revoked by the refusal of one of them to act, but survives to and vests in those who qualify. Conover v. Hoffman, 1 Bosw.

214, affd., 15 Abb. Pr. 100.

The above provision applies even where one only out of several executors qualifies. Meakins v. Cromwell, 2 Sandf. 512, affd., 5 N. Y. 136; Ogden v. Smith, 2 Paige, 195; Roseboom v. Mosher, 2 Den. 61.

This provision of the statute has been held not to divest the estate, or power of an executor who has not qualified; nor is it applicable at all, when the only surviving executor is the one who has neglected or refused. In such case, the rule of the common law has been held to govern. Dominick v. Michael, 4 Sandf. 374.

The "neglect or refusal" need not be in writing, nor be matter of record, in order to enable the others to execute a conveyance pursuant to a power in order to enable the others to execute a conveyance pursuant to a power in the will to all the executors to sell real estate. Nor is it essential that the executor who does not join in a conveyance should have formally renounced, or have refused, after a citation for that purpose, to take the administration. It seems that any evidence legitimately tending to establish the fact of such neglect or refusal is competent. Roseboom v. Mosher, 2 Den. 61; also see Sharp v. Pratt, 15 Wend. 610; Matter of Baldwin, 27 App. Div. 506.

App. Div. 506.

The above provision of statute applies as well to discretionary as to peremptory powers of sale. Leggett v. Hunter, 19 N. Y. 445; Niles v. Stevens, 4 Den. 399; Taylor v. Morris, 1 N. Y. 341; Sharp v. Pratt, 15 Wend. 610. Where two out of three executors and trustees, who had all qualified, made the conveyance, it was held sufficient, the other having been removed as executor and declining to sign. The rule that where a trustee is removed, the estate is vested in the others, would apply to a trustee removed by the surrogate as executor. In re Bull, 31 How. Pr. 69; 45 Barb. 334.

See now, however, provision contra, that the removal of an executor who is also trustee does not now necessarily affect him as trustee. Code Civ.

is also trustee does not now necessarily affect him as trustee. Code Civ.

Proc., § 2688.

This was enacted to settle a conflict between the decisions in Matter of Crossman, 20 How. 350, and Matter of Bull, 45 Barb. 334. See also Derais-

mes v. Dunham, 22 Hun, 86.

And an Act of the Legislature may direct two out of three trustees to act, and give a substituted testamentary trustee all the powers of the original ones. Leggett v. Hunter, 19 N. Y. 445; In re Bull, 45 Barb. 334; and supra, p. 315.

supra, p. 315.

An executor who renounces his office, the renunciation being followed by many years of total noninterference with the estate, is deemed also to have renounced the trusts conferred, by the will, which are personal and discretionary. In re Stevenson, 3 Paige, 420; Beekman v. Bonsor, 23 N. Y. 299; Leggett v. Hunter, 25 Barb. 82; 19 N. Y. 445.

Executors who qualify alone have power under the will. Executors who do not prove the will are superseded by the grant of letters testamentary or

of administration to others; and they cannot dispose of any part of the estate until they appear and qualify as executors. Ogden v. Smith, 2 Paige, 195; Meakings v. Cromwell, 5 N. Y. 136.

A power in trust to executors survives on the death of one or more of the executors, and may be executed by the survivor. Niles v. Stevens. 4 Den.

A devise to an executor in trust is to the person, and not to the officer. and an administrator with the will annexed cannot take. Dunning v. Ocean Nat. Bk., 61 N. Y. 497.

If the executors are all dead the court may carry out the power. Delaney v. McCormick, 25 Hun, 574, affd., 88 N. Y. 174.

One of two executors to whom a power to sell is given cannot convey or make a valid contract to convey alone. Wilder v. Ranney, 95 N. Y. 7. See, however, Brown v. Doherty, 185 N. Y. 383.

Trustees.— The court cannot remove a trustee and appoint a new one, unless

the former had accepted the trust. In re Stevenson, 3 Paige, 420.

It was formerly held that in the absence of express provision authorizing the execution of the trust by part of the trustees only, the court must appoint unew one in place of a trustee who has qualified and subsequently resigns, is removed or is discharged, in order that a valid sale may be made. Matter of Van Wyck, 1 Barb. Ch. 565.

See now, however, § 2818, Code Civ. Proc., which makes similar provisions in regard to trustees as originally existed concerning executors and adminis-

trators with respect to the right to execute trusts.

As to the appointment of a new trustee, see Real Property Law, § 92. See also as to survivorship and removal, and substitution of trustees, supra, pp. 295, 297, and as to survivorship of powers, supra, Chap. XII, Tit. V.

Survivorship of the Power.— As seen above (p. 348), an express power to dispose of lands, when not clothed with an estate or interest, is not descendible or transmissible, but terminates with the lives, or according to the terms of its creation, with the life of the survivor of those in whom it is vested.

See also Catton v. Taylor, 42 Barb. 578; Martin v. Martin, 43 id. 172; Matter of Bierbaum, 40 Hun, 504.

It has been seen above (p. 348) that it is provided by statute that all persons vested with a power must unite in its execution. but that, in case of death, the survivor or survivors can act, and that this provision is applicable as well to powers that are discretionary as to those that are imperative.

It was also seen above (p. 457), that where one of several executors or administrators shall die, etc., then the remaining executors shall act and complete the execution of the will.

Decisions of our courts have also been referred to (supra, p. 348), showing that a testamentary power in trust would survive to executors living; and that if the power were a naked one, the power ceases on the death of those qualified to exercise it.

Under the Laws of 1813, also, when one executor died the survivor might execute the power. See 1 R. L. 366.

See as to decisions under this law, holding that the power would survive only in case the executors had a legal or equitable interest. Osgood v.

Franklin, 2 Johns. Chan. 1; 14 Johns. 527; Davoue v. Fanning, 2 Johns. Chan. 252; Jackson v. Burtis, 14 Johns. 391; Jackson v. Given, 16 id. 167.

The Supreme Court may appoint a trustee to execute the power.

right v. Storminger, 49 Hun, 249.

The heir is a necessary party to any proceeding therefor. Phillips, 27 N. Y. 357; Delaney v. McCormack, 88 id. 174.

See also as to powers surviving, supra, p. 348, and as to substitution of trustees, supra, Chap. X, Tit. VII, and Marshall v. Kortright, 132 N. Y. 450.

Administrators with the Will Annexed .- In many cases it is held that an administrator with the will annexed is not authorized by the statute (2 R. S. 72, § 22; Code Civ. Proc., § 2613) to execute a power to sell land conferred by testator upon his executor, and that his succession to the powers given by testator upon his executor, and that his succession to the powers given by statutes to the executors, only applies to personalty. Roome v. Phillips, 27 N. Y. 357; Paret v. Keneally, 30 Hun, 15; Dominick v. Michael, 4 Sandf. 375; Conklin v. Edgerton, 21 Wend. 430; Edgerton v. Conklin, 25 id. 224; Beekman v. Bonsor, 23 N. Y. 298; Dunning v. The Ocean Nat. Bank, 61 N. Y. 497; Cooke v. Platt, 98 N. Y. 35, affg. 51 Super. 55.

The general rule seems to be that a sale by an administrator with the will

annexed is good, if the direction in the will is imperative or mandatory, but not if it is discretionary or indicates a personal confidence or trust. See, how-

ever, Cooke v. Platt, 98 N. Y. 35.
In Bain v. Matterson, 54 N. Y. 663, the rule is laid down that an administrator with the will annexed takes all the powers of a renouncing executor,

except personal trust in the executor be expressed, or clearly implied.

But it may be expressly, or indirectly, provided in the will that the administrator with the will annexed, shall succeed to all the powers given to the executors or trustees. Fish v. Coster, 28 Hun, 64, affd., 92 N. Y. 627; Royce v. Adams, 10 N. Y. Supp. 821, affd., 123 N. Y. 402; Dugan v. Wade,

A power of sale which effects an equitable conversion, without discretion, may be exercised by the administrator with the will annexed. Mott v. Acker-

man, 92 N. Y. 539; Fish v. Coster, 28 Hun, 64, affd., 92 N. Y. 627.

An administrator with the will annexed cannot, upon renunciation of the executors, exercise a power of sale conferred upon them in connection with power over the investment of property given them in trust. Kortright v. Storminger, 49 Hun, 249.

Power to wife as executrix to sell held to survive to administrator with the will annexed. Mott v. Ackerman, 92 N. Y. 539; followed In re Christie, 13

N. Y. Supp. 202, affd., 133 N. Y. 473.

If the will positively directs a sale an administrator with the will annexed

may sell. Fish v. Coster, 28 Hun, 64, affd., 92 N. Y. 627.

A mandatory direction to executors to sell real estate passes to the administrator with the will annexed, but a discretionary power of sale does not. Scott v. Douglass, 39 Misc. 555.

Authority to Mortgage.— Before the statute an order of court authorizing an executor or trustee to mortgage was inoperative, as against cestuis qui trustent then living, who were not made parties to the proceedings. The mortgage would be void as against them. So held in a case where the executors were empowered to hold and apply rents and subsequently divide.

Horspool v. Davis, 6 Bos. 581, et vide, Chap. X, Tit. VI.

An executor who purchases lands with trust funds when no such power is given him in the will, is nevertheless invested with the full legal title, though between the executor and his beneficiaries it is impressed with a trust which they could enforce; and since the title does not come to him under the will. his want of power to mortgage under that instrument does not apply, and a mortgage executed by him on the property is valid. McLean v. Ladd, 21 N. Y. Supp. 196; s. c., 66 Hun, 341.

But provision was made by statute for the mortgage and sale of lands held in trust, upon application to the Supreme Court and notice to the beneficiaries.

L. 1882, Chap. 275; amd. L. 1884, Chap. 26; L. 1886, Chap. 257 (correcting error in original statute).

See Goebel v. Iffla, 10 N. Y. St. Rep. 726.

See now Real Property Law, § 85, as amd. L. 1897, Chap. 136; Matter of

Asch, 75 App. Div. 486.

In a sale under special testamentary powers the beneficiaries need not be parties to the contract. Strauss v. Bendheim, 162 N. Y. 469.

Sales, how Made.—The Revised Statutes of 1830 required sales of real estate by an executor to be made on notice, and to be conducted as sales made by order of a surrogate, i. e., by auction.

2 R. S. 109, § 56, 2 R. S. 104, § 26.

This was repealed by Laws of May 9, 1835, Chap. 264, by which, as regards both wills theretofore made and thereafter to be made, it was provided that such sales, unless when otherwise directed in the will, and except for real estate in the city of New York, might be public or private, on such terms as might seem most advantageous to the executor, and in the same manner as sales directed by order of surrogates.

In the city of New York they were still to be public. By Laws 1837, Chap. 460, however, it was provided that sales of real estate made by executors pursuant to an authority given in the will, unless otherwise directed in such will, might be public or private, and on such terms as in the opinion of the executor should be most advantageous to those interested therein. This act was repealed by Laws 1880, Chap. 245, and the subject was then left unregulated until the enactment of Laws 1883, Chap. 65, providing that sales of real estate in the city and county of New York or elsewhere within the State of New York may be either public or private, as under the Act of 1837, and confirming sales made since Sept. 1, 1880.

See L. 1883, Chap. 65, the provisions of this statute being still in force. Compare Code Civ. Proc., §§ 2772-2773, repealed L. 1904, Chap. 750, as to provisions regulating sale by executors to pay debts.

The provisions to sell by auction or other statutory regulations, have no application where the executors have a discretionary power as to manner of sale. McDermot v. Lorillard, 1 Edw. 273. And if the will direct, a sale in a particular manner, it must be followed. (Pendleton v. Fay, 2 Paige, 202.)

Under a power to sell within a limited time, a sale after that time will not

give title. Richardson v. Sharp, 29 Barb. 222.

As to the necessity of strictly following the *intent* or directions in the will, vide Waldron v. McComb, 1 Hill, 111; 7 id. 335; Ives v. Davenport, 3 id. 373; Edgerton's Admr. v. Conklin, 25 Wend. 224; 29 Barb. 222, and supra. p. 356, as to formalities requisite in the execution of powers. See also Pendleton v. Fay, 2 Paige, 202.

As to which character a party acts in who has two rights. See Mut. Life Ins. Co. v. Shipman, 108 N. Y. 19; s. c., 119 N. Y. 324.

Where an administrator sells for anything else but cash, see Matter of Gilman. 39 Misc. 762.

Form of Deed - Law of 1890, Chap. 475, as to Short Form of Clause as to the Estate and Appurtenances.—By said act in any deed by an executor or trustee the words "together with the appurtenances, and also all the estate which the said testator had at the time of his decease in said premises, and also the estate therein which said party of the first part has or has power to dispose of. whether individually, or by virtue of said will or otherwise," are to be construed as having as extensive meaning as indicated in said act.

See Real Property Law, §§ 223, 221.

The Consideration. This must be fairly adequate, and a nominal con-

sideration expressed in the conveyance will cause suspicion.

But the question of sufficient consideration is of no importance under a power "to sell for such price, etc., as to him may seem meet." Van Zandt v. Furlong, 18 N. Y. Supp. 54; compare, however, Harris v. Strodl, 132 N. Y.

See as to necessity for cash as the consideration. Matter of Gilman, 39 Misc. 762; also Code Civ. Proc., § 2771, providing for sale on credit as to part by surrogate's decree.

Time of Sale.—If a time is fixed by the will, the sale must be made within the prescribed time to be valid.

Richardson v. Sharp, 29 Barb. 222, and see supra, p. 356.

If a statute require a sale to be public, it cannot be made privately

Edgerton's Admr. v. Conklin, 25 Wend. 224.

The power of sale may be exercised as well by making an executory contract of sale as by deed. Demarest v. Ray, 29 Barb. 563. But see Ives v. Davenport, 3 Hill, 373.

Where the intent to convert is clear, a sale after the time is good. Waldron v. Schlang, 47 Hun, 252, affd., 113 N. Y. 665; Stewart v. Hamilton,

37 Hun, 19.

The execution of a power of sale will not be enjoined merely on the ground that the time chosen for doing so is not the best to dispose of the property. McDonald v. O'Hara, 9 Misc. 686.

See also Cotton v. Burkelman, 2 Misc. 165, affd., 142 N. Y. 160, as to continuance of the power when coupled with an interest. See also Smith v. Chesebrough, 176 N. Y. 317.

Sale cannot be indefinitely delayed on plea that the land may become more

valuable. Matter of Levy, 41 Misc. 68.

Exercise of Discretion.—The exercise of the discretion of executors in making a sale cannot be questioned as to its necessity.

Roseboom v. Mosher, 2 Den. 61; Champlin v. Champlin, 3 Edw. 571.

Roseboom v. Mosher, 2 Den. 61; Champlin v. Champlin, 3 Edw. 571.

Nor can a court hasten the exercise of a power of sale left to the discretion of the executors as to time. Campbell v. Purdy, 5 Redf. 434.

But where no discretionary power is given the court may enforce the execution. Van Boskerck v. Herrick, 65 Barb. 250. See also, In re Juch's Estate, 136 N. Y. 106, as to enforcement to pay creditors, or restrain its exercise even when discretionary, if it is being exercised to pay outlawed debts. Butler v. Johnson, 111 N. Y. 204.

General power of sale to executors sustained for the purpose of paying debts. Matter of Bolton, 83 Hun, 259, affd., 146 N. Y. 257.

Conveyance of Land in Another State.—Although an executor appointed in this State cannot act as such beyond the State jurisdiction, he may convey land situate in another State, where the power to do so is contained in the will.

Newton v. Bronson, 13 N. Y. 587.

Legislative Acts.—As to legislative acts with reference to changes of testamentary trustees, vide supra, Chap. X., Tit. IX.

When Purchaser is Bound to Ascertain Grounds of Sale.-Where a power is given by will to executors to sell land in case of a deficiency of personal assets to pay debts, etc., and no estate is devised to the executors, it seems that the purchaser, to sustain his title, must show the fact of such deficiency, but not where the opinion or discretion of the executors is to be exercised.

Rosenboom v. Mosher, 2 Dem. 61. See also, Allen v. De Witt, 3 N. Y. 276; Matter of Bolton, 83 Hun, 259, affd., 146 N. Y. 257.

Power to be Strictly Exercised.—If a power is conferred to be exercised for a special purpose or on certain conditions, any deviation so as to defeat the object contemplated by the testator, would prevent any title from being transferred. Thus, if a power of sale were given for the payment of legacies, a transfer in satisfaction of a precedent debt would not pass any title. Hence the purchaser must look to the strict exercise of the power, not only in its details, but in its general scope and effect, and it is a principal of equity that the vested interests of cestuis que trustent cannot be impaired or destroyed by the voluntary act of the trustee, in breach of the trust, but will follow the land in the hands of persons to whom it has been conveyed by the trustee, with knowledge of the trust.

Allen v. DeWitt, 3 N. Y. 276; Briggs v. Davis, 20 N. Y. 15; Roome v. Phillips, 27 N. Y. 357; Russell v. Russell, 36 N. Y. 581; criticised 5 Dem. 17; Smith v. Bowen, 35 N. Y. 83; Waldron v. Macomb, 1 Hill, 111, revd., 7 Hill, 335; Griswold v. Perry, 7 Lans. 98. Kilpatrick v. Barron, 125 N. Y. 75.

So stringent is the rule on this subject that even legislative action cannot avoid its effect, except in cases of necessity arising from the infancy, insanity, or other incompetency of those in whose behalf it acts. Powers v. Bergen, 6 N. Y. 359; Legget v. Hunter, 19 id. 445; and see supra, p. 279.

And a purchaser is presumed to have full knowledge of every prior right of which he has sufficient notice to put him upon inquiry. Williamson v. Brown, 15 N. Y. 354. See Cohnfeld v. Tanenbaum, 58 App. Div. 310; Albany Exch. Sav. Bank v. Brass, 59 App. Div. 370; Morgan v. Turner, 35 Misc. 399.

See fully, supra, pp. 298, 315, as to notice of the terms of a trust.

Full discretionary power of sale for purposes of the will cannot be exercised for any other purpose. Roarty v. McDermott, 84 Hun, 527; reversed on other

grounds, 146 N. Y. 296.

If the direction be for a sale to pay debts, and after that, a division of avails among devisees, a conveyance to one of the devisees before the payment of debts would be invalid; and likewise a distribution before such payment. sonalty, and the real estate descends subject to the power. Allen v. DeWitt, 3 N. Y. 276.

When given to pay legacies and the purchaser has knowledge that they are paid already or funds exist for their payment he cannot acquire title by its exercise. Horey v. Chisholm, 9 N. Y. Supp. 671; s. c., 56 Hun, 328.

So where the power is general, and the personalty is sufficient for debts, etc., the object ceasing, the power ceases. McCarty v. Terry, 7 Lans. 236.

Under power of sale executors cannot make a contract to sell with implied covenant to pay off incumbrances. Bostwick v. Beach, 31 Hun, 343.

Nor can they convey with covenants of warranty. Ramsey v. Wendell, 32

Hun, 482.

See a case where the heirs were estopped from denying the validity of a sale. Favill v. Roberts, 50 N. Y. 222.

A provision in an instrument creating a trust which restricts the power of the trustee to sell, or imposes a condition upon him, limits his right to convey a title to a purchaser. Suaraz v. DeMontigny, 12 Misc. 259.

The intention of a testator in the creation of a power of sale contained in his will must, if possible, be ascertained, and when ascertained it controls the exercise of such power. McCready v. Met. Life Ins. Co., 83 Hun, 526.

As to how far purchaser need follow the application of the proceeds, see Behrman v. Van Heyn, 15 N. Y. Supp. 604.

See also supra, Chap. XII, Tit. VI, as to valid execution of powers, and

as to the prescribed formalities.

Power Given for Several Purposes.—A power of sale given for several purposes does not fail because among them is one that is void or has lapsed.

In the case of Benedict v. Webb, 98 N. Y. 460, it was held that under the terms of the will the power could not be executed as a separate and independent provision, and that as it could be exercised only in furtherance of the

establishment of a void trust, it could not be upheld.

A full discretionary power of sale sustained and separated from an invalid trust. McCready v. Met. Life Ins. Co., 83 Hun, 526. See Wilson v. Lynt, 30 Barb. 124; et vide, supra, Chap. X, Tit. IV, and cases cited.

As to not lapsing, see Cotton v. Burkelmann, 21 N. Y. Supp. 623, affd., 142

N. Y. 160.

Effect of Exercise of Power. - A full power of sale is held when exercised to cut off the lien even of legacies charged on the land, also debts. Wait v. Cerqua, 7 N. Y. Supp. 110, affd., 117 N. Y. 654; Bradford v. Mogk, 8 N. Y. Supp. 709; s. c., 55 Hun, 482.

Cessation of the Power.—It is also a rule of construction of testamentary powers, that, where it appears that the intention of a testator in creating a power has been answered, the power itself will cease. The purposes of the testator in giving the power must be ascertained from all the provisions of the will; and the objects of the power must be considered in connection with the power itself; and the power is considered to fail when the intentions of the testator are defeated or are unattainable.

As for example, where a power of sale is given to make provision for the support of a person who has since died, it would cease at his death, and the lands would descend free from the power. The power would thereupon become extinguished by operation of law.

It will be remembered that the statutes provide that where the purposes for which an express trust shall have been created shall have ceased, the estate of the trustees shall also cease.

Dominick v. Michael, 4 Sandf. 374; Edgerton's Admr. v. Conklin, 25 Wend. 224; Jackson v. Jansen, 6 Johns. 73; Hutchins v. Jones, 7 Bos. 236; Hotchkiss v. Elting, 36 Barb. 38; Jackson v. Ellsworth, 6 Johns. 72; Sharpsteen v. Tillou, 3 Cow. 651; Slocum v. Slocum, 3 Eds. Ch. 613; McCarty v. Terry, 7 Lans. 236; Chamberlain v. Taylor, 36 Hun, 24; Hetzel v. Barber, 69 N. Y. 1; Trask v. Sturges, 170 id. 482.

Full joint power of sale to executors and trustees, of whom testator's widow was one, held to cease with widow's life, at which time the trust estate terminated. Herriot v. Prime, 87 Hun, 95. See also supra, Chap. XII,

As to cessation of powers in trust, see Cotton v. Burkelman, 142 N. Y. 160. It is needful to observe whether the power is for a special purpose or general. Bruner v. Meigs, 64 N. Y. 507.

Also whether there are post-testamentary children not provided for: Smith v. Robertson, 89 N. Y. 555; not forgetting posthumous children.

A power is void if the object of its exercise be wholly unattainable. Hetzel

v. Barber, 69 N. Y. 1; or its object has been otherwise effected. Id.

Its exercise may also be dispensed with in some cases by the election of the persons entitled to the proceeds. See 12 Barb. 117; Garvey v. McDevitt, 72 N. Y. 556; Prentice v. Janssen, 79 id. 478; Savage v. Sherman, 24 Hun, 307; 87 N. Y. 277; Trask v. Sturges, 170 id. 482.

It is a general principle that where the beneficiaries under the power are also vested with the title to the real estate as heirs or devisees, they may unite and, before the power has been exercised, convey the real estate and thus defeat and annul the power of sale. Hetzel v. Barber, 69 N. Y. 1; Garvey v. McDevitt, 72 id. 556; Roberts v. Carey, 84 Hun, 328; Mellen v. Mellen, 139 N. Y. 210; McDonald v. O'Hara, 144 id. 566.

Account of Proceeds of Sale.— Where a sale is directed to be made in a will, either for the payment of debts or legacies, the surrogate may compel the executors to account for the proceeds as if the same were personal assets.

L. 1822, 283, § 3; 2 R. S. 109, § 57. See In re Juch's Estate, 136 N. Y. 106. An indirect purchase by the executor of the property sold avoids the sale. People v. O. B. S. B. B. Co., 92 N. Y. 98.

By law of 1837, Chap. 460, the proceeds of sales of real estate under an authority by will, may be brought into the office of the surrogate where the will was proved, for distribution; and the surrogate shall proceed to distribute the same, in like manner and upon like notice, as if such proceeds had been paid into his office, in pursuance of an order of sale of real estate, for the payment of debts. Bloodgood v. Buen, 2 Bradf. 8; In re McLaughlin, id. 107; Stagg v. Jackson, 1 N. Y. 206; 2 Barb. Ch. 86; Clark v. Clark, 8 Paige, 152. See Code Civ. Proc., § 2687. Repealed L. 1904, Chap. 750.

Surplus.— The residue of proceeds of sales, after payment of debts and legacies as directed, belong to the devisees of the lands sold.

Erwin v. Loper, 43 N. Y. 521.

Validity.— The validity of a power of sale given to executors by a will is a question primarily of legal, not of equitable cognizance, and is a question for a court of law, as distinguished from a court of equity. Mellen v. Mellen, 130 N. Y. 210.

Effect of the Power as an Equitable Conversion. See supra, Chap. XV Tit. III, and Fraser v. Trustees, etc., 124 N. Y. 479; Mellen v. Banning, 72 Hun, 176.

Where a will expressly directs the executors to sell the real estate, the power of sale is mandatory. McDonald v. O'Hara, 9 Misc. 686. But it can be extinguished by election. See supra.

TITLE IV. MISCELLANEOUS PROVISIONS AS TO EXECUTORS, ETC.

The following provisions it may be desirable to refer to.

Waste and Trespass .- Executors and administrators may have actions for trespass committed on the real estate of deceased, in his lifetime, and shall be liable for trespass on lands, committed by him. 2 R. S. 114.

As to proceedings for waste, vide supra, Chap. VI, Tit. II.

Judgments Against Executors, etc.—Real property which belonged to a decedent is not bound, or in any way affected by a judgment against his executor or administrator; and is not liable to be sold, by virtue of an execution issued upon such a judgment, unless the judgment is expressly made, by its terms, a lien upon specific real property therein described, or expressly directs the sale thereof. Code Civ. Proc., § 1823. For former law see 1 R. L. 313; 2 R. S. 449, § 12. Repealed by L. 1880, Chap. 245.

A judgment against executors is no lien proprio vigore though for a debt of decedent, but a direction to pay debts makes the debt as such a lien.

Hibbard v. Dayton, 32 Hun, 220.

Actions by and Against.—In actions brought by or against executors, it shall not be necessary to join those, as parties, to whom letters testamentary shall not have been issued, and who have not qualified. Law of April 2, 1838, Chap. 149. Repealed by L. 1880, Chap. 245. A similar provision is now made by Code Civ. Proc., § 1818; Lawrence v. Townsend, 88 N. Y. 24.

See also as to actions by executors, etc., Code Proc., §§ 113, 317; repealed, L. 1877, Chap. 417; Schermerhorn v. Schermerhorn, 5 Wend. 513; 12 Barb. 21; Code Civ. Proc., §§ 1814 to 1836, inclusive.

Letters granted in one State confer no right to sue in courts of another State. Johnson v. Powers, 139 U. S. 156.

Powers of Executors, etc., to Protect Against Fraud. - By Law of April 17, 1858, Chap. 314, executors, administrators, receivers, assignees, or other trustees of an estate or the property and effects of an insolvent estate, corporation, association, partnership, or individual, may, for the benefit of creditors or others interested in the estate or property so held in trust, disaffirm, treat as void, and resist all acts done, and transfers and agreements made, in fraud of the rights of any creditor, including themselves and others, interested in any estate or property held by, or of right belonging to any such trustee or estate.

Actions may be maintained by such persons to recover any property taken or its value.

By section 3 of this act, indorsers, sureties, and the above persons, might also be allowed their costs and expenses in prosecuting or defending actions as above, done in good faith. This section was repealed by L. 1880, Chap. 245, and re-enacted in a somewhat modified form in Code Civ. Proc., § 1916.

Application of Surplus Moneys on a Mortgage Sale.—By Law of April 23, 1867, Chap. 658, amended and added to by Law of April 11, 1870, Chap. 170, provision was made as to the obtaining and distribution, through the surrogate's office of the surplus moneys arising from the sale of any lands or real estate, of which any deceased person died seized, by virtue of any lien thereon. The act was further amended by an Act of April 28, 1871, Chap. 834, and repealed, L. 1880, Chap. 245.

For the present law, so far as these acts have been retained, see Code Civ. Proc., §§ 2408 (repealed by L. 1904, Chap. 750), and 2797 to 2799, inclusive.

Preference to Rents.— By the Revised Statutes preference might be given by the surrogate to rents due or accruing upon leases held by the testator or intestate over certain other debts, if such preference would benefit the estate. 2 R. S. 87, § 30. This provision was retained in Code Civ. Proc., § 2719.

Testamentary Guardians or Trustees to Account.—By L. 1867, Chap. 782, and Law of April 13, 1871, Chap. 482, testamentary guardians and trustees might be compelled to account and to give security or be removed on default. These acts were repealed by L. 1880, Chap. 245.

For the present law as to trustees, see Code Civ. Proc., §§ 2802 to 2811, inclusive; for Guardian, see Code Civ. Proc., §§ 2855 to 2857, inclusive.

Testamentary Trustees, Guardians and Executors in the County of New York.—Special provisions were enacted by Law of April 22, 1870, Chap. 359, as to letters granted in the county of New York, as to revocation thereof and the appointment of successors of those removed by the surrogate of said county, as to the accounting of those removed, as to release of sureties of guardians, proof of wills, construction of wills, and as to the appointment of receivers during a contest over a will of real estate. This act was repealed by L. 1880, Chap. 245. Most of the provisions of this act are to be found in the Code of Civil Procedure extended to the whole State.

CHAPTER XVIII.

SALE, ETC., OF REAL ESTATE BY ORDER OF SURROGATE.

TITLE I .- THE APPLICATION TO THE SURROGATE.

II .- THE ORDER.

III.— THE SALE, IV.— VALIDITY OF THE PROCEEDINGS AND IRREGULARITIES.

Provision has been made by law, for the sale or other disposition, through proceedings before the surrogates of counties, of the real estate of a deceased person, if the personal estate is insufficient to pay his debts. These proceedings, being founded on statute authority, must be strictly pursued, according to the law in force at the time, or they are void. The general statutory provisions relative to such proceedings, as far as titles to real estate are affected under or by them, are given below; for the special details thereof reference will have to be made to the statutes indicated.

See Long v. Long, 60 St. Rep. 311; 142 N. Y. 545; Kingsland v. Murray, 133 id. 170; Cooke v. De Graw, 14 St. Rep. 727; Mead v. Jenkins, 27 Hun, 570; Hyde v. Tanner, 1 Barb. 75; Eddy v. Traver, 6 Paige, 521; Maples v. Howe, 3 Barb. Ch. 611. For some account of this legislation see Fowler's Real Property Law (2d ed.), 394, 395.

Former Laws.—Sales of real estate, by order of courts of probate in case of insufficient personalty, were provided for by statute of April 4, 1786 (1 Greenl. 236), and of March 27, 1801 (1 Webs. 317); also 1 R. L. 450; Law of April 12, 1819; Law of April 17, 1822, which laws were repealed by the repealing act of Revised Statutes, December 10, 1828. For the provisions of

the Revised Statutes, see 2 R. S. 99-113.

For a history of the remedy allowing sales of real property to pay creditors, vide Ferguson v. Broome, 1 Bradf. 10; Fowler's Real Property Law (2d ed.), 394, 395. They are not strictly proceedings in rem. Schneider v. McFarland,

4 Barb. 139; 2 N. Y. 459.

As to proceedings under the Laws of 1813 and 1819, vide Sheldon v. Wright, 5 N. Y. 497, affg. 7 Barb. 39; Jackson v. Irwin, 10 Wend. 442; Fox v. Lipe,

The filing of the inventory was not necessary to give the surrogate jurisdiction under the Law of 1813, but an account of the assets and debts was necessary. Schneider v. McFarland, 4 Barb. 139; 2 N. Y. 459.

The liability to be sold attaches to lands not only in the hands of the heirs

or devisees, but in the hands of every subsequent purchaser. It is a kind of statutory lien running with the land for three years. Hyde v. Tanner, 1 Barb. 75; Eddy v. Traver, 6 Paige, 521.

TITLE I. THE APPLICATION TO THE SURROGATE.

Provisions of the Revised Statutes.—In Part II, Chap. VI. Tit. IV. of the Revised Statutes, provisions respecting these proceedings are collected.

The executors or administrators might make an application, within three years after obtaining their letters, for authority to mortgage, lease, or sell as were found insufficient, and after the filing of their inventory. Repealed, L. 1880, Chap. 245. See Code Civ. Proc., § 2750.

The three years run from the original grant of letters and not from the

grant to those applying. Slocum v. English, 4 Supm. 266, affd., 62 N. Y. 494. Formerly the time for application was not limited. Under this provision

the proceedings were void if not taken within the three years. Id.

A provision in a will authorizing executors to sell and convey, without mention of debts, is not a valid power of sale for payment of debts, which will prevent a proceeding under Code Civ. Proc., § 2759; Parker v. Beer, 173 N. Y. 332. See where such a power of sale to pay debts was given and decree refused. Matter of Rowley, 38 Misc. 622. See also Matter of Wood, 70 App. Div. 321.

By Law of May 16, 1837, Chap. 460, §§ 40, 41, 42, it was provided, that the executors, etc., might apply, as above, to mortgage, sell, or lease the real estate of the testator or intestate, and for the sale of the interest of such testator or intestate, in any land held under a contract for the purchase thereof, whenever the personal estate was insufficient to pay debts.

Vide, an elaborate decision involving many points under this law. Matter of

Dolan, 88 N. Y. 309.

By the Code of Civil Procedure, §§ 2749 to 2801a, inclusive, these proceedings are fully regulated. The petition may be presented by an executor or administrator or by any creditor of decedent, provided he be not a mortgage creditor having a lien on the real property. The limitation of three years is retained, except that for a creditor the time consumed in litigating his claim with the representatives of decedent is excluded, if he files in the county clerk's office a notice of the pendency of the action, and as to any property the title to which is in litigation the time only begins to run from the termination of the action. Code Civ. Proc., §§ 2750, 2751. The proceedings are by citation, hearing and decree, as in other matters in surrogate's courts, and the contents of petition, proof required, bond and other matters, are minutely regulated.

The amendments to these sections in the Code of Civil Procedure are various, the whole subject being practically reframed by Law of 1894, Chap. 735. See also L. 1904, Chap. 750, repealing certain of these sections and

substituting other provisions in their stead.

It has been held that an ancillary administrator cannot take this proceeding. Hendrickson v. Ladd, 2 Dem. 402.

The surrogate who granted letters may entertain the proceeding, though the lands be in another county. Long v. Olmstead, 3 Dem. 581.

The executor's or administrator's letters cannot be attacked collaterally in the proceeding. O'Connor v. Huggins, 113 N. Y. 511.

The surrogate may pass upon the validity of the petitioner's claim. Kammerrer v. Ziegler, 1 Dem. 177.

The costs of a foreclosure cannot be collected in this way. Hurd v. Callahan, 5 Redf. 393. But a mortgagee who has obtained a deficiency judgment on foreclosure after decedent's death may apply. East River Nat. Bk. v. Mc-Caffrey, 3 Redf. 97.

The statute of limitations does not run during the three years within which heirs and devisees cannot be charged. Mead v. Jenkins, 29 Hun, 253,

affd., 95 N. Y. 31.

The surrogate can decree the sale of land only by the regular statutory proceedings. Bennett v. Crain, 41 Hun, 183.

Application cannot be made to the Supreme Court. Letson v. Evans. 33

Misc. 437.

The Petition Before the Code .- The application was to be by sworn petition, setting forth the personal property, its application, debts due, description, value and occupation of the real estate, and names and ages of devisees and heirs.

The petition and account are necessary to the surrogate's jurisdiction. Ford v. Walsworth, 15 Wend. 449; Bloom v. Burdick, 1 Hill, 130; 3 Barb. 341: Atkins v. Kinnan, 20 Wend. 241; and recitals in the order are not sufficient. Id.

The account must have been rendered by all the executors or administrators before a judgment-creditor could apply. 13 Barb. 392. But all need not have united in the inventory. 40 Barb. 417. But all should join in the application. Fitch v. Witbeck, 2 Barb. Ch. 161.

If there is no petition or order to show cause or inventory, or they are defective in substance, the order of sale is void. Ackley v. Dygert, 33 Barb.

177; Corwin v. Merritt, 3 id. 341.

The omission to file a separate inventory does not prevent jurisdiction. An inventory presented with the petition may be deemed the account. Bloom v. Burdick, 1 Hill, 130; Bostwick v. Atkins, 3 N. Y. 53.

The petition should state that the inventory has been filed to give jurisdiction. Ackley v. Dygert, 33 Barb. 177. And failure to file the inventory is a fatal defect. Slocum v. English, 2 Hun, 78, affd., 62 N. Y. 494.

Also, that there are debts for which the personalty is insufficient. Id.

The account must give the names of creditors, and the amounts and consideration of indebtedness. Atkins v. Caywood, 20 Wend. 241. Legatees are not necessary parties. Matter of Dolan, 88 N. Y. 309.

It need not show all details, nor the character of the debts. Sheldon v. Wright, 7 Barb. 39; 5 N. Y. 497. The omission of an heir makes the proceeding void as to him. Jenkins v. Young, 35 Hun, 569; Pinckney v. Smith, 26 Hun, 524.

It may be verified before a justice of the peace. Richmond v. Foote, 3

A previous sale in partition by the heirs does not divest the surrogate of his power to decree a sale within the three years. Hall v. Partridge, 10 How. 189.

The surrogate has no authority to pass upon the question of the decedent's

title to the lands. Hewitt v. Hewitt, 3 Bradf. 265.

If a creditor's petition omits to state any facts required by the statute no jurisdiction is acquired and no valid decree can be rendered. Matter of German Bank, 39 Hun, 181.

The Petition Under the Code. The application is to be by sworn petition, setting forth the unpaid debts and funeral expenses, the inadequacy of the personal estate, description, value, condition and occupation and incumbrances of the real estate, and names of devisees, heirs, husband or wife of decedent and any persons claiming under them, the age and general guardians of infants, if any, and, in a creditor's petition, the names of the executors or administrators; in a petition by executors or administrators an account of the personal property. If any of these facts cannot be ascertained that fact must appear and the surrogate must inquire. Upon a creditor's petition an account from the executors or administrators may be required. Code Civ. Proc., §§ 2752 and 2753.

The allegations prescribed by § 2752 for the petition are jurisdictional. Dennis v. Jones, I Dem. 80. As to contents of petition, vide Laird v. Arnold,

42 Hun, 136; Matter of Meagley, 39 App. Div. 83.

The Debts.—A second sale cannot be had on debts newly discovered, except on a new application and petition. Nor can an administrator pay outlawed debts, and then have a sale to reimburse himself. Gilchrist v. Rea, 9 Paige, 66.

The surrogate must be convinced that the debts are justly due. Baker v.

Kingsland, 10 Paige, 366.

A sale cannot be had to pay expenses of administration. Smith v. Meakin. 2 Dem. 129; disapproved 5 id. 5; see Matter of Hatch, 97 App. Div. 496; Matter of Summers, 37 Misc. 575; Matter of McGee, 65 App. Div. 460; Matter of Quatlander, 29 Misc. 566; Matter of Foley, 39 App. Div. 248.

The surrogate can adjudicate claims rejected by an executor or administrator. Turner v. Amsdell, 3 Dem. 19; Matter of Haxton, 102 N. Y. 157;

In re Merchant's Est., 6 N. Y. Supp. 875.

Assets Insufficient. In determining whether the assets are sufficient (under Code Civ. Proc., § 2756), the surrogate acts judicially, and his error cannot affect his jurisdiction. Atkins v. Kinnan, 20 Wend. 241; Jackson v. Crawford, 12 id. 533; and can only be corrected on appeal. Id. Uncollected demands are not to be included in assets. Bridge v. Swain, 3 Redf. 487. If there were sufficient assets originally, the proceeding cannot be had. Kingsland v. Murray, 133 N. Y. 170.

Infants - Appointment of Guardians - Guardians were to be appointed for any heirs or devisees who are minors, and the minors were to be served in the same manner as on proof of wills. Laws of 1863, Chap. 362. This changed the former mode under the Revised Statutes, and the Laws of 1837. Chap. 460, § 6.

This Act of 1863 was partially repealed, Laws of 1880, Chap. 245. subject at present is regulated by Code Civ. Proc., §§ 2821, etc., also §§ 2526.

Infants are to be served with citation in like manner as with summons (§ 2526), but the surrogate may by order require further service (§ 2527). A special guardian is to be appointed (§ 2530) upon notice to the infant

The failure to appoint a special guardian is fatal and cannot be remedied by an appointment nunc pro tunc after the sale. Matter of Mahoney, 34

Hun, 501.

As to the effect of failure to give notice to the infant. Vide Price v. Fenn.

3 Dem. 341.

Infant heirs held not bound by a sale unless guardians are appointed where necessary. Schneider v. McFarland, 2 N. Y. 459; Bloom v. Burdick, 1 Hill, 130; 3 Barb. 341; 33 id. 17. And the statutes must be strictly complied with. Havens v. Sherman, 42 Barb, 636.

A guardian need not be appointed under a final application, where a guardian has been appointed under a former application in the same matter.

Richmond v. Foote, 3 Lans. 244.

The presumption will be that the guardian was appointed within the

proper time. Sheldon v. Wright, 7 Barb. 39, affd., 5 N. Y. 497.

The guardian should be appointed six weeks before the return of the order to show cause. So held under the earlier laws. Sheldon v. Wright, 7 Barb. 39, affd., 5 N. Y. 497. See also Olcott v. Robinson, 21 N. Y. 150.

The heirs or devisees must be represented, or the surrogate has no jurisdiction as to their shares, and minors must have guardians as provided.

Ackerly v. Dygert, 33 Barb. 176, and supra.

If the infant be served, failure to appoint a special guardian is not fatal. Jenkins v. Young, 43 Hun, 194. But if the infant be not served before proof taken the defect is fatal and is not cured by appointment of a special guardian and subsequent notice thereof to the infant. Pinckney v. Smith, 26 Hun, 524.

Creditor's Application. By L. 1837, Chap. 460 (as amended by L. 1843, Chap. 172, and L. 1847, Chap. 298), any creditor, after the accounting of the estate, at any time after letters granted, if there was not enough personal estate to pay debts, might institute similar proceedings against the executor or administrator to force a sale or lease, or mortgage of the real estate. The order to show cause was to be served fourteen days before return day on him; and after notices served and published in the same manner as under above proceedings, the surrogate might direct a mortgage, lease or sale, by the executor or administrator, or freeholder, under similar provisions above given. These acts were repealed by L. 1880, Chap. 245.

As to creditor's proceedings under the Code of Civil Procedure, see § 2750

and supra, p. 480.

A creditor who has assigned his debt cannot apply, but the assignee thereof may. Butler v. Emmett, 8 Paige, 12.

A State hospital may institute proceedings for sale for the payment of decedent's debts. Matter of Buffalo State Hospital, 47 Misc. 33.

A creditor of a firm, both partners being dead, may have an order to sell the real estate of the last survivor, though the estate of the other be ample. Bridge v. Swain, 3 Redf. 487.

The Statute of Limitations may be set up to bar the debt. Raynor v. Gordon, 23 Hun, 264; see Church v. Olendorf, 49 id. 439.

There was no bar as to the time for the application by the creditors

before the Code.

If there was an unreasonable delay, however, the application would be refused. Ferguson v. Broome, 1 Bradf. 10.

As to time for proceeding under these acts, vide Mead v. Jenkins, 95 N. Y.

Parties.— The widow who has had her dower assigned her is not a necessary party to these proceedings. Rigney v. Coles, 6 Bosw. 479.

Contingent remaindermen were necessary parties before the Code. Wilson

v. White, 109 N. Y. 59.

A creditor intervening may do so merely to prove and contest claims. Matter of Campbell, 66 App. Div. 478.

Citation.— If it appears that the facts specified in the petition have been ascertained as far as they can be on diligent inquiry, and that the debts, judgment liens, and funeral expenses, or either, cannot be paid without resorting to the real property, the surrogate must issue a citation according to the prayer of the petition. If, on inquiry, it appears that any heir or devisee, or person claiming under an heir or devisee, is not named in the petition, the citation must also be directed to him, and, unless the usual notice to creditors has been published, and the time for presentation of claims has elapsed, the citation must be directed to all other creditors of decedent generally as well as those named.

Code Civ. Proc., § 2754 (amd. L. 1894, Chap. 735).

Executors and purchasers at partition among the heirs must be cited. Kammerrer v. Ziegler, 1 Dem. 177.

Personal representatives of party cited but not served, cannot be served on death of such party. Matter of Georgi, 35 Misc. 685.

Procedure must be strictly followed. Matter of Georgi, 44 App. Div. 180.

Unknown creditors must be cited or a sale will not be enforced. Id.

Where petition was filed within three years, the proceeding does not lapse because citations were not issued for four years after issue of letters. Matter of Van Vleck, 32 Misc. 419.

Before the Code of Civil Procedure - Order to Show Cause .- If it appeared that the personalty had been exhausted and that there were still debts unpaid, the court might order all persons interested to appear in not less than six nor more than ten weeks from the date of the order, to show cause why authority should not be given to mortgage, lease or sell as much of the real estate of the testator, or intestate, as might be necessary to pay debts,

Service and Publication .- The order was to be published for four weeks in a county newspaper, and a copy served personally on every one in occupation of the premises, and on the widow, heirs and devisees of the deceased, resident in the county of the surrogate, fourteen days before the day to show cause. If they resided out of the county, but in the State, or if such personal service could not be made, then a copy might be served personally forty days before return day, or by publishing once a week for four consecutive weeks in the State paper. If the heirs, etc., did not reside within the State, or could not be found therein, then the like publication was to be made once a week, for six weeks successively, in the State paper, or there might be personal service forty days before return day of a copy of the order. It is doubtful if publication in each of the four weeks, once in each week, was sufficient. Sheldon v. Wright, 7 Barb. 39, affd., 5 N. Y. 497.

Publication in the N. Y. Law Journal alone held insufficient. Matter of

Lesourd, 27 Misc. 414.

The publication must be strictly made. Sibley v. Waffle, 16 N. Y. 180, or there was no jurisdiction. Sheldon v. Wright, supra; Matter of Marlow, 73 Hun, 433. And recitals in the order of sale were not sufficient. Sibley v. Waffle, 16 N. Y. 180; Corwin v. Merrit, 3 Barb. 341; Schneider v. McFarland. 2 N. Y. 459.

The order could not be published until made. Sibley v. Waffle, 16 N. Y.

The order was to be published as soon as might be. This act did not require the first of the four successive publications to be four weeks before the day of showing cause. The requirement was satisfied by four successive weekly publications previous to the day. Sheldon v. Wright, 7 Barb. 39, affd., 5 N. Y. 497. See also Rigney v. Coles, 6 Bosw. 479.

But total publication for less than six weeks held to invalidate the proceed-

ing. Stilwell v. Swarthout, 81 N. Y. 110.

Not so where the order was returnable one day too late. O'Connor v. Huggins, 113 N. Y. 511.

Under the Code.—As to service and publication under the Code of Civil Proc., see §§ 2515 to 2538.

Intervention. - Surrogate may allow other creditors to intervene for the purpose of proving their claims and contesting others; but not to contest the necessity of the proceeding or defend against it. Matter of Campbell, 66 App. Div. 478.

TITLE II. THE DECREE FOR SELLING, LEASING, ETC.

The surrogate is to hear and examine the allegations and proof.

The surrogate shall make no decree directing the disposition of real property, unless he finds that the proceedings have conformed with the provisions of the title, and that the personal estate is insufficient to pay debts and funeral expenses. Code Civ. Proc., § 2756, amd. L. 1904, Chap. 750. See formerly § 2659.

Before the Code an order took the place of the present decree. Actual insufficiency was required, funeral expenses were not provided for, nor was

any provision made for a power of sale.

The surrogate may direct a reference. Matter of Walker, 43 Misc. 475. If the purchaser knew that the debt was fictitious, the sale will be void. Sibley v. Waffle, 16 N. Y. 180.

The evidence necessary to confer jurisdiction upon the surrogate, discussed in Forbes v. Halsey, 26 N. Y. 53.

The order is considered incontrovertible evidence of the facts adjudicated on. Bloom v. Burdick, 1 Hill, 130; Thomas v. Whallon, 31 Barb. 178; Sheldon v. Wright, 5 N. Y. 497; In re King, 1 Bradf. 182.

An order of sale would be void where the personal property had been applied to the payment of general legacies instead of debts. Corwin v. Merritt, 3 Barb. 341.

The order could not be made unless all the personal property had been

applied. Id.

Under a petition for a sale, a leasing or mortgaging may be directed.

Sibley v. Waffle, 16 N. Y. 180.

An order for sale to pay funeral expenses under L. 1874, Chap. 267, would be refused where the expenses were extravagant. Owens v. Bloomer, 14 Hun. 296.

Decree to Mortgage, Lease or Sell.—If it shall appear to the satisfaction of the surrogate that the personal estate of the decedent is insufficient for the payment of his debts and funeral expenses, the surrogate shall make a decree empowering the executor or administrator to mortgage, lease or sell the whole or such part of the real property or interest of the decedent in real property as the surrogate shall deem necessary for the payment thereof. The surrogate may limit the amount to be sold and afterward extend the power to other parcels, and direct the order of the sale of parcels, and may direct whether the same be mortgaged, leased or sold, for the purpose of preserving all the rights and equities of the parties and preventing any unnecessary disposition of such real property; and may limit the amount to be raised thereby. The decree must describe the property to be sold with common certainty. If it appears that one or more distinct parcels of which the decedent died seized has been devised by him or sold by his heirs the decree must provide that the several distinct parcels be sold in the following order:

- I. Property which descended to the decedent's heirs and which has not been sold by them.
 - 2. Property so descended which has been sold by them.
- 3. Property which has been devised which has not been sold by the devisee.
 - 4. Property so devised which has been sold by the devisee.

Code Civ. Proc., § 2757, amd. L. 1904, Chap. 750.
Substituted in place of Code Civ. Proc., §§ 2760, 2761, 2763, as amd. by
L. 1885, Chap. 213, which provided for commissioners. For the former law vide L. 1837, Chap. 460, § 41, supra, and 2 R. S. 102, 103, §§ 15–20. This did not provide for commissioners.

When power to executors to sell is given "after payment of all my just debts, etc., I give all my estate, etc., " * with power to sell, etc.," held application to the surrogate for power to sell to pay debts is necessary. In re Duffy's Est., 18 N. Y. Supp. 724; re Est. Campbell, 67 Hun, 13. But compare Matter of Gantert, 136 N. Y. 106.

Equitable or trust interests are not to be sold. So held under the Laws of 1813. Livingston v. Livingston, 3 Johns. Ch. 148. Nor expectant interests under L. 1850, Chap. 150. Matter of Igglesden, 3 Redf. 375.

The entire title is to be sold of whatever is sold. Pelletreau v. Smith. 30 Barb. 894.

Lands descended to an heir charged with debts could not be sold unless he had refused to pay. Dill v. Wisner, 88 N. Y. 153.

A creditor might have a sale, notwithstanding a sale in partition to one with notice of the creditor's claim, the creditor not being a party to the partition. Voessing v. Voessing, 4 Redf. 360.

Land bought with pension money may be sold. Smith v. Blood, 106 App.

Div. 317.

As to loss of rights by laches, see Matter of Baker, 48 App. Div. 443.

Bonds.—If the lands are to be mortgaged or leased or sold, the executor or administrator has to give bond with two or more sureties, in a penalty at least double the amount to be raised or the value of the property directed to be sold. The bond must be conditioned for the faithful performance of the duties imposed and for an accounting for all moneys received by the principal, whenever he is required by a court of competent jurisdiction. Code Civ. Proc., § 2758.

See formerly Code Civ. Proc., § 2766. For earlier law, see 2 R. S. 103, 104,

§§ 21 and 22.

A like bond was formerly to be given before an order for any sale, in double the value of the land to be sold, that the executors, etc., will pay all moneys resulting by the sale, and that the executors or administrators will deliver all securities taken on such sales to the surrogate in twenty days after receiving them, the bond to be in double the total value of the land, without deducting incumbrances. Jackson v. Holladay, 3 Redf. 379.

In case the executor or administrator refuses to give the bond, the surrogate may revoke letters and grant administration to such person entitled as will execute such decree. Code Civ. Proc., § 2759. See formerly § 2667, repealed L. 1904, Chap. 750.

Formerly in case of refusal to give bond by an executor or administrator, a freeholder might be appointed by the surrogate to mortgage, lease or sell. See Code Civ. Proc., § 2667, repealed L. 1904, Chap. 750. As to freeholder's functions in such cases, see Matter of McGee, 60 App. Div. 460.

Miscellaneous Matters .- The Supreme Court, on appeal, will not review the exercise of the surrogate's discretion, when he has made the order. Moore v. Moore, 27 Barb. 27.

The surrogate cannot pass upon the question of title to disputed lands.

Hewitt v. Hewitt, 3 Bradf. 265.

The order cannot be made in order to pay the expenses of the administration. Fitch v. Witbeck, 2 Barb. Ch. 161. But may be to pay funeral expenses under Code Civ. Proc., § 2749. Estate of King, 10 C. P. R. 175; see Cornwall's Estate, 1 Tuck. 250.

An order to lease is not a revocation of a previous order to sell.

v. Irwin, 10 Wend. 442.

An order vacating a previous order may be appealed from by the purchaser.

Delaplaine v. Lawrence, 10 Paige, 602; 3 N. Y. 301.

Heirs who have been parties to the original proceeding must be parties to an appeal and an omission of any cannot be remedied after time to appeal has expired. Patterson v. Hamilton, 26 Hun, 665.

Lands as to which the executors have a power of sale only for purposes

of distribution may be sold. Matter of Dodge, 40 Hun, 443.

Under the Code, the decree can only be set aside for substantial cause. Neglect of an attorney is not enough. Matter of Olmstead, 17 Abb. N. C. 320.

Reversal.—A mortgage taken after dismissal of proceedings before time of appeal has expired is taken at peril. Olyphant v. Phyfe, 48 App. Div. 1.

TITLE III. THE SALE.

The executor or administrator must proceed to execute the decree in the same manner, and the execution thereof shall have the same effect, as if he were acting as executor of the decedent under a like power contained in a will of said decedent duly executed and proved. He must apply the proceeds in the same manner as if he acted under such power, and all interested persons shall have the same remedies for the enforcement of the decree and the application of the proceeds as in such case. Code Civ. Proc., § 2761 (as amd. 1904, Chap. 750).

Formerly by Code Civ. Proc., § 2761, as amended by L. 1885, Chap. 213 and L. 1894, Chap. 735, the sale might be either public or private, as the decree directed. Where the sale was to be public it was governed by Code Civ. Proc., §§ 1384-1386, 1434, 1435, and 1436, which regulate sheriff's sales, the person making the sale to stand in place of the sheriff. Code Civ. Proc., § 2772, as amd. L. 1885, Chap. 213.

See also Chap. XXXVIII, Tit. IV, as to sales under execution.

The following provisions and decisions will be found valuable, though superseded in many cases by the Code.

superseded in many cases by the Code.

Notice of Sale. - The notice of sale was to be posted for six weeks at three of the most public places of the town or ward where the sale was to be had, and published in a county newspaper, or, if none, in the State paper, for six weeks successively. The notice must specify the number of the lots, and the name or number of the towns or townships where situated, or otherwise appropriately describe the lands and all improvements thereon. Where the land is in a city the sale could not be confirmed unless the notice was posted in the ward where the land is situate. Matter of McFeeley, 2 Redf, ŝ41.

Sale .- The sale must have been made at public vendue in the county where the premises are situated, between 9 A. M. and sunset. It might be on a credit of three years for three-fourths of purchase-money, if the surrogate so directed, secured by mortgage on the land, and bond of the purchaser. See Code Civ. Proc., § 2771.

The sale must be reported to the surrogate. Stilwell v. Swarthout, 81

N. Y. 110.

Purchaser .- Any sale made directly or indirectly to the executor or administrators or guardians of minors (except for benefit of the minors), is void. Code Civ. Proc., § 2774; 2 R. S. 104, § 27. Also to one acting in behalf of the administrator. Forbes v. Halsey, 26 N. Y. 53. As to protection of bona fide purchaser, vide infra, Tit. IV.

Under the old law it was held that the sale was void, even if the executor

became interested after the sale and before confirmation. Terwilliger v. Brown, 44 N. Y. 237. This decision was formally incorporated into the Code. § 2774. See also Bostwick v. Atkins, 3 N. Y. 53, as to waiver by the minor

when of age.

Order of Sale.—Code Civ. Proc., § 2757, provides that if it appears that one or more distinct parcels of which the decedent died seized has been devised by him or sold by his heirs the decree must provide that the several distinct parcels be sold in the following order:

1. Property which descended to the decedent's heirs and which has not been sold by them.

Property so descended which has been sold by them.
 Property which has been devised which has not been sold by the devisee.
 Property so devised which has been sold by the devisee.

Where a paramount devise is made to the widow in lieu of dower, other lands of the testator should be first sold. Matter of Dolan, 4 Redf. 511.

Lands in which a devisee has not mortgaged his interest should be sold

before those in which he has mortgaged it. Matter of Clark, 3 Redf. 225.

Confirmation or New Sale .- See Code Civ. Proc., §§ 2775 (amended, L.

1885, Chap. 213), 2776 and 2778, all repealed L. 1904, Chap. 750.
Such a sale does not affect the title of a purchaser or mortgagee in good faith and for value, from the heir or devisee, unless letters have been issued on a petition filed within four years after decedent's death. Code Civ. Proc.. § 2777.

As to sale and confirmation before the Code, see 2 R. S. 105, §§ 29-31; vide also, L. 1880, Chap. 231; there is no essential difference in the law.

The surrogate has power to relieve a purchaser, if there be a defect of title, under Code Civ. Proc., §§ 2472 and 2481. Matter of Lynch, 33 Hun, 309. The purchaser has a right to a good title. Matter of Mahoney, 34 Hun, 501.

A surrogate cannot compel a purchaser to accept a deed. Cromwell v.

Phipps, 6 Dem. 60.

The sale may be confirmed in part only; and a resale ordered of another part. Delaplaine v. Lawrence, 3 N. Y. 301.

As to when a resale may be ordered for insufficient price. Kain v. Masterton, 16 N. Y. 179; Horton v. Horton, 2 Bradf. 200.

The confirmation must be made previous to the conveyance. Rea v. Mc-Eachron, 13 Wend, 465,

Interest of Lands Under Contract Sold .- Code Civ. Proc., §§ 2757, 2782, 2783. See also former §§ 2779, 2780, 2781 (repealed L. 1904, Chap. 750).

Recitals of Orders. Before the Code it was held that the recitals in an Recitals of Orders.—Before the Code it was held that the recitals in an order of sale as to jurisdictional facts, were not conclusive or sufficient. Sibley v. Waffle, 16 N. Y. 180. The orders should be recited in the deed. Atkins v. Kinnan, 20 Wend. 241. A mistake therein, however, as recited, did not avoid the deed. Sheldon v. Wright, 5 N. Y. 497.

By Code Civ. Proc., § 2776 (repealed L. 1904, Chap. 750), the deed must briefly refer to the decree, the order to execute it, and the order of confirmation, which last order must direct the execution of the deeds. See now

§§ 2757, 2761.

If the first deed is defective, a second may be given relating back.

v. Wright, 7 Barb. 39; 5 N. Y. 497.

The deed is not invalid if executed in guardian's name, if the order so direct. Cole v. Gourlay, 9 Hun, 493, affd., 79 N. Y. 527.

Widow's Dower. Dower is to be paid out of the proceeds. 2 R. S. 106, § 36; Code Civ. Proc., § 2800; L. 1905, Chap. 430; see formerly Code Civ. Proc., § 2793, subd. 3, amd. L. 1886, Chap. 652; L. 1893, Chap. 640; L. 1894,

Chap. 735 (repealed, L. 1904, Chap. 750).

It was formerly provided expressly that dower could not pass by the sale if it had been assigned. Code Civ. Proc., § 2778; repealed, L. 1904, Chap. 750. See also Lawrence v. Brown, 5 N. Y. 394; Lawrence v. Miller, 2 id. 245, revg. 1 Sandf. 516. But, it seems, if it be a mere claim to dower it would pass. Id. Or the lands may be sold subject to the widow's life estate. Maples v.

Howe, 3 Barb. Ch. 611.

The widow held entitled to interest on one-third proceeds. Higbie v. Westlake, 14 N. Y. 281. See further, Laws of 1863, Chap. 400, as to dower. And to one-third of the gross amount sales, without deduction for ex-

It was formerly expressly provided that the person making the sale must sell in different plots under an order to sell the whole, where the sale is public and the property consists of several distinct parcels, unless other-Code Civ. Proc., § 2773, as amended by L. 1885, Chap. 213; wise directed. repealed L. 1904, Chap. 750. See now Code Civ. Proc., § 2757.

Formerly held that property might be sold in separate lots, if deemed

beneficial, though order described it as a single parcel. Delaplaine v. Lawrence,

3 N. Y. 301; see Jackson v. Irwin, 10 Wend. 442.

Held the sale might be made of different portions, from time to time, under the original order. Farrington v. King, 1 Bradf. 182.

In Ackley v. Dygert, however, 33 Barb. 177, an order for a further sale, based upon the former proceedings, and not founded upon any new petition,

or order to show cause, was held wholly void.

The Law of 1863, Chap. 362, § 6, provided that the surrogate might order a sale of a portion, and a mortgage or lease of another portion; and only one order to show cause need be made in any proceeding. Repealed by L. 1880, Chap. 245. See L. 1904, Chap. 750; L. 1905, Chap. 430.

Prior Liens.— The sale is made subject to all charges by judgment, mortgage, or otherwise, existing at the time of the decease of the testator or intestate. 2 R. S. 105, § 32; Code Civ. Proc., § 2778, as amd., L. 1894, Chap. 735; repealed L. 1904, Chap. 750.

The deed under the rulings before the Statutes of 1850 (infra), had to recite at large, although not word for word, the order of sale. Atkins v.

Kinnan, 20 Wend. 241.

Crops will pass on the sale. Jewitt v. Keenholz, 16 Barb. 193.

If Executor, etc., Die, or be Removed .- By L. 1850, Chap. 162, if the executor or administrator died or was removed, or disqualified after order made, the administrator of the estate unadministered, or a freeholder, might execute the order on giving the requisite security. Repealed, L. 1880, Chap. 245.

Where one of several administrators or executors fails to give the bond required, the surrogate may authorize the remainder to act, or, if all fail, any freeholder, on his giving the bond. Code Civ. Proc., § 2767; repealed, L. 1904, Chap. 750.

For these provisions in modified form, see now Code Civ. Proc., §§ 2759,

2760.

Distribution.— As to this vide 2 R. S. 106, §§ 35-43; Code Civ. Proc., §§ 2793, 2795, 2796; repealed, L. 1904, Chap. 750; Code Civ. Proc., § 2799; also Matter of Hatch, 182 N. Y. 320.

As to the distribution and investment of surplus, and payment of liens therefrom, vide Sears v. Mack, 2 Bradf. 394; Matter of Fox, 92 N. Y. 93; Kavanagh v. Wilson, 5 Redf. 43; Matter of Gardner, id. 14; L. 1879, Chap. 389; Code Civ. Proc., §§ 2793, 2795 and 2796; repealed, L. 1904, Chap. 750.

Accounting.—Compulsory. Matter of Bradley, 25 Misc. 261; also Code Civ. Proc., § 2726, subd. 3.

Record of Proceedings.— The several surrogates shall record in books all orders and decrees by them under above proceedings, and shall file and preserve all papers therein. 2 R. S. 110, § 60; Laws of 1823, Chap. 283; 1837, Chap. 460; repealed, Laws 1880, Chap. 245; Code Civ. Proc., § 2498.

Dower, Remaining Lands, Surplus, etc. - For further provisions in the statute providing that the heirs and devisees, and the remaining lands, shall be exonerated from the payment of debts according to the amount realized; that the executors, etc., shall account for the proceeds of sales, and the surplus be distributed for expenses, and for the payment of dower rights by a sum in gross, if the widow so consent by an instrument under seal, duly acknowledged, etc.; that amount due executors, etc., for deficiency is to be paid; that if the widow does not consent, as above, the surrogate is to invest one-third the amount of sales, and hold the securities, and pay her the interest for life. See 2 R. S. 106, § 33-38; Laws of 1863, Chap. 400; repealed, L. 1880, Chap. 245; Code Civ. Proc., §§ 2793-2996; L. 1904, Chap. 750 (repealing these Code sections).

Vide Lawrence v. Brown, 5 N. Y. 394, as to exoneration of other lands, etc.

As to allowances to administrators, etc., for making the sale, vide Laws of 1844, Chap. 300; repealed, L. 1880, Chap. 245; Higbie v. Westlake, 14 N. Y. 281; Code Civ. Proc., §§ 2563 and 2564. Vide also, as to debts, etc., Chap. XIV, Tit. VII, supra.

Surplus Moneys on Mortgage Sales .- Surplus moneys arising after sale through a mortgage or other lien on decedent's real estate, are to be paid to the surrogate having jurisdiction, and may be disposed of and distributed by him in the same manner as moneys derived from the sale of real estate under the above proceedings. Code Civ. Proc., §§ 2798 and 2799.

The act was not to apply where letters in this State have been issued

four years previous to the sale. Law of April 23, 1867, Chap. 658; also Chap. 460, as amended by Laws of April, 1870, Chap. 170; April 28, 1871,

Chap. 834. Repealed L. 1880, Chap. 245.

See also Butler v. Emmett, 8 Paige, 13; Ford v. Walsworth, 15 Wend. 450;

Laws of 1843, Chap. 172; 1847, Chap. 298; repealed, L. 1880, Chap. 245.

Character of Surplus Moneys.—As to the character in which surplus moneys

are regarded in law, vide supra, p. 377.

Held to be realty which should go to heirs or devisees. Matter of Knapp, 25 Misc. 133.

Penalty Against Executors.— The statutes also provide that executors, etc., fraudulently making sales contrary to the above provisions, shall forfeit double the amount of the land sold to the person having the inheritance. 1 R. L. 452; 2 R. S. 110; Stagg v. Jackson, 2 Barb. Ch. 86. Vide L. 1880, Chap. 245.

Contracts of Sale .- As to contracts of sales for the purchase of land, vide infra, Chap. XIX, "Contracts of Sale," and Laws of 1837, Chap. 460, §§ 40, 41, 42. Repealed, L. 1880, Chap. 245. Also Code Civ. Proc., §§ 2782, 2783 (see formerly §§ 2779-2783, repealed L. 1904, Chap. 750).

Dower.— Sale may be ordered of real estate including right of dower, where advantageous, proceeds being applied in place thereof. Code Civ. Proc., § 2800, amd. L. 1905, Chap. 430.

Curtesy.— The surrogate may order the sale of the land of a married woman dying intestate, subject to her husband's curtesy. Arrowsmith v. Arrowsmith, 8 Hun, 606.

TITLE IV. VALIDITY OF THE PROCEEDINGS AND IRREGULARITIES.

The following are provisions of statute making sales valid under the above provisions, and as to the correction of irregularities therein:

Correction of Irregularities.—2 R. S. 110, §§ 61 et seq. Whenever a conveyance had been made under above proceedings, irregularities (as to nonconcurrence of a discreet person and nonrecitals in the deed) might be rectified, and deed confirmed by the Supreme Court (formerly "chancellor") on notice to heirs and devisees. Laws of 1819, p. 214; 1825, p. 445. This, however, would not allow rectification of jurisdiction or of matters of fact.

The decree may be contested on other grounds than that of irregularity. Bostwick v. Atkins, 3 N. Y. 53; so holding, as to sale made under the Law of 1801. Repealed, L. 1880, Chap. 245.

See also as to irregularities under the above statute, and their correction. Hallenbeck v. Brady, 2 Paige, 316; *In re* Hemiup, 3 *id.* 305; Bostwick v. Atkins, 3 N. Y. 53; Rea v. McEachron, 13 Wend. 465.

Presumption of Regularity.- In absence of proof regularity will be presumed, when surrogate's decree is attacked collaterally. Mott v. Ft. Edward Water Works Co., 79 App. Div. 179.

Sales Made Valid.—By Law of March 23, 1850, Chap. 82, § 1, all such sales as above, heretofore made or hereafter to be made, were to be deemed as valid as if made by order of a court having original general jurisdiction; and the title of any purchaser at any such sale made in good faith, was not to be invalidated by reason of any omission, error, defect, or irregularity, in the proceedings before the surrogate, or by allegation of want of jurisdiction on the part of such surrogate; except in the manner and for the causes for which it could be impeached if sale were made by a court of general jurisdiction. Sales made prior to the Revised Statutes were held within the provisions of this act as well as all since. This act did not, however, cure the omission of a necessary party to the proceedings. Jenkins v. Young, 35 Hun, 569.

Nor should such sale be impeached for any defect or omission in the petition, provided it showed that an inventory had been filed, and that there was a debt which the personal estate was insufficient to discharge, and that

recourse was necessary to the real estate. § 2.

Nor should it be impeached because all the executors, etc., did not present the petition, nor all sign the bond, or deed, or notice, or act in any other proceeding; nor by reason of any irregularity in any matter or proceeding after the presentation of any petition and giving notice of order to show cause why the authority or direction should not be granted, and before the order confirming the sale. The act not to affect suits commenced. § 3.

The surrogate, or other officer, however, was not to make any order for sale or confirmation unless satisfied that the provisions of the Revised Statutes and its amendments had been complied with, as if the Act of 1850

had not been passed. Id., § 4. Even since the Laws of 1850, a sale under an order omitting to state that the inventory was filed, or that there are debts for which the personal

property is insufficient, would be void. Ackley v. Dygert, 33 Barb. 176.
Under the above Law of 1850, the burden of proof is thrown upon the party impeaching the sale. Wood v. McChesney, 40 Barb. 417.

If the petition state facts sufficient to confer jurisdiction, under the Law of 1850, the decree should have the same effect as a judgment to protect bona fide purchasers. Wood v. McChesney, 40 Barb. 417.

And this has been the general rule, and the title cannot be impeached collected by any parel evidence to supply defeats may be given and entries.

collaterally, and parol evidence to supply defects may be given, and entries in the surrogate's books may be made nunc pro tunc. Jackson v. Crawford, 12 Wend. 533; Bloom v. Burdick, 1 Hill, 130; Farrington v. King, 1 Bradf.

This Law of 1850 has been held constitutional in its retrospective provisions. 24 Barb. 129; 40 id. 417; Forbes v. Halsey, 26 N. Y. 53. Vide also, L. 1878, Chap. 129, amdg. the Act of 1850 and validating sales made. Repealed, with the Act of 1850. L. 1880, Chap. 245.

The Act of 1850 only applies where the sale is questioned collaterally. Stillwell v. Swarthout, 81 N. Y. 109; Kelley's Estate, 1 Abb. N. C. 102. See Mott v. Ft. Edward, etc., Co., 79 App. Div. 179.

The Code of Civil Procedure now provides: "The title of a purchaser in good faith at a sale pursuant to a decree made as prescribed in this title is not nor is the validity of a mortgage or lease made as prescribed in this title, in any way affected, where a petition was presented and the proper persons were duly cited and a decree authorizing a mortgage, lease or sale, was made as prescribed in this title, by any omission, error, defect or irregularity occurring between the return of the citation and the making of the decree, except so far as the same would affect the title of a purchaser at a sale made pursuant to the directions contained in a judgment rendered by the Supreme Court."

§ 2763 (am'd L. 1904, Chap. 750).

See formerly Code Civ. Proc., § 2784 (repealed by L. 1904, Chap. 750).

Presumption after twenty-five years as to appointment of guardian. Code Civ. Proc., § 2785.

Code Civ. Proc., § 2785.

Former Laws, Law of April 20, 1869, Chap. 269.— Neither shall such sale be invalidated for omissions to serve minor heirs or devisees with a copy of the above order to show cause, provided it has been served upon the general guardian or the guardian appointed in these proceedings. Repealed, L. 1880, Chap. 245. See Havens v. Sherman, 42 Barb. 636.

As to these saving laws, see Stillwell v. Swarthout, 81 N. Y. 109; Matter of

Dolan, 88 N. Y. 309.

Act of March 7, 1872, Chap. 92.— This act amended § 1 of the Act of April 20, 1869, so that § 3 of the Act of March 23, 1850, read in substance that sales were not to be invalidated or impeached for a number of specified reasons given in detail. This act was repealed by Laws 1880, Chap. 245, and is now covered by the Code. § 2763.

Suits Against Heirs and Devisees.—No suit shall be brought against heirs or devisees to charge them with debts within three years after granting letters testamentary, etc., or if no letters have been granted, within three years from the death of the decedent, and the court shall stay such suit brought after that time, if the proceedings to sell decedent's land are commenced, until the result of the application. And on order of sale therein the suit shall not be further prosecuted, unless the plaintiff alleges that lands have come to heirs or devisees not included in the order of sale. In such case the judgment shall not affect lands so ordered to be sold, etc., and the plaintiff shall have no share in the proceeds unless he discontinued his suit. 2 R. S. 109, § 53; Code Civ. Proc., §§ 1844, 1845; vide also 26 Barb. 364; 13 id. 252; 10 id. 249; 10 How. Pr. 532; Butts v. Genung, 5 Paige, 254 at 257; Herkimer v. Rice, 27 N. Y. 163.

Held the action may be brought within nine years after debtor's death.

Mead v. Jenkins, 27 Hun, 570.

The action is not to enforce but to acquire the lien. Rogers v. Patterson, 79 Hun, 483. See Cunningham v. Parker, 146 N. Y. 29.

Bona Fide Purchasers Protected.—By Law of May 11, 1869, Chap. 845, amdg. § 72 of the Act of May 16, 1837, no real estate, the title to which should have passed out of any heir or devisee by conveyance or otherwise, to a purchaser in good faith, and for value, should be sold as above, unless letters testamentary or of administration had been applied for within four years after the decease of the former owner; nor unless application had been made for the sale within three years after granting such letters, provided the surrogate of any county in this State had jurisdiction to grant such letters. The act was not to apply where application had already been made for sale under the Revised Statutes, or said § 72. Repealed, Laws 1880, Chap. 245.

If the debt on which the sale was made was fictitious, the title of the purchaser will not be avoided, unless he conspired with the administrator for

a fraudulent sale. Sibley v. Waffle, 16 N. Y. 180.

See for present rule, Code Civ. Proc., § 2628.

Held to apply to children born long after the death of testator. Fox v. Fee,

167 N. Y. 44.

By Law of April 12, 1873, Chap. 211, no real estate, the title to which has passed out of any heir or devisee to bona fide purchasers for value, was to be sold as above, unless letters had been applied for within four years after the decease of the former owner, nor unless application for sale was made within three years after granting letters, provided any surrogate in the State had jurisdiction. The period in which an action by a creditor might be pending was not to be computed, provided the creditor filed a notice of lis pendens with the county clerk stating the object of action, and that said real estate would be held as security. The court might, on motion, relieve the real estate of such lien. This act was repealed by Laws 1880, Chap. 245, but its pro-

visions are substantially contained in Code Civ. Proc., §§ 2751 (amended L. 1887, Chap. 423) and 2777.

Vide, as to the law before the Code. Fonda v. Chapman, 23 Hun, 119.

Validation of Sales, Act of 1895, Chap. 525.—By this act, the title of a purchaser of real estate, at a sale at any time heretofore made pursuant to an order or decree of a surrogate authorizing or directing such a sale, when it is discovered that the personal estate of a testator or intestate is insufficient to pay his debt, shall not be invalidated or in any wise affected by the failure of the conveyance of such real estate to such purchaser, to contain or set forth at large the original order authorizing or directing the sale and the order confirming the sale and directing a conveyance, or either of them, but such conveyance shall be valid and sufficient, if it briefly refers to the order or decree directing or authorizing the sale, and the order confirming the sale and directing the conveyance; provided, however, that nothing herein contained shall affect any action or proceeding now pending.

This was repealed by the Real Property Law, L. 1896, Chap. 547.

Infant Heirs Accepting Proceeds.—As to when infant heirs would be es-

topped by accepting proceeds, vide Ackley v. Dygert, 33 Barb. 176. In the case of Gaines v. New Orleans, 6 Wall. 642, the Supreme Court of the United States held that a probate court cannot by subsequent order give validity to sales of real estate made by executors, which were void by the laws of the State where made.

CHAPTER XIX.

CONTRACTS TO SELL AND PURCHASE LAND.

TITLE I .- THE CONTRACT, HOW MADE.

II.- EFFECT OF THE CONTRACT.

III.—SUFFICIENCY OF THE DEED AND TITLE.

IV .- TENDER AND TIME OF PERFORMANCE.

V .- SPECIFIC PERFORMANCE..

VI .- MISCELLANEOUS PROVISIONS AS TO CONTRACTS.

TITLE I. THE CONTRACT, HOW MADE.

It is usual for parties to contract, in writing, for the purchase and sale of land, prior to the giving of the deed. The land must be described with certainty, or in such a way that it can be identified; and the agreement must be mutually binding on the vendor and vendee. Whether an instrument operates as passing an immediate interest, or rests in contract, depends upon the intention of the parties, to be collected from the whole instrument.

See Tamsen v. Schaeffer, 108 N. Y. 604, that the intent governs; see also Real Property Law, \S 205.

To be in Writing.—A contract for the leasing for a longer period than one year, or for the sale of any real property, or an interest therein, is void, unless the contract, or some note or memorandum thereof, expressing the consideration, is in writing, subscribed by the lessor or grantor, or by his lawfully authorized agent.

Real Property Law, § 224; see 2 R. S. 135, §§ 8, 9, modified from 1 R. L. 78, and based on the English St. of Frauds, 29 Car. II, Chap. 3.

See Real Property Law, § 234 to the effect that "nothing contained in this article abridges the powers of courts of equity to compel the specific performance of agreements in cases of part performance."

By L. 1892, Chap. 677, § 12, "writing" and "written" include every legible representation of letters upon a material substance, except when applied to the signature of an instrument.

The above statutes of this State would not apply to contracts for lands in

other States. Burrel v. Root, 40 N. Y. 496.

If a tenant enters under a void agreement, he may be compelled to pay for use and occupation. Thomas v. Nelson, 69 N. Y. 121; Van Arsdale v. Buck,

82 App. Div. 383.
Statute of Frauds must be pleaded to be availed of as a defense. Crane v. Powell, 139 N. Y. 379; Franklin Coal Co. v. Hicks, 46 App. Div. 441; Seamans v. Barentson, 180 N. Y. 333, revg. 78 App. Div. 36; Closson v. Thomson Pulp & Paper Co., 112 App. Div. 273; Avery v. Lee, 117 App. Div. 244.

The defect in the contract sued on, if it appear on the face of the complaint, may be taken advantage of by demurrer; it can also be raised by answer. Seamans v. Barentsen, 78 App. Div. 36, revd., 180 N. Y. 333.

The following agreements relative to land, it has been held, must be in writing, viz.:

An agreement to exchange lands. Rice v. Peet, 15 Johns. 503. To give a release. Jackson v. Post, 15 Wend. 588. An agreement not to use land. Tryon v. Mooney, 9 Johns. 358. To pay off an incumbrance. Duncan v. Blair, 5 Den. 196. An agreement to convey, on certain payments being made. Loomis v. Loomis, 60 Barb. 22. To alter the boundary of lands. Davis v. Townsend, 10 id. 333. To set back a building. Wolfe v. Frost, 4 Sandf. Ch. 72. To pay service in land. Lisk v. Sherman, 25 Barb. 433. To give possession. Howard v. Easton, 7 Johns. 205. For a license to do any act affecting the enjoyment of land. Houghtaling v. Houghtaling, 5 Barb. 379; and see infra, Chap. XXXVI. For sale of a pew. Trustees v. Bigelow, 16 Wend. 28; Vielie v. Osgood, 8 Barb. 130; St. Paul's Church v. Ford, 34 id. 16. Any agreement of extension of the time of performance of the contract should be in writing, as a general rule. Hasbrouck v. Tappen, 15 Johns. 200. But the time may be extended by parol. Stone v. Spragae, 20 Barb. 509. To sell trees, fruit, and grass (unless severed from the land). Warren v. Leland, 2 Barb. 613; Silvernail v. Cole, 12 id. 685; Goodyear v. Vosburgh, 57 id. 243; Bank of Lansingburgh v. Crary, 1 id. 542; but see as to licenses to take the same, Jencks v. Smith, 1 N. Y. 90; Pierrepont v. Barnard, 6 N. Y. 279, revg. 5 Barb. 364.

A parol sale of standing trees is void. McGregor v. Brown, 10 N. Y. 114. A parol promise to buy in land for another and sell back when void. Canda v. Totten, 87 Hun, 72.

In Green v. Armstrong, 1 Den. 550, a distinction is made between growing trees, fruit or grass and other natural products of the earth, and annual crops of grain. The former are held parcel of the land, and a contract in writing is required; the latter are held personal, and not within the statute. See also Taylor v. Bradley, 39 N. Y. 129.

In Kilmore v. Howlett, 48 N. Y. 569, a contract to cut trees and deliver

them as cord wood, is held not one necessary to be in writing.

An agreement to give another half an interest in lands bought must be in writing. Levy v. Brush, 45 N. Y. 589.

Also to allow a permanent dam. Mumford v. Whitney, 15 Wend. 380.

The agreement may, however, be void only so far as the land is concerned. Campbell v. Campbell, 65 Barb. 639.

Parol Evidence as to Contracts.— Vide Van Mater v. Burns, 76 Hun, 3.

No Writing Necessary.—Agreements, such as the following, need not be in writing, or subscribed as the statute requires.

An agreement to pay for improvements on land. Benedict v. Baker, 11 Johns. 145. A promise to pay for land already sold. Thomas v. Dickinson, 12 N. Y. 361, revg. 14 Barb. 90. A license to remove buildings not fixtures. Dubois v. Kelly, 10 Barb. 496, approved, 125 N. Y. 350. An agreement with respect to disputed boundary lines, unless it transfers a specific interest or estate. Davis v. Townsend, 10 Barb. 333. An agreement to pay for services in land may be enforced in damages in the value of the land, without a writing. Burlingame v. Burlingame, 7 Cow. 92; vide King v. Brown, 2 Hill, 485. An agreement to take back land sold at a certain price, under certain circumstances. Burrell v. Root, 40 N. Y. 496.

Form of the Contract.—A contract required by the statute of frauds to be in writing cannot be partly in writing and partly by parol; and it must be definite in its character.

Clason v. Bailey, 14 Johns. 484; Dow v. Way, 64 Barb. 255; Odell v. Montross, 68 N. Y. 500; Parkhurst v. Van Cortlandt, 1 Johns. Ch. 273; Wright v. Weeks, 25 N. Y. 153, affg. 3 Bosw. 372; Rollins v. Pickett, 2 Hill, 552; Odell v. Montross, 68 N. Y. 499; Mentz v. Neuwitter, 122 id. 491; Cooley v. Lobdell, 153 id. 596; Wadick v. Mace, 118 App. Div. 777.

It is held, however, that although the memorandum must contain what is necessary to show what the contract between the parties is, the property may be ascertained by extrinsic evidence, especially if the memorandum refer to it. Pinckney v. Hagadorn, 1 Duer, 89; Tallman v. Franklin, 14 N. Y. 584.

The rule that all prior negotiations are merged in the written instrument is subject to the qualification that when the verbal contract is entire and a part only is reduced to writing, parol proof of the entire contract is competent. Beagle v. Harby, 73 Hun, 310.

The memorandum signed may properly refer to another writing not itself signed. Newton v. Bronson, 13 N. Y. 587. See also Morss v. Salisbury, 48

But the memorandum must contain the entire and full terms agreed on, and it must leave no part uncertain of the details of the contract, as to consideration, credits, etc. Davis v. Shields, 26 Wend. 341; Foot v. Webb, 59 Barb. 38; Wright v. Mischo, 52 Super. 241.

It must definitely show the parties and which is the seller. Calkins v. Falk,

1 Abb. Ct. of App. Cas. 291; s. c., 41 N. Y. 610.

Subscription.—The agreement must be subscribed at the end thereof. Davis v. Shields, 26 Wend. 341; Champlin v. Parish, 11 Paige, 406; Worthington, etc., Co. v. Bull, 44 Hun, 462. See Clason v. Bailey, 14 Johns. 484.

A printed subscription of a name is not sufficient. Vielie v. Osgood, 8 Barb.

By L. 1892, Chap. 677, § 12, the term signature is to include any memorandum, mark or sign, written or placed upon any instrument or writing with intent to execute or authenticate such instrument or writing.

The Writing .- The contract may be in lead pencil. Merritt v. Clason, 12 Johns. 102; Clason v. Bailey, 14 id. 484. Vide also L. 1892, Chap. 677, supra, p. 494.

Seal.—There need be no seal, either to the contract or to any assignment thereof. Worrall v. Munn, 5 N. Y. 229; Stoddart v. Whiting, 46 id. 627. Cf. Leask v. Horton, 39 Misc. 144, to the effect that a deed does not require a seal under Real Property Law, § 208.

By whom Subscribed.—The contract properly should be subscribed by both parties, and necessarily by the vendor, or party by whom the lease or sale is made.

Real Property Law, § 224; 2 R. S. 135, § 8. Champlain v. Harris, 10 Paige, 386; Worrall v. Munn, 5 N. Y. 229; The Nat. Fire Ins. Co. v. Loomis, 11 Paige, 431; Cammeyer v. German Churches, 2 Sandf. Ch. 188; Montauk Association v. Daly, 62 App. Div. 101. All the vendors should subscribe. St. Paul's Church v. Ford, 34 Barb. 16.

It is supposed, however, that others might ratify and adopt the act of one, for their benefit. Vide, Silliman v. Tuttle, 45 Barb. 171. Real Property Law,

§ 224.

If signed by the vendor, it may be enforced against him, whether the vendee sign or not. Worrall v. Munn, 5 N. Y. 229; Kittel v. Stueve, 10 Misc. 696; to the contrary was Cammeyer v. German Church, 2 Sandf. Ch. 187; vide also, Codding v. Walmsley, 4 Supm. 49, affd., 60 N. Y. 644.

It had to be signed by the party who was to be charged thereby before the Revised Statutes. Since then it need be signed only by the party making the lease or sale. Davis v. Shields, 26 Wend. 341; First Baptist Church v. Bigelow, 16 Wend. 28; McCrea v. Purmort, id. 460; Sturmdorf v. Saunders, 117 App. Div. 762; Quinto v. Alexander, 123 App. Div. 1; Montauk Association v. Daly, 32 Misc. 558; 62 App. Div. 101.

If signed by the vendee alone, the contract is void, and it cannot be enforced against him. Debeerske v. Paige, 47 Barb. 172; 36 N. Y. 537; Miller v. Pelletier, 4 Edw. 102; Cowles v. Bowne, 10 Paige, 526; McWhorter v. McMahan, Id. 386; Champlin v. Parish, 11 id. 405; Montauk Association v. Daly, 62 App. Div. 101; Haydock v. Stow, 40 N. Y. 363.

It seems a contract executed by the vendor only, but delivered to and accepted by the purchaser, and acted upon by him, can be enforced against such purchaser. Worrall v. Munn, 5 N. Y. 229.

Representations.— Vide, Center v. Weed, 138 N. Y. 532; Stokes v. Johnson, 57 id. 673; Phillips v. Conklin, 58 id. 682; Wheeler v. Tracy, 49 Super. 208; Smidt v. Reed, 132 N. Y. 108; White v. Lowden, 8 Misc. 106; DeMilt v. Hill, 89 Hun, 56.

See also Encroachments, infra, p. 512.

Failure to Read.—When no defense. Rozen v. R. R. Co., 7 Misc. 130.

Fraud.—Infra, p. 512.

Contracts made by an Agent .- The contract or some note or memorandum thereof may be subscribed by the lawfully authorized agent of the lessor or grantor.

Real Property Law, § 224; 2 R. S. 135, § 9. Earl v. Collins, 19 Wkly. Dig. 307.

The contract, however, should be executed in the name of the principal to be binding on him. Townsend v. Orcutt, 4 Hill, 351; and see supra, Chap. XIII, Title I; Sherman v. Hill, 22 Barb. 239; Briggs v. Partridge, 64 N. Y. 357.

Oral evidence may, however, be given to prove the agent was so authorized to sign in his own name. Roe v. Smith, 42 Misc. 89.

As to powers of agents to sign. Sheffield v. Smith, 8 Misc. 43. It has been held, however, that where there has been a performance on the part of the principal, accepted by the other contracting party, the principal will be entitled, in equity, to a specific performance, notwithstanding that the agent contracted in his own name. St. John v. Griffith, 2 Abb. 198; vide also Squier v. Norris, 1 Lans. 282; Briggishts, so to contract made in accepted.

See also, as to concealed principal's rights, as to contract made in agent's name. Denike v. DeGraaf, 87 Hun, 61.

See further as to triple relation of vendor, purchaser and his agent as respects fulfillment of covenants in contract by agent in his own name. Tuthill v. Wilson, 90 N. Y. 423; McIntosh v. Battel, 68 Hun, 216.

The agent must be appointed by all the vendors.

Appointment by Parol.—Although in the execution of deeds and leases. by which an interest in praesenti passes, the agent's authority must be in writing (vide Real Property Law, § 207); in agreements to convey, the agent's authority may be conferred by parol, and there may be a parol ratification of an unauthorized agent's written contract. Champlain v. Parish, 11 Paige, 406; Worrall v. Munn, 5 N. Y. 229; Lawrence v. Taylor, 5 Hill, 107; McWhorter v. McMahan, 10 Paige, 386; Pringle v. Spaulding, 53 Barb. 17; Blood v. Goodrich, 12 Wend. 525; Newton v. Bronson, 13 N. Y. 587; also 36 Barb. 655; Weed, etc., Co. v. Kaulback, 3 Supm. 304; Moody v. Smith, 70 N. Y. 598; Appelbaum v. Galewski, 34 Misc. 281.

An agent may bind his principal if he is recognized subsequently by his

principal as such, and the sale confirmed.

A parol ratification of an agent's sealed contract, where the agent had no authority to make such contract, held insufficient. Blood v. Goodrich, 12 Wend. 525. But it might be valid as a simple contract if a seal were not requisite. Lawrence v. Taylor, 5 Hill, 107. And even where such agent had no power to bind the principal—viz., the agent of a trustee—but then the ratification must be in writing, as required by the terms of the statute. More v. Smedbergh, 8 Paige, 600, affd., 26 Wend. 238; also Newton v. Bronson, 13 N. Y. 587, supra.

A written instrument subscribed by the owner of land, authorizing a real estate broker to sell it upon certain terms therein specifically stated, and an agreement to purchase the property upon those terms, subscribed by a purchaser, subsequently written across the face of the paper while unrevoked in the hands of the broker, do not, taken either separately, or together, form a contract for the sale of the land binding upon the owner; nor does his subsequent parol assent to the terms of sale give validity to the transaction. Haydock v. Stow, 40 N. Y. 363. See also Montauk Association v. Daly, 62 App. Div. 101.

A broker's authority to "sell," has been held to authorize him to sign the vendor's name to a contract. Pringle v. Spaulding, 53 Barb. 17, 21. To the contrary, are intimations in Coleman v. Garrigues, 18 Barb. 60, 68; Glentworth v. Luther, 21 Barb. 145; Barnard v. Monnot, 33 How. Pr. 440.

Partners .- One partner cannot by contract bind another as to sales of real estate of the partnership. A verbal authority from his copartner would, however, enable him so to do. Or the contract might be ratified and so made valid. Lawrence v. Taylor, 5 Hill, 107.

An Auctioneer as Agent .-- At an auction the contract of sale is not completed until the auctioneer knocks the article down to the purchaser, until which time the bid may be withdrawn. Then the sale must be reduced to writing by the auctioneer as the agent of the vendor. Champlain v. Parish, 11 Paige, 405; Tallman v. Franklin, 14 N. Y. 584, revg. 3 Duer, 395. See this case as to the auctioneer's memorandum. Also Pinckney v. Hagadorn, 1 Duer. 89. The clerk's signature is supposed sufficient, 12 N. Y. Leg. Ob. 250; Trustees, etc., v. Bigelow, 16 Wend. 28. In Coles v. Browne, 10 Paige, 526, the mere memorandum of the sale, with-

out the signature of the vendor or his agent subscribed, is held insufficient.

The auctioneer's memorandum in his sales-book, in a brief form, is sufficient

as a memorandum. Pinckney v. Hagadorn, 1 Duer. 89.

A memorandum made by an auctioneer after his authority had been revoked, held not sufficient to entitle to specific performance. Byrne v. Fremont Realty Co., 120 App. Div. 692.

As to the auctioneer's signature before the Revised Statutes, vide supra; Pinckney v. Hagadorn, 1 Duer. 89; Trustees, etc. v. Bigelow, 16 Wend. 28. The auctioneer must subscribe the memorandum of sale.

Parish, 11 Paige, 406.

He need not sign it specially as agent for the vendor; that is implied.

Pinckney v. Hagadorn, 1 Duer. 89.

A referee's report of sale made by him, or any written memorandum of sale containing the requisites of the statute, is sufficient. The Nat. Fire Ins. Co. v. Loomis, 11 Paige, 431.

Part Performance.—As to part performance of a parol contract and possession thereunder as notice taking it out of the statute of frauds, vide infra, Tit. V; Erwin v. Erwin, 17 N. Y. Supp. 442, affd., 139 N. Y. 616; Brennan v. Brennan, 21 N. Y. 195; Korminsky v. Korminsky, 2 Misc. 138; Gibbs v. Horton Ice Cream Co., 61 App. Div. 621; Conlon v. Mission of Im. Virgin, 87 id. 165; Dunn v. Arkenburgh, 48 id. 518; Ludwig v. Bungart, id. 613; Russell v. Briggs, 165 N. Y. 500; Hay v. Knauth, 169 id. 298; Everdale v. Hill, 58 App. Div. 151.

The payment of the purchase money is not a sufficient part performance to entitle to specific performance. Dunn v. Arkenburgh, 48 App. Div. 518;

Russell v. Briggs, 165 N. Y. 500.

As to part performance as a consideration, see Cooley v. Lobdell, 82 Hun, 98; Miller v. Ball, 64 N. Y. 286, 292; Winchell v. Winchell, 100 id. 159, 163; Wheeler v. Reynolds, 66 id. 227, 231; Dana v. Wright, 23 Hun, 32; Dunckel v. Dunckel, 56 id. 25, 29, affd., 141 N. Y. 427, and cases cited supra.

Delivery and Acceptance.—Although the vendor may have signed the contract, it will not bind him, unless delivered by him or by his authority, and accepted by the vendee. And, until acceptance, the vendor may withdraw or rescind it.

Stevens v. Buffalo, etc., R. R. Co., 20 Barb. 332.

Parol evidence of conditions qualifying the delivery held not admissible. *Id.*Where, however, title papers were to be examined and contracts were left with attorney by parol agreement until approval of question of title, by him, it was held that the contract was not consummated, the attorney not approving the title papers submitted. Dietz v. Farish, 79 N. Y. 520. See also Montauk Association v. Daly, 62 App. Div. 101; Commins v. Perry, 44 Misc. 458.

TITLE II. EFFECT OF THE CONTRACT.

From the time of entering into a valid contract for the conveyance of land, the estate vests, in equity, in the vendee, and the vendor retains the legal title, as a mere lien or security for the unpaid purchase money. The vendor remains a mere trustee, and his interest is in the proceeds and not in the land; and the vendee becomes trustee of the vendor for the purchase money.

Upon the decease of the vendor, his interest in the contract is personal property, and goes to his personal representatives who can enforce it. It will pass by assignment, with or without seal, like a bond and mortgage, and it may be sold as personal property by his executor or administrator.

And upon the sale of such a contract by the administrator of the vendor, the purchaser *thereof* will have the right to receive the moneys remaining due on the same, at the death of the vendor.

An assignment by the vendee of such a contract, will convey to the assignee all his interests therein, and entitle the assignee to demand and receive a conveyance from the vendor or his heirs, upon payment of the purchase money due thereon. The contract as owned by the vendee or his assignee is the subject of devise by them, and descent to their heirs respectively, as of the realty, and in them is vested the equity of redemption. And the administrator or executor of the vendee has no right in the contract or interest in the rents of the land.

The heirs of the vendor will take the title by descent, as a mere security, in equity, for the payment of the debt. The debt is due to the administrator or executor of the vendor; and as the lien is

considered to be held by the heirs in trust, and simply as a pledge or security for its payment, on payment of the debt, the heirs are compellable in equity to execute the trust by the conveyance of the title, and the purchase money must be paid to the personal representatives of the vendor, and not to his heirs.

Thomson v. Smith, 63 N. Y. 301; Hill v. Ressegieu, 17 Barb. 162; Swartwout v. Burr, 1 id. 495; Johnson v. Corbett, 11 Paige, 265; Lowry v. Tew, 3 Barb. Ch. 407; Moore v. Burrows, 34 Barb. 173; Griffith v. Beecher, 10 id. 432; Kidd v. Dennison, 6 id. 9; Pelton v. Westchester Fire Ins. Co., 77 N. Y. 605; Read v. Williams, 125 id. 560; Williams v. Haddock, 145 id. 144; Matter of McKay, 75 App. Div. 78. Vide, Chap. XV, Tit. III.

The executors of a deceased vendee must pay for the land, if it has not been paid for, for the benefit of the heirs. Johnson v. Corbett, 11 Paige, 265; Cogswell v. Cogswell, 2 Edw. 231.

As to effect of judgment after contract, see following pages and also Tit. VI.

As to effect of judgment after contract, see following pages and also Tit. VI. As to taxes imposed after contract, see following pages and also Tit. VI. As to damages for nonperformance of contract, see following pages and also Tit. VI.

As to effect of contract on insurance, see 28 Moak, Eq. 162n.; Clinton v. Hope Ins. Co., 45 N. Y. 454; Pelton v. Westchester Fire Ins. Co., 77 id. 605.

Vide also infra.

It has been held that the purchaser might surrender his interest in a contract to purchase land, by an oral agreement, he having no estate or right in the land, but simply an equitable right. Hart v. Britton, 17 Wkly. Dig. 552; Proctor v. Thompson, 13 Abb. N. C. 340.

If the contract vendee fails to perform, the devisee of the vendor becomes the absolute owner of the fee. McCarty v. Myers, 5 Hun, 83.

A vendee in possession may sue for injuries to the land. Hays v. Miller, 6

Hun, 320, affd., 70 N. Y. 112.

Apportionment of Rents.—Since L. 1875, Chap. 542, repealed and re-enacted Code Civ. Proc., § 2720, amd. 1881, Chap. 535; 1893, Chap. 686; the vendor and purchaser of premises demised are each entitled to the rent earned during their respective ownerships. Matter of Eddy, 10 Abb. N. C. 396, disapproved, 26 Abb. N. C. 378.

The purchaser cannot terminate a lease of the premises until he has received the deed. Reeder v. Sayre, 70 N. Y. 180.

See also infra, Tit. VI, as to all the above.

Improvements to the Land or Destruction of Building .-- The destruction of a building on land contracted to be sold has been held no defense to an action for the purchase money, the purchaser being considered as owner. The general rule is that the vendee, in a contract for the sale of land, is entitled to any benefits or improvements happening to the land after the date of the contract, and must bear any losses by fire or otherwise which occur without the fault of the vendor.

This view has, however, been much modified by later decisions, and the rule seems to be that the intention of the parties as to the value of the building destroyed, will largely govern.

McKechnie v. Sterling, 48 Barb. 330; Mott v. Coddington, 1 Rob. 267; Paine v. Miller, 6 Ves. 349; Clinton v. The Hope Ins. Co., 45 N. Y. 454; Kidd v. Dennison, 6 Barb. 9; Wicks v. Bowman, 5 Daly, 225; Aspinwall v. Balch, 7 Daly, 200; 4 Abb. N. C. 193; Listman v. Hickey, 65 Hun, 8, affd., 143 N. Y. 630; Marvin v. Bernheimer, 38 Misc. 344.

The case of Smith v. McCluskey, 45 Barb. 610, holds that if a building,

which is the main object of the contract be destroyed, the vendees having quitted under notice so to do, are not liable for future payments on the contract, and may recover back those paid, even under a judgment therefor. The contract was considered rescinded under a failure of consideration. See also infra, as to deterioration.

See also Clinton v. The Hope Ins. Co., 45 N. Y. 454; Pelton v. Westchester

Fire Ins. Co., 77 id. 605.

See the latter cases as to insurance moneys, on a loss occurring.

The distinction drawn appears to be, that where the personal property on destruction will prevent the consideration from being given as contemplated. Wicks v. Bowman, 5 Daly, 225; Aspinwall v. Balch, 7 Daly, 200; s. c., more fully, 4 Abb. N. C. 193; Listman v. Hickey, 19 N. Y. Supp. 880, affd., 143 N. Y. 630. the land is contemplated specially as a main feature in the contract, its

On general question of responsibility to insure or rebuild, and separate insurance, see Foley v. Farragut Fire Ins. Co., 71 Hun. 369.

Liens and Taxes.— See Lathers v. Keogh, 39 Hun, 576, affd., 109 N. Y. 583; English v. Ripley, 1 N. Y. St. Rep. 762; Gotthelf v. Stranahan, 138 N. Y. 345; Barlow v. St. Nicholas Bank, 63 id. 399; Skidmore v. Hart, 13 Hun, 441; Woolley v. Friedlander, 67 Hun, 321; Green v. Herz, 2 App. Div.

In contracts for the sale of lands the word "incumbrances" does not neces-

sarily include taxes. Miller v. Eheinzweig, 79 Hun, 1.

A stipulation in the contract that the vendee shall pay mortgages and taxes may be enforced, although the deed contains no provision on the subject. Sage v. Truslow, 88 N. Y. 240.

Repairs.-A party agreeing to sell and convey does not, in absence of stipulation to that effect, owe the purchaser any duty to keep the premises in good repair or to guard against ordinary decay. Hellreigel v. Manning, 97 N. Y. 56; Woolley v. Friedlander, 67 Hun, 321.

Deterioration of the Estate Between Contract and Completion .- The rule established by the courts in England appears to be, that if there is a palpable deterioration after the vendee takes possession, or after he might have taken possession under the contract, there can be no allowance for such deterioration; but otherwise he would be entitled to a deduction, especially if through defects in title there was a delay before possession could be given, and even if there was a mutual mistake as to such defects. When in possession the vendee is to prevent waste, and would be allowed reasonable repairs. The cutting of valuable timber would be a deterioration. Timber blown down cutting or valuable timber would be a deterioration. Timber blown down would belong to the purchaser. Binks v. Bokely, 2 Swanst. 222; Phillips v. Silvester, 20 W. R. 406; s. c., 21 id. 179; 17 S. J. 364; Poole v. Shergold, 1 Cox, 273; Magennis v. Fallon, 2 Moll. 584; Foster v. Deacon, 3 Mad. 394; Ferguson v. Todman, 1 Simm. 530; Lord v. Stevens, 1 Yonge & C. 222; Minchin v. Nance, 4 Beav. 332; Corrodus v. Sharp, 20 id. 56; The Regent's Canal Co. v. Ware, 23 id. 515. See also Sugden on Vendors (Am. ed.), 747; Taylor v. Porter, 1 Dana, 423; Williams v. Rogers, 2 id. 375; as to changes in the building, removal of fixtures, etc. See Smyth v. Sturges, 13 Abb. N. C. 75 Abb. N. C. 75.

Possession.—Possession under a parol agreement constitutes the vendee the owner in equity, with the vendor's right of redemption, etc., except as against a bona fide purchaser without notice.

Lowry v. Tew, 3 Barb. Ch. 407; also 18 Barb. 80.

A mere agreement to sell does not, of itself, import a license to enter into possession; but when the vendee has fully performed such a license will be implied.

Eggleston v. N. Y. & H. R. R., 35 Barb. 162; Spencer v. Tobey, 22 id. 260; Fagan v. Scott, 14 Hun, 162; Miller v. Ball, 64 N. Y. 286, distinguishing

Spencer v. Tobey, supra.

Where a party occupies under an agreement to purchase, he is not a tenant, but a vendee, and "use and occupation" will not lie. Mott v. Coddington, I Robin. 267; Thompson v. Bower, 60 Barb. 463. But after rescission by mutual consent it will lie. Thrasher v. Bently, 2 Supm. 309, affd., 1 Abb. N. C. 39 mem.; s. c., 59 N. Y. 649.

After the purchaser has remained in possession for a year and upwards, use

and occupation, it is held, will lie under certain circumstances. Pierce v. Pierce, 25 Barb. 243. His possession is not adverse. Matter of Grinnell, 18

Alb. L. J. 75.

A sale of lands on execution against the grantee by quitclaim deed of one who was in possession under a contract to purchase, does not give to the purchaser any interest in the lands, such sale being prohibited by statute.

1 R. S. 744, § 4; Code Civ. Proc., § 1253; Sage v. Cartwright, 9 N. Y. 49.

A vendee in possession is bound to pay interest. Stevenson v. Maxwell, 2

N. Y. 408; Parker v. Parker, 65 Barb. 206; Worral v. Munn, 53 N. Y. 185.

A vendee in possession has not any permanent interest or estate in the land, nor is he tenant, but a licensee, subject to re-entry and revocation without demand or tender of a deed, on default of payment. Hotaling v. Hotaling, 47 N. Y. 163; Doolittle v. Eddy, 7 Barb. 74.

Where the contract names no time for fulfillment a request is necessary to put him in default. Carr v. Carr. 52 N. Y. 251.

A party in possession is entitled to emblements, i. e., crops sown by him, A party in possession is entitled to emotements, i. e., crops sown by min, as if he were a tenant at will, unless he is guilty of some wrongful act; and this even if the contract were invalid. Harris v. Frink, 43 N. Y. 24. He may also maintain an action for damages. Hays' Admr. v. Miller, 6 Hun, 320, affd., 70 N. Y. 112. But may not cut timber. Cook v. Doolittle, 5 Hun, 342. In the case of Burnett v. Caldwell, 9 Wall. 290 (1870), the Supreme Court of the United States decided that if a contract for the sale of property is

silent as to the possession of the vendee, he is not entitled to it. If the contract stipulates for possession by the vendee, or the vendor puts him in possession, he holds as a licensee. The relation of landlord and tenant does not subsist between the parties. Upon default in payment of any installment of the purchase money, the possession becomes tortious, and the vendor may at once bring ejectment.

See also Powers v. Ingraham, 3 Barb. 576, holding that no notice to quit is necessary. See also Tibbs v. Morris, 44 Barb. 138; Stone v. Sprague, 20 Barb.

509.

The Vendor's Lien .- The vendor has a lien on the land for the purchase money, unless other security be taken, or the lien otherwise waived. The lien exists against a subsequent purchaser or incumbrancer, with notice or without consideration. A mere note or bond of the vendee or of a third person taken, will not be a waiver of the lien.

Bennett v. Murphy, 123 App. Div. 102.

Attaches when possession is given before execution of proposed title papers. Walrath v. Abbott, 75 Hun, 445.

A consideration which is really for support, though nominally money, raises no lien. Camp v. Gifford, 67 Barb. 434.

As to taking what description of security will remove the lien, vide Sanders v. Aldrich, 25 Barb. 63; Lewis v. Smith, 9 N. Y. 502; Hallock v. Smith, 3 Barb. 267; Warren v. Fenn, 28 id. 333.

The vendor's equitable lien on the land for the purchase money is lost, where the parties have waived it; or where it is obvious they contemplated a different security for the purchase money. As for example, if a deed for other property is taken in payment. Hare v. Van Deusen, 32 Barb. 92; Coit v. Fougara, 36 Barb. 195; Hazeltine v. Moore, 21 Hun, 355; Gaylord v. Knapp, 15 Hun, 87. But if the vendor was induced to take such other security by fraud of the vendee, the lien remains. Bradley v. Bosley, 1 Barb. Ch. 125; Mills v. Bliss, 55 N. Y. 139, distinguishing Hare v. Van Deusen, supra.

It is superior to the lien of a judgment obtained against the vendee. Arnold

v. Patrick, 6 Paige, 310; see also 33 Barb. 9.

And to dower, Warner v. Van Alstyne, 3 Paige, 513.
This lien may be enforced in favor of third persons. McWhorter v. Stewart,

39 App. Div. 212.

It will pass by a subsequent deed, made by the vendor, and this equitable lien will be bound by a mortgage made by the subsequent grantee. And this mortgage will, to the extent of the unpaid purchase money, be a prior lien to judgments against the original vendee. Lamberton v. Van Voorhis, 15 Hun,

A vendor of land does not waive his equitable lien for the purchase money

A vendor of land does not waive his equitable hen for the purchase money by simply taking the individual note, bond or covenant of the grantee. Maroney v. Boyle, 141 N. Y. 462.

Such lien cannot prevail against one who takes an incumbrance on the land, or a conveyance thereof or interest therein in good faith without notice of the lien and for a valuable consideration. So held as to purchaser on an execution sale. Id.

The lien does not prevail over that of a bona fide mortgage. McKinstry, 106 N. Y. 230; Hubbell v. Hendrickson, 175 id. 175.

It does prevail as against volunteers and persons with constructive notice. Mackreth v. Symmons, 15 Ves. 329, and White & Tudor's notes to this case, 1 Lead. Cas. in Eq. 375; O'Brien v. Fleckenstein, 86 App. Div. 140. Waiver procured by fraud. Yeomans v. Bell, 79 Hun, 215. For collection of New York cases on vendor's lien, see 25 Am. L. Reg. N. S. 391, 396; also Mears v. Kearny, 1 Abb. N. C. 303.

See also as to vendor's lien, Chap. XXIII, Tit. I.

Vendee's Lien .- The vendee, in possession, who has made contract advances or improvements, has an equitable lien on the land therefor, where the vendor cannot, for defect of title, complete the sale, or the title is not transferred.

Gilbert v. Peteler, 38 N. Y. 165; Occidental Realty Co. v. Palmer, 117 App. Div. 505; Eterman v. Hyman, 192 N. Y. 113; Davis v. Rosenberg Realty Co.,

The expense incurred for searching title, or employing an attorney does not give vendee a lien. Occ. R. Co. v. Palmer, 117 App. Div. 505. See contra, Bigler v. Morgan, 77 N. Y. 312.

It seems the widow should be endowed of such interests by analogy. Hawley v. James, 5 Paige, 453, 454, 456; Matter of McKay, 5 Misc. 123; Starbuck v. Starbuck, 62 App. Div. 437. Quære, however, as there is no seisin to support dower.

Semble, the payment of the purchase price alone does not give vendee not in possession an equitable lien. Krainin v. Coffey, 119 App. Div. 516. But see Occidental Realty Co. v. Palmer, supra; Eterman v. Hyman, 192 N. Y. 113; Davis v. Rosenberg Realty Co., Id. 128.

Warranty of Title in Contracts.—In every contract for the sale of land, there is always an implied warranty by the vendor that he has good title, unless such warranty be expressly excluded by the terms of the contract. The implied warranty exists as long as the contract remains executory, i. e., until the deed is given; when the party must rely on covenants in the deed, unless there have been fraud, in which case relief may be afforded in equity. When the deed is accepted, therefore, the original contract becomes null, unless it be otherwise intended, or the contract has collateral covenants. Particularly would it not be extinguished, if it stipulated for acts to be done by the vendee, after the conveyance. Nor would it be extinguished in respect to provisions for a rebate or increase of the purchase money, dependent upon the quantity of land; or other provisions of a similar character; nor where there is to be an exchange of lands.

Woodruff v. Bunce, 9 Paige, 443; Carr v. Roach, 2 Duer, 20; Marvin v. Bennett, 26 Wend. 169; Tallman v. Green, 3 Sandf. 437; Davis v. Lottish, 46 Bennett, 26 Wend. 169; Tallman v. Green, 3 Sandf. 437; Davis v. Lottish, 46 N. Y. 303; Delavan v. Duncan, 49 id. 485; Burwell v. Jackson, 9 N. Y. 535; Bull v. Willard, 9 Barb. 641; Bogart v. Burkhalter, 1 Den. 125; Whitbeck v. Waine, 16 N. Y. 532; Morris v. Whitcher, 20 id. 41; Bennett v. Abrams, 41 id. 619; Innes v. Willis, 48 Super. 188; Bostwick v. Beach, 31 Hun, 343; 103 N. Y. 414; Albany City Savings Inst. v. Burdick, 87 N. Y. 40; Olcott v. Heermans, 3 Hun, 431; Canaday v. Stiger, 35 Super. 423, affd., 55 N. Y. 452; Remington v. Palmer, 62 id. 31; Musgrave v. Sherwood, 23 Hun, 669; Irving v. Campbell, 121 N. Y. 353; Disbrow v. Harris, 122 id. 362; Mahoney v. Allen, 18 Misc. 134; McPherson v. Schade, 149 N. Y. 16; Turner v. Walker, 40 Misc. 379.

This rule of warranty does not apply to a sale of a tax lease. Boyd v.

This rule of warranty does not apply to a sale of a tax lease. Boyd v.

Schlesinger, 59 N. Y. 301.

There is no implied warranty except as to title. Canaday v. Stiger, 35 Super. 423, affd., 55 N. Y. 452.

Effect of Acceptance of Deed .-- In the absence of fraud or mistake the terms of the deed will be deemed controlling upon the parties and all previous propositions and stipulations merged therein. Bennett v. Bates, 94 N. Y. propositions and stipulations merged therein. Bennett v. Bates, 94 N. Y. 354. And even where there was fraud, if title was taken with knowledge. Vernol v. Vernol, 63 N. Y. 45. But it seems a personal covenant although not in the deed, as to pay taxes, encumbrances or the like, may still be enforced. Sage v. Truslow, 88 N. Y. 240. As to survival of covenant to deliver possession. German American, etc., Co. v. Starke, 84 Hun, 430.

A purchaser who accepts a deed subject to all liens is estopped from contesting them. He even becomes liable for deficiency on mortgage. (Semble.) Styles v. Price, 64 How. Pr. 227.

The rule caveat emptor is applicable. Canaday v. Stiger, 55 N. Y. 452. When a deed was accepted without covenants, a subsequently discovered

When a deed was accepted without covenants, a subsequently discovered incumbrance has been held to fall on the grantee, neither party having knowledge of it at time of performance. Whittemore v. Farrington, 76 N. Y.

Fraud on the part of the vendor is waived by acceptance of title and

continued possession by purchaser, and giving a note for the balance of purchase money, collectible by vendor. Lindsley v. Ferguson, 49 N. Y. 623. Purchase money mortgage will not be set aside even where there is a defect of title, there being no fraud alleged and no eviction of the purchaser. The purchasers' remedy is by action on the covenants in the deed. Ryerson v. Willis, 81 N. Y. 277.

The contract merges in the deed so that there is no remedy, after conveyance, for deficiency in quantity. Gerbardt v. Sparring, 29 Hun, 1.

Reformation of Contract.—Requisites for. Curtis v. Giles. 7 Misc. 590.

See, however, p. 513, as to defects remediable.

Record of the Agreement.—These agreements may be recorded when proved or acknowledged, etc.

Real Property Law, § 244; 1 R. S. 762, § 39.

They are not strictly noticed, however, when so recorded, nor considered as included in the term "conveyance" used in the recording statutes.

Gillig v. Maas, 28 N. Y. 191; Boyd v. Schlesinger, 59 id. 301.

Held the record could not be canceled as a cloud on title. Boyd v.

Schlesinger, 59 N. Y. 301; Washburne v. Burnham, 63 id. 132.

See, however, Real Property Law, § 276 (L. 1880, Chap. 530), providing for an action to have any recorded instrument in writing relating to real property, other than those required by law to be recorded, declared void or invalid, or to have the same canceled of record.

See also Davidson v. Fox, 65 App. Div. 262, to the effect that a building contract did not create an equitable lien and should be canceled of record.

If the agreement is recorded, and there is possession, the rights of subsequent grantees or incumbrancers are subject to it, for such possession is notice of an interest.

Laverty v. Moore, 32 Barb. 347, affd., 33 N. Y. 658; Trustees v. Wheeler, 5 Lans. 160, affd., as to this, in 61 N. Y. 88; Merrithew v. Andrews, 44 Barb.

If it is to operate by way of security or mortgage, it must be recorded with mortgages. Gillig v. Maas, 28 N. Y. 191.

Possession by a third party of land contracted to be sold, is notice to the purchaser of his rights. Umfreville v. Keeler, 1 Supm. 486, approved 127 N. Y. 171.

And see infra, Chap. XXVI, as to record of instruments.

Assignment of the Contract.—An assignee of the contract takes it subject to all equities against his assignor; and with all the rights of the assignor, e. g., to a contract of insurance; and it might be enforced, after notice, although the insurers did not consent to the assignment, by way of equitable lien.

Tompkins v. Seely, 29 Barb. 212; Stoddard v. Whiting, 46 N. Y. 627; Cromwell v. The Brooklyn Fire Ins. Co., 44 id. 42; Reeves v. Kimball, 40 id. 299; Wood v. Perry, 1 Barb. 115; Cythe v. LaFontain, 51 id. 186. So the assignee of a vendee's interest in an informal contract which stated that a more formal one was to be drawn, was held to take, subject to all agreements in contemplation of the parties which may be inserted in the new contract, including a covenant against assignment unless inserted with fraudulent intent. Cranston v. Wheeler, 37 Hun, 63. There is no covenant implied, on the part of the assignor, of title in the vendor. Thomas v. Barstow, 48 N. Y. 193. v. Barstow, 48 N. Y. 193.

The assignee of the purchaser's interest in a contract for the purchase of land is not, however, personally liable to pay the moneys thereafter becoming due on the contract, without an agreement to pay them express or implied.

Adams v. Williams, 40 Barb, 225; Walton v. Rafel, 7 Misc. 663; Forbes v. Reynard, 46 id. 154.

TITLE III. SUFFICIENCY OF THE DEED AND TITLE.

As seen above, there is always an implied warranty by the vendor that he has a good marketable title, unless such warranty is excluded by the terms of the contract. And this is the rule even when the contract is general, without specification of what title is to be given.

A covenant to give a deed, it has been held, is satisfied by giving a deed

without warranty or covenant, and without the vendor's wife joining in the deed. Ketchum v. Evertson, 13 Johns. 359.

This would not be the case if the contract were to give a warranty deed, in which case the wife must be a party. Pomeroy v. Drury, 14 Barb. 418, denying Gazley v. Price, 16 Johns. 267, and Parker v. Parmele, 20 id. 130, which had been overruled by Burwell v. Jackson, 9 N. Y. 535.

And it is doubtful whether the above case Ketchum v. Evertson, 13 Johns. 359, now would be sustained under later decisions as to the wife's nonjoinder.

A contract to give a deed in fee simple is not satisfied by giving a title subject to incumbrances. Penfield v. Clarke, 62 Barb. 584. To the contrary were Ketchum v. Evertson, 13 Johns. 359; Fuller v. Hubbard, 6 Cow. 13. To give a deed satisfactory to a Title Company. Flanagan v. Fox, 3 Misc. 365; 5 id. 589; 6 id. 132; 144 N. Y. 706.

A covenant for quiet enjoyment, is sufficient to satisfy an agreement to convey by a "warranty deed." That term does not include a covenant against incumbrances. Wilsey v. Dennis. 44 Barb. 354.

The title will be considered good, if there is only a trifling incumbrance

or slight discrepancy of description, e. g., a bare possibility of some fact vitiating it. Schermerhorn v. Niblo, 2 Bosw. 161. But not where it requires proof aliunde to sustain it. Coray v. Matthewson, 7 Lans. 80.

A covenant to give a warranty deed implies a conveyance passing a per-

fect and complete title, in which the wife shall join. Even though the contract provide that there shall be no covenants in the deed, the purchaser is still entitled to a good title to the land. Atkins v. Barrett, 19 Barb. 639; Pomeroy v. Drury, 14 id. 418; Penfield v. Clark, 62 id. 584.

Any objection to the form of the deed not made at once is waived. Bigler v. Morgan, 77 N. Y. 312; Timpson v. Goodchild, 11 Reporter, 585.

In equity, under a general contract "to sell," a party is entitled to a good and unincumbered title. Guynet v. Mantel, 4 Duer, 86; Delavan v. Duncan, 49 N. Y. 485; Bostwick v. Beach, 103 id. 414.

Incumbrances must be removed before specific performance can be compelled. Hinckley v. Smith, 51 N. Y. 21; Reeder v. Schneider, 3 Supm. 104; Carr v. Dooley, 19 Misc. 553; Bowman v. McClenahan, 19 id. 438.

The deed must be not only sufficient in form, but an operative conveyance transferring a sufficient legal title without necessity for resort to evidence aliunde to make it good.

Clute v. Robinson, 2 Johns. 613; Judson v. Wass, 11 id. 525; Everson v. Kirtland, 4 Paige, 628; 14 Barb. 418; Fletcher v. Button, 4 N. Y. 396; 62 Barb. 585; Coray v. Matthewson, 7 Lans. 80.

The assignment of a comptroller's certificate for sale of lands for taxes is not sufficient. Burrowes v. Peck, 19 Wkly. Dig. 15; Bensel v. Gray, 80 N. Y. 517. As to right to have a will proved before taking land passing under it, vide supra, 443.

A purchaser at a judicial sale is entitled to a marketable title. ing v. Burnham, 100 N. Y. 1; Crouter v. Crouter, 133 id. 55.

Marketable Title.—As to what constitutes marketability, see Emens v. St. John, 79 Hun, 99; Reynolds v. Strong, 82 id. 202; Foster v. Winfield, 142 N. Y. 327; Landon v. Walmuth, 76 Hun, 271; Schween v. Greenberg, 76 id. 354; Jordan v. Poillon, 77 N. Y. 518; Fleming v. Burnham, 100 id. 1; Miller v. Wright, 109 id. 194; Abbott v. James, 111 id. 673; Crouter v. Crouter, 133 id. 55; Moore v. Williams, 115 id. 586; Todd v. Union Dime Svgs. Inst., 128 id. 636; Jacobs v. Morrison, 136 id. 101; Brokaw v. Duffy, 165 id. 391; Stuyvesant v. Wail, 41 App. Div. 551; Nathan v. Hendricks, 87 Hun, 483; Fisher v. Wilcox, 77 id. 208; Ungrich v. Shaff, 119 App. Div. 843; Mishkind-Feinberg Realty Co. v. Lidorsky, 111 App. Div. 678; Runyon v. Grubb, 119 id. 17; Weiss v. Schweiter, 47 Misc. 297; Salisbury v. Ryan, 105 App. Div. 445; Van Williams v. Elias, 106 id. 288; Downey v. Seib, 102 id. 317: Matter of Coogan. 177 N. Y. 376; Hagan v. Drucker, 90 App. Div. 28. Marketable Title,-As to what constitutes marketability, see Emens v. id. 317; Matter of Coogan, 177 N. Y. 376; Hagan v. Drucker, 90 App. Div. 28.

Under the words "good and sufficient deed," the vendor is bound to convey a good title, and not merely to execute it sufficient in form.

Burwell v. Jackson, 9 N. Y. 535; Story v. Conger, 36 id. 673.

He is also bound to give a legal title as well as to execute the covenants. Fletcher v. Button, 4 N. Y. 396, questioning Gazley v. Price, 16 Johns. 267, and Parker v. Parmele, 20 Johns. 130; Winne v. Reynolds, 6 Paige, 407; Coray v. Matthewson, 7 Lans. 80.

A contract to give a good and sufficient deed, implies a warranty against

incumbrances. Burwell v. Jackson, 9 N. Y. 535.

The general rule is that specific performance will not be decreed unless the vendor can give good title. Bensel v. Gray, 80 N. Y. 517; Forsyth v. Leslie, 74 App. Div. 517.

Tender not necessary to recover in action for specific performance affecting only the question of costs. Murray v. Harbor & S. Bldg. & Sav. Assn., 91 App. Div. 397.

Title in Part Defective.— If the title to a part of the land is defective, the purchaser is not obliged to take the rest, even though compensation be tendered. Gilbert v. Peteler, 38 N. Y. 165; Schriver v. Schriver, 86 id. 575; Wilhelm v. Federgreen, 2 App. Div. 483.

Waiver of defects, what constitutes. Kountz v. Helmuth, 140 N. Y. 432.

Notice as to Defects on delivery of contract not a waiver. Nathan v. Morris, 17 N. Y. Supp. 13; s. c., 62 Hun, 452; Huyck v. Andrews, 113 N. Y. 81.

Various Objections to the Title.—An old lis pendens, or invalid mortgage, is not an objection to the title. Wilsey v. Dennis, 44 Barb. 354. See also Simon v. Vanderveer, 84 Hun, 452; Styles v. Blume, 12 Misc. 421; Zorn v. McParland, 8 id. 126; Grace v. Bowden, 10 App. Div. 541.

Where the title had not been questioned for fifty years, though mortgages more than seventy-five years old appeared unsatisfied of record, and an existing conveyance to a mesne grantor had not been recorded, held specific

performance should be granted. Forsyth v. Leslie, 74 App. Div. 517.

Lis Pendens. -- See Zorn v. McParland, 8 Misc. 126; 11 id. 555. Valentine v. Austin, 124 N. Y. 400; Aldrich v. Bailey, 132 id. 85; Oliphant v. Burns, 146 id. 218; Simon v. Vanderveer, 84 Hun, 452, revd., 155 N. Y. 377; Grace v. Bowden, 10 App. Div. 541.

Where complaint states a good cause of action the *lis pendens* is a valid objection to title. Simon v. Vanderveer, 155 N. Y. 377.

Other Objections to the Title .- But old assessment and tax sales are an objection, it seems. Wood v. Squires, 1 Hun, 481, this case was reversed on other grounds, in 60 N. Y. 191; Dyker Meadow, etc., Co. v. Cook, 159 id. 6. A covenant to give a sufficient deed to vest the title, or to give the title,

means the legal estate in fee, from all other claims, liens, or incumbrances whatever. Jones v. Gardner, 10 Johns. 266; 15 Barb. 16; Carpenter v. Bailey, 17 Wend. 244; Traver v. Halsted, 23 id. 66.

It is not satisfied by a deed not acknowledged by the wife. Stevens v.

Hunt, 15 Barb. 17.

The words "title to be satisfactory," imply only that the title shall be good and marketable. Rigney v. Coles, 6 Bosw. 479. But see Flanagan v. Fox, 6 Misc. 132; 144 N. Y. 706. A title held not marketable where there is a conflict of opinion among experts as to boundaries. Diets v. Farrish, 44 Super. 190.

Where the contract prescribes that the title should be made satisfactory, and the vendor has no title, the vendee may recover damages, etc., without showing offer to comply with certain conditions precedent. Lawrence v. Taylor, 5 Hill, 107. See also Murray v. Harbor & S. Bldg. & Sav. Assn.,

91 App. Div. 397.

Insanity.— Effect of insanity of a grantor before inquest considered. Brokaw v. Duffy, 36 App. Div. 147, affd., 165 N. Y. 391; Prentise v. Cornell, 31 Hun,

Burden of Proof.—The burden of proof is on the purchaser to show that. the title is defective. The mere fact that sufficient time has not elapsed under the statute to protect a purchaser from an heir, against discovery of a will or debts of the ancestor, is held insufficient to justify rejection of title by purchaser. Moser v. Cochrane, 12 Daly, 292, affd., 107 N. Y. 35; and a purchaser who makes valid objections on the law day must abide by them. Higgins v. Eagleton, 155 N. Y. 466.

It is no evidence against the title that no loan can be had on it, nor that

lawyers disapprove it. *Id.* See also *infra*, p. 512, and Ferry v. Sampson, 112 N. Y. 415; Cambreling v. Purton, 125 *id*. 610.

112 N. Y. 415; Cambreling v. Purton, 125 id. 610.

Full discussion as to not being necessary to take title where parol evidence is necessary, etc. Moore v. Williams, 115 N. Y. 586; Irving v. Campbell, 121 id. 353; College Point Sav. Bank v. Vollmer, 44 App. Div. 619, affd., 161 N. Y. 626; Huber v. Case, 93 App. Div. 479.

Under stipulation that the title was to be "first class," vide, Vought v. Williams, 120 N. Y. 253; to be "approved by Title Co." Flanagan v. Fox, 6 Misc. 132; 144 N. Y. 106.

The sound discretion of the court may determine marketability. Lenehan v. College of St. Francis Xavier, 30 Misc. 378.

A title open to judicial doubt is not marketable. Spoule v. Davies, 69 App. Div. 502, affd., 171 N. Y. 277.

Validity.—To justify rejection of title by purchaser he must show something more than doubt as to the vendor's title; at least there must be reasonable doubt, such as affects its value and would interfere with its sale to a reasonable purchaser. A defect in the record title may under certain circumstances furnish a defense to the purchaser, but there is no inflexible rule that a vendor must furnish a perfect record or paper title. It has frequently been held that defects in the record or paper title may be cured or removed by parol evidence. Hillreigel v. Manning, 97 N. Y. 56; Murray v. Harway, 56 id. 337; Grace v. Bowden, 10 App. Div. 541; Hagan v. Drucker, 90 id. 28; Matter of Coogan, 177 N. Y. 376. Strong indications of fraud will relieve. People v. Globe, etc., Co., 33 Hun, 393.

Defect must be substantial; Fleming v. Burnham, 100 N. Y. 1, 10; nor is it fatal that conveyancers disapprove the title, unless so bad as to be unsaleable. Methodist Ch. v. Thompson, 108 id. 618; see Forsyth v. Leslie,

74 App. Div. 517.

A wrong course in a deed in the chain of title is not ground for rejection of title where, from a reading of the entire description, an intent to convey the premises in question is apparent. Brookman v. Kurzman, 94 N. Y. 272.

An objection to title through a trustee who took a conveyance apparently to himself must be obviated by some action of the persons who could set aside such a conveyance, or by lapse of time. Farrar v. McCue, 89 N. Y. 139: People v. Open Bd. Stock Brokers Bldg. Co., 92 id. 98.

Variance of Names in Chain of Title .- May be obviated by proof that both referred to same person. Hillreigel v. Manning, 97 N. Y. 56.

Defects in general may be removed by parol proof. Id.

Adverse Possession. Title resting on adverse possession alone has been held bad, and tender and offer to perform unnecessary on part of purchaser. Hartley v. James, 50 N. Y. 38; Schultz v. Rose, 65 How. Pr. 75, but see Id. 245; Kip v. Hirsh, 53 Super. 1; 103 N. Y. 565. But sixty years undisputed possession is held sufficient evidence of title. Ottinger v. Strasburger, 33 Hun, 466, affd., 102 N. Y. 692. Forty years also is held sufficient. Goldman v. Banta, 12 N. Y. Supp. 346; Eldridge v. Kennig, *Id.* 693. Twentyone years also held sufficient. Abrams v. Rhoner, 44 Hun, 507; also see Bohm v. Fay, 18 Abb. N. C. 175, and see Kneller v. Lang, 17 N. Y. Supp. 443; s. c., 63 Hun, 48, affd., 137 N. Y. 589; Simis v. McElroy, 12 App. Div. 434; 160 N. Y. 156; Foorsyth v. Leslie, 74 App. Div. 517; Faile v. Crawford, 30 id. 536; Fuhr v. Cronin, 82 id. 210.

Proof must be clear and strong as to the adverse possession to entitle vendor to decree. Metzger v. Martin, 87 App. Div. 572, affd., 177 N. Y. 561; Shire v. Plimpton, 50 App. Div. 121.

Incumbrances.—A lease not expressed in contract was held not to be an incumbrance, where the contract provided for receipt of rents thereunder, by the purchaser from the date of the contract. Page v. McDonnell, 55 N. Y. 299, criticised, 7 N. Y. St. R. 85. A purchaser at foreclosure will be relieved where the sale is made simply "subject to a lease," etc., and he subsequently discovers that the lessee is entitled to remove a substantial building. Beckenbaugh v. Nally, 32 Hun, 160. See also Fruhauf v. Bondheim, 127 N. Y. 587. A covenant to build, etc., streets not an incumbrance. 10 N. Y. Supp. 225.

As to taxes as incumbrances, see Chap. XLVI, Tit. II; also p. 501, and

infra, p. 527.

A covenant against use for cemetery purposes held no objection to title of a city lot. Floyd v. Clark, 7 Abb. N. C. 136.

Nor a general covenant against nuisances. Id., but see Gibert v. Peteler, 38 N. Y. 165; Roberts v. Levy, 3 Abb. N. S. 311; Re Whitlock, 10 Abb. 316; 5 N. Y. Supp. 99; Reynolds v. Cleary, 16 id. 421; s. c., 61 Hun, 590. Grantee's agreement to "pay and discharge" incumbrances held not to require him to discharge them of record. Jackson v. Smidt, 7 Wkly. Dig. 516.

But see Zorn v. McParland, 8 Misc. 126; 11 id. 555.

Where contract says "free and clear" it is immaterial that vendee knew of incumbrances. Wetmore v. Bruce, 54 Super. 149, affd., 118 N. Y. 319.

A judgment against one only having instantaneous seizin is no lien. O'Donnell v. Kerr, 50 How. Pr. 334.

Party Wall held not to be an incumbrance. Hendricks v. Stark, 37 N. Y. 106. To the contrary where situated all on one lot. Mohr v. Parmelee, 43 Super. 320. See also O'Neill v. Van Tassell, 17 N. Y. Supp. 824, affd., 137 N. Y. 297; Higgins v. Eagleton, 13 Misc. 223; Levy v. Hill, 50 App. Div. 294; Schaefer v. Blumenthal, 169 N. Y. 221.

See also, infra. Chap. XXXVI, Tit. VI; also Schafner v. Micheling, 13

Misc. 520, as to beam rights.

Restrictions against buildings of a certain character have been held an incumbrance. So also as to buildings beyond a certain line. Robert v. Levy, 3 Abb. (U. S.) 318; Perkins v. Coddington, 4 Robt. 647; Post v. Bernheimer, 31 Hun, 247 (following Plumb v. Tubbs, 41 N. Y. 442). Fourth Presb. Ch. v. Steiner, 79 Hun, 314; Kountze v. Helmuth, 67 Hun, 344, affd., 140 N. Y. 432. A grantee of lots which are included within and subject to a parol agreement between adjoining owners restricting the right of building thereon, who takes his conveyance with full knowledge of the extent and nature of the restrictions, takes the land subject to such restrictions and is bound thereby. Hayward Homestead Tract Assn. v. Miller, 6 Misc. 254.

As a rule a restrictive covenant is an incumbrance and unless disclosed, in a contract of sale renders the title "unmarketable." Wetmore v. Bruce, 118 N. Y. 139; Forster v. Scott, 136 id. 582; Scudder v. Watt, 98 App. Div. 228; Conlon v. Rizer, 109 id. 537; Goodrich v. Pratt, 114 id. 771; Levin v. Hill, 117 id. 472; Roussel v. Lux, 39 Misc. 508. See also Jones v. Wittner, 79 Hun, 283.

Covenant against sale of liquors, when a defect. Woodhaven Junction Land Co. v. Solly, 74 Hun, 637.

As to right of way abandoned over thirty years. Suydam v. Dunton,

84 Hun, 506.

For a collection of cases on restraint of use, see 13 Abb. N. C. 105. So of restriction of use of part of lot to a court-yard. Wetmore v. Bruce, 118 N. Y. 319.

It is enough to justify a vendee in refusing to complete that the land is subject to easements not before disclosed. Wheeler v. Tracy, 49 Super. 208.

Projecting stoop not always a defect. Levy v. Hill, 70 App. Div. 95.

Fixtures.—If fixtures have been removed, vendee may rescind and recover back purchase money paid. Smith v. Sturges, 108 N. Y. 495.

Readiness to Discharge Incumbrances.—It is enough if the vendor at time and place of performance has the incumbrancers present, ready to discharge the incumbrances held by them, upon performance by the purchaser. Actual discharge previous to and independent of performance is not necessary. Hinckley v. Smith, 51 N. Y. 21; Rinaldo v. Housman, 1 Abb. N. C. 312. Cf. Reiners v. Niederstein, 55 App. Div. 80; Jackson v. Smidt, 7 Wkly. Dig. 516. Cf. Zorn v. McParland, 11 Misc. 555; Webster v. Kings Co. Tr. Co., 145 N. Y. 275.

The existence of a lien which the vendor offers to pay or deduct from the purchase-money, held not objectionable. Pangburn v. Miles, 10 Abb. N. C. 42.

A former contract which has been avoided by *laches* of the vendee, is held not to justify a rejection of title by a subsequent purchaser. The record of assignment of a previous contract, also is held not to be constructive notice. Johnson v. Duncan, 2 How. Pr. N. S. 366.

Where a vendor covenanted to make repairs within sixty days after closing title, held purchaser could not maintain specific performance, having refused a conveyance, not for failure of title, but for defects in building for which he demanded a reduction in price. Sokolski v. Bullenwieser, 96 App. Div. 18.

Form of Deed.—As to covenants and conditions in deed tendered, with respect to wording of contract, etc., see Congregation Shaaer Hash Moin v. Halladay, 50 N. Y. 664.

A mere general objection and refusal to accept the deed tendered held insufficient. Id.

Alterations in a Deed After Execution void the deed offered and the purchaser need not accept it. Stone v. Lord, 80 N. Y. 60.

Assumption of mortgage by vendee is not necessary where he contracts merely to take title *subject* to a mortgage. Kohner v. Higgins, 42 Super. 4. Nor where he agrees to assume payment of the interest on the mortgage. Manhattan Life Ins. Co. v. Crawford, 9 Abb. N. C. 365.

Deed from Third Person.—It has been held that the purchaser cannot be required to take title from another than the person contradicting as vendor. Henretty v. McGuire, 6 Wkly. Dig. 393; contra, Bigler v. Morgan, 77 N. Y. 312; MacDonald v. Bach, 51 App. Div. 549; but holding that the party con-

tracting must join in the covenants of the deed. It is no objection to title that the vendor did not have good title on executing contract, provided he is able to procure a conveyance of the fee by the legal owners to his vendee. Friedman v. Dewes, 33 Super. 450; Wamsley v. Houghton, 77 Hun,

Judicial Proceedings.—A purchaser in foreclosure cannot object to the title because of outstanding interests where the sale was made subject to such interests. Cromwell v. Hull, 97 N. Y. 209. See also Dunlop v. Mulry, 85 App. Div. 498. He cannot reject part and take part. Thompson v. Schneider, 38 Hun, 504. An amendable defect not amended excuses purchaser. Crouter v. Crouter, 133 N. Y. 55.

As to what irregularities in service by publication will not excuse purchaser, see Loring v. Binney, 38 Hun, 152. See also Chap. XXVIII, Tit. III, and Reynolds v. Cleary, 16 N. Y. Supp. 421; Parish v. Parish, 175 N. Y. 181; Dresser v. Travis, 177 id. 371; Mishkind-Feinberg Realty Co. v. Sidorskey,

111 App. Div. 578.

As to order for publication made by court instead of judge, being fatal, see Crosby v. Thedford, 13 Daly, 150. Same as to unacknowledged authorization of appearance for nonresident. McKenna v. Duffy, 19 N. Y. Supp. 248; s. c., 64 Hun, 597.

Failure to make general assignee party in foreclosure held cured after twenty-five years. Kip v. Hirsh, 103 N. Y. 565; Cahill v. Hamilton, 20 Hun, 388, distinguished and questioned. See also Chap. XXVIII, Tit. II.

Mere proof of a notice of claim, without some foundation for it, held not

That some of the parties in partition were of unsound mind will not relieve the purchaser at partition sale where there has been no judicial declaration of the mental unsoundness. Prentiss v. Cornell, 31 Hun, 167. Failure to advertise adjournment of judicial sale, not fatal. Beckstein v.

Schultz, 120 N. Y. 168.

For irregularities that will excuse purchaser, see Lake v. Kessel, 64 App. Div. 540.

Construction of a Will.—As to purchaser not being bound by judgment in an action to construe a will, see Monarque v. Monarque, 80 N. Y. 320.

Burden of Proof on Vendor, to show that Statute of Limitations has cut off claims. Schriver v. Schriver, 86 N. Y. 575.

Or that there are no other heirs. Walton v. Meeks, 120 N. Y. 79. See also supra p. 508; also Vought v. Williams, 120 N. Y. 253.

When Burden of Proof is on Vendee, as to Defect.—Greenblatt v. Hermann, 69 Hun, 298, reversed, 144 N. Y. 13; Simon v. Vanderveer, 84 Hun, 452; Goodwin v. Crooks, 58 App. Div. 464; Platt v. Finck, 60 id. 312.

False Representations, though not made with fraudulent intent, have been held sufficient to avoid contract. Philips v. Conklin, 58 N. Y. 682.

Distinguished in regard to contracts for exchange of lands. Wilkin v. Barnan, 61 N. Y. 28.

As to right to demand affidavits, see Wormser v. Garvey, 4 Hun, 476.

Interest on Purchase-Money can, in the absence of express stipulation in the contract, be demanded only from the time the vendor is ready to give good title subsequent to time fixed for performance. Merchants' Bk. v. Thomson, 55 N. Y. 7.

Fiduciary Relations.—As to objections to title arising from these, see Farrar v. McCue, 89 N. Y. 139; People v. Open Bd. Stock Broker Bldg. Co., 92 id. 98; Priessenger v. Sharp, 14 N. Y. Supp. 372; John v. Gleason, 11 Misc. 483; Kahn v. Chapin, 84 Hun, 541; Anderson v. Blood, 86 id. 244. See also Chap. X, supra.

Breach of Legal Obligation.—And as to attempted cutting off of legal obligation by legal sales, etc. See Munroe v. Crouse, 12 N. Y. Supp. 815; s. c., 59 Hun, 343; Huntley v. ReVoir, 20 N. Y. Supp. 920; Carpenter v. Carpenter, 12 id. 189, revd. in part, 131 N. Y. 101; McPherson v. Smith, 49 Hun, 254; General Synod v. O'Brien, 13 Misc. 729.

Fraud.— People v. Globe, etc., Co., 33 Hun, 393; Jacob v. Morrison, 136 N. Y. 101; Yeomans v. Bell, 79 Hun, 215; White v. Louden, 8 Misc. 106.

Recitals of encumbrances, etc., Dingley v. Bon, 130 N. Y. 607. Chap. XXVI, Tit. V.

The Land, Quantity and Boundaries.— Where a specified tract is sold in gross, the boundaries of the land control the description of the quantity it is said to contain; and neither party can have a remedy against the other for excess or deficiency of quantity, unless such excess or deficiency is so great as to furnish evidence of fraud or misrepresentation.

The rule would not apply where there was a mistake in the "boundaries," nor where land was sold by the quantity.

Voorhees v. De Meyer, 2 Barb. 37; Belknap v. Sealey, 14 N. Y. 143. See also "Description," Chap. XX, Tit. IV.

The description may be made certain — e. g., "a farm" — by extrinsic evi-

dence. Brinckerhoff v. Olf, 35 Barb. 27.

When land is sold on a map filed showing streets, the purchaser is entitled to have such streets opened. Tibbitts v. Cumberson, 39 Hun, 456; Phillips v. Higgins, 7 Lans. 314, affd., 55 N. Y. 663.

In sales of agricultural lands quantity is presumed to enter into the transaction, unless expressly eliminated; the words "more or less" alone, will not change the presumption. Paine v. Upton, 87 N. Y. 327; Murdock v. Gilchrist, 52 id. 242; see Watson v. City of N. Y., 67 App. Div. 573.

When land sold by the quantity falls short by nearly half, damages can be recovered. O'Conor v. Philipsen, 74 Hun, 68.

See also for further decisions on questions of boundaries. Johnson v. Long Island Inv. & Imp. Co., 85 App. Div. 60; Schaefer v. Blumenthal, 51 id. 517; Lewis v. Upton, 52 id. 617; Fuhr v. Cronin, 82 id. 210; Smith v. Trustees, etc. of Brookhaven, 89 id. 475; People v. Hall, 43 Misc. 117; Kennedy v. Mineola, etc., Co., 77 App. Div. 484, affd., 178 N. Y. 508.

Encroachments .- Suppression by vendor of the fact that the adjoining building encroached is held to avoid the sale, even though words "more or less" were contained in the terms of sale. King v. Knapp, 59 N. Y. 462, affg. 66 Barb. 225;; McPherson v. Schade, 8 Misc. 424; Spero v. Shultz, 14 App. Div. 423.

Rule where the encroachment is in the nature of an easement and patent. Archer v. Bach, 84 Hun, 297; Volz v. Steiner, 67 App. Div. 504.

Encroachment on street held fatal. Smithers v. Steiner, 13 Misc. 517.
See also Webster v. Kings Co. Tr. Co., 145 N. Y. 275; of other building, McPherson v. Schade, 8 Misc. 424; Levy v. Hill, 70 App. Div. 95; Harrison v. Platt, 35 id. 533.

Slight encroachment held within the rule de minimis non curat lex. Ungrich v. Shaff, 119 App. Div. 843; Code Civ. Proc., § 1499; Bergman v. Klein, 97 App. Div. 15; Kertel v. Zimmerman, 19 Misc. 581; Moot v. Business Men's Investment Assn., 157 N. Y. 201.

Description .- The description in the deed must be in accordance with the terms of the contract. Phillips v. Higgins, 7 Lans. 314, affd., 55 N. Y. 663. How curable. Bang v. Dorey, 11 Misc. 350; Raben v. Risnikoff, 95 App.

When an entire piece of land was contracted to be sold by a definite description, and for a fixed price, and the number of acres followed the description, with the words "more or less" added, it was held that the quantity was not of the essence of the contract. Wilson v. Randall, 67 N. Y. 338; Felix v. Devlin, 90 App. Div. 103. See where amount was held controlling. Kennedy v. Mineola, etc., Co., 77 App. Div. 484, afid., 178 N. Y. 508.

The words "more or less" are merely precautionary. Watson v. City of New York, 67 App. Div. 573, affd., 175 N. Y. 475.

The test of a materiality of a deficiency in quantity is,—had the falsity been known would the contract have been entered into? Stokes v. Johnson, 57 N. Y. 673.

Failure of title to fourteen inches of land when a ground for compensation, not refusal of title. Kelly v. Brower, 7 N. Y. Supp. 752, affd., 132

Deed for 24 feet 3 inches will not do where contract says 24 feet 81/2 inches.

Liebel v. Cohen, 54 Super. 436; Ring v. Palmer, 83 App. Div. 67.

Deed conveying "28 feet more or less" is good where contract says "28 feet 2 inches more or less." Moser v. Cochrane, 107 N. Y. 35.

Variances of Description -- Wrong course not necessarily fatal. Brookman v. Kurzman, 94 N. Y. 272.

See also as to variance of a few inches. Kelly v. Brower, 132 N. Y. 539: Shriver v. Shriver, 86 id. 575.

When Street Number Governs .- Bernstein v. Nealis, 19 N. Y. Supp. 739; Nolan v. Harned, 13 App. Div. 155.
When it does not. Thompson v. Wilcox, 7 Lans. 376. Vide also as to

Descriptions, supra, p. 512.

Distance from Corner of Street.-A wrong statement of distance from actual corner may render title unmarketable. Egilhoff v. Simpson, 50 App. Div. 595.

Mistake.— Delivering of deed held not to bar recovery for deficiency in quantity, both parties having been under a mistake as to quantity, subsequently discovered. Paine v. Upton, 21 Hun, 306, affd., 87 N. Y. 327. Vide also Arend v. Laing, 79 Hun, 203.

Word "lots" construed to mean full sized lots. Crowe v. Lewin, N. Y.

Daily Reg., Feb. 14, 1881. See more fully as to this, infra, Chap. XX, Tit. IV, and 5 Lans. 392.

Practical Location .- Occupation of city lots, and building on lines, together with the repair of intervening walls constitutes a practical location of the boundaries. Wentworth v. Braun, 78 App. Div. 634, affd., 175 N. Y.

Mutual act and acquiescence of the parties may fix the boundaries. Bell v. Hayes, 60 App. Div. 382.

TITLE IV. TENDER AND TIME OF PERFORMANCE.

Time is not generally, in equity, deemed to be of the essence of the contract, unless the parties make it so, or it necessarily follows from the nature and circumstances of the contract; but time is of the essence, and a condition of the contract, if the parties choose so to agree, originally, or if it be made so by subsequent notice, and the courts will not enforce performance after the time specified. This rule is subject to modifications such as are below referred to.

Hun v. Bourdon, 57 App. Div. 351. The subsequent notice must be express and unequivocal. Myers v. De Mier, 4 Daly, 343, affd., 52 N. Y. 647; Hubbell v. Von Schoening, 49 id. 326, revg. 58 Barb. 498; Baldwin v. McGrath, 41 Misc. 39; 90 App. Div. 199; Leinhardt v. Solomon, 57 Misc. 238; Klingstein v. Alexander, 57 id. 236; Darrow v. Cornell, 30 App. Div. 115.

Time.— Considered essential though not made so by the terms of the contract, where a change of value or other material circumstances has occurred. Merchants' Bank v. Thompson, 55 N. Y. 7; Van Campen v. Knight, 63 Barb. 205, affd., 65 N. Y. 580; Voorhees' v. De Meyer, 2 id. 37; Dominick v. Michael, 4 Sandf. 374; Wells v. Smith, 7 Paige, 22, affg. 2 Ed. 78; Bennett v. Abrams, 41 Barb. 619; Leinhardt v. Solomon, 57 Misc. 238; Klingstein v. Alexander, id. 236.

A contract to convey free of incumbrance by a certain day, requires that the land be free by that day. If a legal title cannot be given at the time agreed on, the purchaser may reseind. Morange v. Morris, 34 Barb. 311; Bostwick v. Frankfeld, 74 N. Y. 207. But it is enough if the incumbrancers are present ready to release. Rinaldo v. Houseman, 1 Abb. N. C. 312; compare Webster v. Kings Co. Trust Co., 145 N. Y. 275.

Where a reasonable delay (three weeks) was asked for further examination of title and refused, it was held in an action for specific performance brought by the purchaser, that he was entitled to a conveyance and the loss of time could be made good to vendor by allowance of interest. Willis v. Dawson, 34

Hun, 492. To the contrary, see Babcock v. Emrich, 64 How. Pr. 435.

As to delay not avoiding the contract, see also Hubbell v. Von Schoening, 49 N. Y. 326; Day v. Hunt, 112 id. 191; Shipman v. Cummins, 19 N. Y.

Supp. 974.

A short delay, where time is not a distinct condition of the contract—a delay fairly accounted for, so as to repel presumption of a waiver or abandonment of the contract—will not ordinarily deprive a party of his right to a specific performance. Wells v. Smith, 7 Paige, 22, affg. 2 Ed. 78, supra; Merchants' Bank v. Thomson, 55 N. Y. 7; see, however, also Paige v. McDonnell, Id. 229; Myers v. De Mier, 52 id. 647; also Hun v. Bourdon, 57 App. Div. 351.

Where no time is fixed, a reasonable time is intended. Equity may extend the time, on cause shown, when the time is not essential. The time may be extended by parol. Wiswall v. McGown, 2 Barb. 270, affd., 10 N. Y. 465; Stone v. Sprague, 20 Barb. 509; Beebe v. Dowd, 22 id. 255. Time may be limited by notice. Myers v. De Mier, 4 Daly, 343, affd., 52 N. Y. 647.

The time fixed may also be waived by act of the parties. Gregg v. Van Phul, 1 Wallace, 274; Duffy v. O'Donovan, 46 N. Y. 223; Williams v. Haddock,

78 Hun, 429; Daly v. Bruen, 88 App. Div. 263.

When the purchase-money is to be paid "on or before" a specified date and conveyance thereupon given, the purchaser may tender performance previous to that date, and on a refusal to perform and repudiation of the contract may commence an action at once. Freer v. Denton, 61 N. Y. 492.

Where the time of payment has been extended generally the vendee is entitled to a reasonable time after notice to make his payment. Cythe v. La Fontain, 51 Barb. 186. See this case as to forfeiture generally. Van Wagner v. Royce, 21 N. Y. Supp. 191. As to fixing time of performance for final performance. Zorn v. McParland, 8 Misc. 126; 11 id. 555.

Continued possession would preclude a party from rescinding the contract on the ground that the other did not perform on the precise day. Benson v. Tilton, 24 How. Pr. 494, affd., 41 N. Y. 619; Coray v. Matthewson, 7

Lans. 80.

The party who caused any delay, or is unable to give a clear title, cannot raise the objection as to time, nor take advantage of a delay to complete the purchase on the part of the other. 7 Robt. 115; Morange v. Morris, 34 Barb. 311; Stone v. Sprague, 20 id. 509.

As to extending time of performance where vendor was not acquainted

with the defect alleged. Grillenberger v. Spencer, 7 Misc. 601.

Executors of a deceased contractor to sell land may extend time for com-

pletion of contract. Williams v. Hadock, 78 Hun, 429.

Where a person contracts to purchase land with the purpose of selling it again, if she loses an opportunity to resell the land because of a defect in the seller's title thereto, time will be held to be of the essence of the contract, and the buyer will not be bound to take the title to the premises more than a month after the time fixed by the contract.

Where the person contracting to sell is concededly not in a condition to give title, the buyer will not be required to go through the useless ceremony of

making a tender. Spaulding v. Fierle, 86 Hun, 17.

Purchaser cannot take advantage of his own laches or a delay arising from an untenable objection to title made by him. Merchants' Bank v. Thomson, 55 N. Y. 7. Same rule applied to vendor. Delevan v. Duncan, 4 Hun, 29. As to when time is or is not of the essence of the contract, see Spaulding

v. Fierle, 86 Hun, 17; Brown v. Fox, 12 Misc. 147; Zorn v. McParland, 8 id. 126; 11 id. 555; Glenn v. Rossler, 88 Hun, 74; Moot v. Business Men's Invest-

ment Association, 90 id. 155.

Where time is not of the essence of the contract, notice given to make it so must be clear and specific. Selleck v. Tallman, 10 Wkly. Dig. 188, affd., 87 N. Y. 106.

A waiver may be implied. Kent v. Church, etc., 136 N. Y. 10; White v.

Truman, 18 App. Div. 144.

Tender of Performance.—If the vendor wishes to rescind the contract, or hold the purchaser, the deed must be prepared by the vendor on the day specified, ready for delivery, and tendered to the purchaser if within the vendor's reach and if on demand and tender he is in default, the vendor may rescind.

Robb v. Montgomery, 20 Johns. 15; Fuller v. Hubbard, 6 Cow. 13, 6 Barb. 147; Camp v. Morse, 5 Den. 161; McWilliams v. Long, 32 Barb. 194; Leaird v. Smith, 44 N. Y. 618; Davison v. Associates, etc., 6 Hun, 470, affd., 71 N. Y. 333; Hoag v. Parr, 13 Hun, 95.

The vendor need not make tender if performance has been waived or pre-

vented. Lawrence v. Miller, 86 N. Y. 131; White v. Truman, 18 App. Div.

Nor need he make any tender to entitle him to specific performance. Mc-Cotter v. Lawrence, 4 Hun, 107; Freeson v. Bissell, 63 N. Y. 168. The complaint in such case should contain an offer to execute conveyance; the omission to make an earlier tender affects only the question of costs. Id. See also Bruce v. Tilson, 25 N. Y. 194.

To enforce a right to purchase, contained in a lease, against the heirs of the vendor, a tender is held necessary, notwithstanding the existence of incumbrances. Kerr v. Purdy, 51 N. Y. 629.

It is no defense to an action to enforce an equitable lien for balance of purchase-money that plaintiff had not tendered the deed. Freeson v. Bissell, 63 N. Y. 168. This case is distinguished in Thompson v. Smith, id. 301.

Where there is a mutual obligation to pay the money and to convey, an offer, tender, and readiness on the part of the purchaser is sufficient, and he is not obliged to prepare and tender the deed to the vendor for execution, especially where the vendor refuses to convey at all; but he may do so to expedite the matter.

Fuller v. Hubbard, 6 Cow. 13; Tompkins v. Hyatt, 28 N. Y. 347; Stone v. Sprague, 20 Barb. 509; Foote v. West, 1 Den. 544.

Where a conveyance and payment are to be made simultaneously on a fixed day, and neither party tenders, neither party can recover in an action at law on the contract, but relief may be had in equity. Stevenson v. Maxwell, 2 N. Y. 408; Freeson v. Bissell, 63 id. 168.

In an action for specific performance the failure to make tender before suit

affects only the question of costs. Id.

As to mutual covenants. Grant v. Johnson, 5 N. Y. 247; Meriden Britannia Co. v. Zingsen, 48 id. 247; James v. Burchell, 82 id. 108; Kohner v. Higgins, 42 Super. 4.

Where time, however, is not an essential ingredient of the contract, the tender may be made within a reasonable time after the day named. Mc-Williams v. Long, 32 Barb. 194; Goodwin v. Nelin, 35 How. Pr. 402; Goldman

v. Willis, 64 App. Div. 508.

Taking possession by the vendee waives default of the vendor in not delivering the deed at the requisite time. It also waives claim to relief for defective title, if vendee knew it. Tompkins v. Hyatt, 28 N. Y. 347; Bennett v. Abrams, 41 Barb. 619; also 24 How. Pr. 494. But see Coray v. Matthewson, 7 Lans. 80.

Delay in making payments by a vendee will not work a forfeiture of vendee's rights, where the delay has been waived by acts, or otherwise not

claimed. Richmond v. Foote, 3 Lans. 244.

And the rule as to dependent covenants requires only that tender of deed precede an action for the purchase money. Suydam v. Dunton, 84 Hun, 506.

Covenants, when dependent and when independent. Smith v. Smith, 83

Hun, 381; Glenn v. Rossler, 88 id. 74.

Tender not necessary when party cannot complete. Spaulding v. Fierle, 86 Hun, 17.

Oral statements at sale not allowed to conflict with written terms of sale.

Bradley v. Leahy, 54 Hun, 390.

A vendor who is to convey by a day certain is not in default until the vendee has demanded a deed, and after waiting a sufficient time to have it drawn, has demanded it again. Or the purchaser may prepare and tender the deed for execution, which dispenses with a second demand. Connelly v. Pierce, 7 Wend. 129; Stevenson v. Maxwell, 2 N. Y. 409; Wells v. Smith, 2 Ed. 78, affd., 7 Paige, 22. See also Stone v. Lord, 80 N. Y. 60, holding that there is no necessity for tender by vendee of a deed for execution.

If on the first demand the vendor refuse to convey, a second demand is

unnecessary. Lutweller v. Litnell, 12 Barb. 512.

If the vendor die leaving infant heirs, the course of the vendee is to apply to the court, asking it to compel performance. Tompkins v. Hyatt, 28 N. Y.

See this case, as to the effect of a decree in such matter, and how far it

waives a defective title so known to the vendee.

If the purchaser die, a tender to his executor is sufficient. Brinckerhoff v.

Olf, 35 Barb. 27.

When the last installment is due on the contract, the payment and the giving of the deed are dependent acts, and the vendor cannot recover the balance due without showing performance or offer to perform, under a valid title. Smith v. McCluskey, 45 Barb. 610; see Grant v. Johnson, 5 N. Y. 247; Meriden Britannia Co. v. Zingsen, 48 id. 247; James v. Burchell, 82 id. 108; Hoag v. Parr, 13 Hun, 95.

A certified check will be a good tender by the vendee, unless it is refused as not being money. Duffy v. O'Donovan, 46 N. Y. 223; Wright v. Robinson,

84 Hun, 172.

To excuse personal tender it must be shown that the defendant was out of the State, beyond plaintiff's reach, or that he intentionally avoided plaintiff. Hoag v. Parr, 13 Hun, 95.

Notice by purchaser that he will not complete does not obviate necessity for clearing up objections to title, by vendor, if he seeks specific performance. Hinckley v. Smith, 51 N. Y. 21.

Where title is defective a vendee may recover back payments made without

further tender. Hartley v. James, 50 N. Y. 38.

Where the contract provides that all payments shall be made previous to giving the deed, the vendor may sue, without conveyance or offer to convey. Adams v. Wadhams, 40 Barb. 225.

A tender may be waived by refusal to receive the money or to do the act

required. Stone v. Sprague, 20 Barb. 509.

Where there is to be part cash payment on a fixed day, and a bond and mortgage to be given for the balance, on the delivery of the deed, if the money is paid, there must be a tender of the deed to put the vendee in default. If neither party tenders the deed or mortgage, neither is in default. Morange v. Morris, 32 How. 178; Leaird v. Smith, 44 N. Y. 618. And if both fail to perform mutual and dependent parts of the agreement on the contract day, as specified, each impliedly waives strict performance as to time, and the agreement remains in full force and effect otherwise; and either can have specific performance, on compliance with the terms of the agreement. Van Campen v. Knight, 63 Barb. 206, affd., 65 N. Y. 580; also 22 Barb. 255.

A demand of a deed from one tenant in common is sufficient. Blood v. Good-

rich, 9 Wend. 68.

A tender need not be made after refusal to perform, or to receive the money. Traver v. Halsted, 23 Wend. 66; 20 Barb. 509; Bunge v. Koop, 48 N. Y. 225. Nor where the vendor has perpetrated a fraud. Ziehen v. Smith, 73 Hun, 571.

Nor after an inability to perform or to give an unincumbered title. Karker v. Haverly, 50 Barb. 79; Holmes v. Holmes, 9 N. Y. 525; Delavan v. Duncan, 49 id. 485; Hartley v. James, 50 id. 38; Smith v. Rogers, 42 Hun, 110, affd., 118 N. Y. 675; Glenn v. Rossler, 88 Hun, 74.

Place.—The tender, where no place is fixed, must be personal, if the time is fixed, unless, on application at the residence of the party, he is not found. If no time be fixed, the tender should be personal, if the party is in the State. Smith v. Smith, 25 Wend. 405; see also Smith v. Smith, 2 Hill, 351; Hoag v. Parr, 13 Hun, 95.

Where no place of performance is named it may be governed by the arrange-

ment of the parties. Grillenberger v. Spencer, 7 Misc. 601.

Purchaser held excused from tender where the vendor's acts amounted to a refusal to perform, except on payment of interest on purchase-money. Selleck v. Tallman, 87 N. Y. 106, or where informed by the vendor that he could not give good title. Mut. Life Ins. Co. of N. Y. v. Leonard, 2 Supm. 425.

Effect of Non-performance by the Vendor.—If the vendor rescind, or cannot make title, or is guilty of laches, or refuses to give a deed, or if the premises are encumbered, the purchaser has a right to treat the contract as rescinded, without demanding a conveyance, and may recover all payments made.

Burwell v. Jackson, 9 N. Y. 535; Ellis v. Hoskins, 14 Johns. 363; Ketchum v. Evertsen, 13 id. 359; Foote v. West, 1 Den. 544; Utter v. Stuart, 30 Barb. 20; Myers v. De Mier, 4 Daly, 343, affd., 52 N. Y. 647; Mutual Life Ins. Co. v. Leonard, 2 Supm. 425; Reynolds v. Wynne, 121 App. Div. 272.

When purchase was made at an auction sale recovery may be had either from the vendor or the auctioneer, or both, with interest. Cockroft v. Muller,

71 N. Y. 367.

Vendee's right is to sue to recover damages and for amount paid; he cannot compel specific performance with deductions because of defects. Levy v. Hill,

50 App. Div. 294.

But an assignee of the vendor's interest in the contract is not liable in an action, if the vendor cannot make title, even though he has received the purchase price. Only the vendor is liable. Youmans v. Edgerton, 91 N. Y. 403.

If the premises are incumbered, a tender of the money is not necessary in order to save the vendee's rights under the contract. Delavan v. Duncan, 49 N. Y. 485; Karker v. Haverly, 50 Barb. 79; Morange v. Morris, 32 How. 178.

And the vendor cannot afterward have specific performance. Hinckley v. Smith, 51 N. Y. 21; Reeder v. Schneider, 3 Supm. 104.

Upon rescission by vendor the vendee is entitled to crops planted by him. Harris v. Frink, 49 N. Y. 24.

Vendee may recover purchase money paid where title, though not bad, is so doubtful as not to be salable. So in specific performance. M. E. Church Home v. Thompson, 108 N. Y. 618, criticised, 7 St. Rep. 85, declared overruled, Moore v. Williams, 115 N. Y. 586.

Specific performance will not be decreed where vendor, owing to defect in

title, is unable to perform. Ellis v. Salomon, 57 App. Div. 118.

Effect of Nonperformance by the Vendee.—If the vendee refuses to complete the purchase, he forfeits all payments on account.

Garlock v. Lane, 15 Barb. 359; Green v. Green, 9 Cow. 46; Ellis v. Hoskins, 14 Johns. 363; Ketchum v. Evertson, 13 id. 359; Simon v. Kaliske, 6 Abb. N. S. 224; Paige v. McDonnell, 55 N. Y. 299, criticised, 7 N. Y. St. Rep. 85; Lawrence v. Miller, 86 N. Y. 131. See, as to rights of vendee, Bigler v. Morgan, 77 N. Y. 312.

He may rescind the contract for misrepresentation as to rentals. Phillips

v. Conklin, 58 N. Y. 682.

If the purchaser take possession, he cannot rescind the contract without restoring possession, nor refuse to pay the purchase money if title be made good before action brought. Tompkins v. Hyatt, 28 N. Y. 347; Coray v. Matthewson, 44 How. Pr. 80; s. c., 7 Lans. 80.

Implied Rescission.—A rescission of the contract may be presumed from lapse of time. Van Benthuysen v. Crapser, 8 Johns. 257; Ballard v. Walker, 3 Johns. Cas. 60; 2 Abb. Pr. 261; Jackson v. Edwards, 7 Paige, 386. And by re-entry when so provided. Hart v. Britton, 17 Wkly. Dig. 552.

Mutual Rescission.—As to rescission and recovery of amount paid down on contract by purchaser, see Meth. Epis. Ch. Home v. Thompson, 52 Super. 321; 108 N. Y. 618; see Moore v. Williams, 115 id. 586; Bayliss v. Stimpson, 110 N. Y. 621; Shriver v. Shriver, 86 N. Y. 575, 584.

Under such circumstances the vendor is entitled to be paid for use and occupation (if possession was had by purchaser) and the purchaser is entitled to receive back the purchase-money paid. Thrasher v. Bentley, 2 Supm. 309, affd., 1 Abb. N. C. 39; mem. s. c., 59 N. Y. 649.

But a vendee releasing all rights cannot recover money paid. Zinsser, 76 N. Y. 549.

Action to Rescind .- In case of fraud or mistake the court will rescind the contract. Crowe v. Lewin, 95 N. Y. 423; Hammond v. Pennock, 61 id. 145. Bill may pray for specific performance or rescission in the alternative. Int. Paper Co. v. H. R. Water Power Co., 92 App. Div. 56.

A vendee who has been misled by false representations may rescind and recover money paid, or may retain the land and sue for damages. Krumm v. Beach, 96 N. Y. 398.

As to the rights of the parties and third persons in such case, vide, Hammond v. Pennock, 61 N. Y. 45.

Right to rescind when part of contract cannot be carried out. Ankeny v.

Clark, 148 U. S. 345.

Rescission may be had even after performance when defects covered by covenants of the deed are ascertained — the remedy is not confined to action upon the covenant. Wright v. Denniston, 9 Misc. 79.

When not had. Styles v. Blume, 12 Misc. 421.

Brokers' Commission.—When earned. Vide Turner v. Stymers, 9 Wkly. Dig. 216; Moses v. Bierling, 31 N. Y. 462; Knapp v. Wallace, 41 id. 477; 1 Abb. App. Cas. 108; Sibbald v. Iron Co., 83 N. Y. 378, 381.

As to recovery of brokers' commissions paid by purchaser, upon rescission, vide Emerson v. Roof, 13 Abb. N. C. 358; Von Hermanni v. Wagner, 81 Hun, 431; Douglass v. Halsted, Id. 65; Gerding v. Haskin, 141 N. Y. 514; Dailey v. Young, 13 N. Y. Supp. 435; Goldsmith v. Cook, Id. 578, revd., 14 id.

878; Gale v. Roll, 75 Hun, 14; Kelley v. Baker, 132 N. Y. 1; Gilder v. Davis, 137 id. 504; Bennett v. Egan, 3 Misc. 421; Ames v. McNally, 6 id. 93; Carrol v. Pettit, 67 Hun, 418; Condict v. Cowdrey, 139 N. Y. 273; Wooley v. Buhler, 73 Hun, 158; Gold v. Serrell, 6 Misc. 124; Levy v. Ruff, 3 id. 147, affd., 4 id. 180; Brown v. Helmuth, 2 id. 566; Tinkham v. Knox, 18 N. Y. Supp. 433, affd., 2 Misc. 579; Bathrick v. Coffin, 13 App. Div. 101.

TITLE V. SPECIFIC PERFORMANCE.

The specific performance of such contract may be enforced. either in favor of the vendor or vendee, in equity; and even a barol agreement may be enforced in equity, after a part performance. To entitle a party to a specific performance the contract must be certain in its terms and mutual in its character.

Courts, however, will not enforce a specific performance, if there has been fraud or mistake, surprise or unreasonable delay, or excusable inadvertence; nor where the agreement is not mutual, so that both parties are bound by it; nor where it has been abandoned: nor where it would produce injustice or is against the interest of persons under protection of the court; nor where it is out of the power of a party to perform. In the last case the only remedy is an action at law for damages.

Gillett v. Borden, 6 Lans. 219; Worrall v. Munn, 5 N. Y. 229; German v. Machin, 6 Paige, 288; Copes v. Bowen, 10 id. 526; Matthews v. Terwilliger, 3 Barb. 50; Benedict v. Lynch, 1 Johns. Ch. 370; Cuff v. Dorland, 50 Barb. 438; Sherman v. Wright, 49 N. Y. 227; Wood v. Perry, 1 Barb. 115; Tibbs v. Morris, 44 id. 138; Dodge v. McBurney, 43 How. 427; Wilson v. Van Pelt, 2 Supm. 414, affd. 71 N. Y. 611; Paige v. McDonnell, 55 N. Y. 299; Margraf v. Muir, 57 id. 155; Pickett v. Michaels, 120 App. Div. 357.

The contract must be clear and certain. Shakespeare v. Markham, 72 N. Y.

Where resort must be had to much extrinsic evidence it has been doubted if specific performance is the remedy. Sharkey v. Larkin, 52 N. Y. 623; Crouse v. Frothingham, 97 id. 105; Dyke, Meadow L. & Imp. Co. v. Cooke, 159

 id. 6; McPherson v. Schade, 149 id. 16.
 Dismissal on the merits in suit for specific performance should provide that it is without prejudice to action for money paid over by vendee. Conlon v. Mission of Immaculate Virgin, 84 App. Div. 507.

Defenses.— It is not always a valid defense that title comes through a will diffcult of construction. Kelso v. Larillard, 85 N. Y. 177; Cf. Salisbury v. Ryan, 105 App. Div. 445; Marks v. Halligan, 61 id. 179.

Any evidence tending to show that it would be inequitable to grant the relief sought is admissible. Warren v. Hall, 41 Hun, 466.

Performance will not be enforced if the vendor cannot make good title,

except in cases where the vendee assumes to take the title as it is. Judson v. except in cases where the vendee assumes to take the title as it is. Judson v. Wass, 11 Johns. 525; Bates v. Delavan, 5 Paige, 299; Stephenson v. Buxton, 15 Abb. Pr. 352; Bensel v. Gray, 80 N. Y. 517; Ellis v. Salomon, 57 App. Div. 118; 1 Lans. 169; Warner v. Will, 5 Misc. 329; Reynolds v. Wynne, 121 App. Div. 272.

Where the vendor before making the contract had parted with title to part of the property and concealed the fact, he was refused specific performance. Jones v. Babbitt, 66 Barb. 611.

Burden of proof in specific performance asked by vendor is on him to show that he can give such a title as purchaser had contracted to take.

Hinckley v. Smith, 51 N. Y. 21. See also Bensel v. Gray, supra, as to possession, by vendee not waiving defects of title in action for specific performance by vendor; and also that vendee's purchase of outstanding title does not

enure to benefit of vendor, but is hostile.

Performance will not be enforced where there has been misrepresentation. Philips v. Conklin, 2 Supm. 219. Nor where there are incumbrances or liens. Reeder v. Schneider, 3 Supm. 104. Unless known and assumed. Paige v. McDonnell, 55 N. Y. 299. Nor where there is an action pending to set aside a deed in claim of title. Aldrich v. Bailey, 8 N. Y. Supp. 435, revd., 132 N. Y. 85.

Laches is particularly applicable as a defense in cases where specific performance is asked. Darrow v. Bush, 45 App. Div. 262. And see cases, supra.

p. 514.

Neither will courts always enforce these contracts strictly; but the interference of the court will be exercised so as to defer to existing equities: and performance of the contract may be decreed or not decreed, on conditions that will prevent undue exaction or hardship.

Peters v. Delaplaine, 49 N. Y. 362; Day v. Hunt, 112 id. 191; Hayes v. Nourse, 114 id. 595; Hoch v. Cocks, 78 Hun, 253; Conger v. R. R. Co., 120 N. Y. 29; Farrow v. Holland Trust Co., 74 Hun, 585; Hart v. Brown, 6 Misc. 238; Piza v. Lubelsky, 121 App. Div. 734; Sokolski v. Buttenweiser, 96 App. Div. 18; Baldwin v. McGrath, 90 id. 199; Felix v. Devlin, Id. 103; Baumeister v. Demuth, 84 id. 394; Lynch v. Buckley, 82 id. 614; Heller v. Cohen, 9 id. 465.

Although, also, it is considered a matter of discretion whether specific performance will be decreed, yet the discretion must be exercised according to certain well established rules, and does not rest in the mere caprice of the court.

Frain v. Klein, 18 App. Div. 64; Demarest v. Friedman, 61 id. 576; Kullman v. Cox, 167 N. Y. 411; Binzen v. Epstein, 58 App. Div. 304; Platt v.

Man V. Cox, 107 V. 1. 41; Blillett V. Epstein, 55 App. 104. 304; Hatt V. Zimmerman, 13 Misc. 519.

Mechanics' Bank v. Lynn, 1 Pet. 376; also 18 Barb. 350; Lose v. Morey, 57 id. 561; Seymour v. Delancey, 3 Cow. 445; Viele v. Troy & B. R. R., 20 N. Y. 184; Solcum v. Closson, 1 How. App. Cas. 758; Willard v. Taylor, 8 Wall. 557; King v. Hamilton, 4 Pet. 311; Morey v. Farmers' L. & T. Co., 14 N. Y. 302; Foot v. Webb, 59 Barb. 38; Parkhurst v. Van Cortlandt, 14 Johns. 15, revg. 1 Johns. Ch. 273; St. John v. Benedict, 6 Johns. Ch. 111; Peters v. Delaplaine, 49 N. Y. 365; 11 N. Y. Supp. 668; Pickett v. Michaels, 120 App. Div. 357.

A vendee after refusing to perform cannot himself have specific performance.

Emrich v. White, 102 N. Y. 657.

An objection to the form of deed, capable of being remedied if suggested, is waived by failing to mention it when the deed is offered. Bigler v. Morgan,

77 N. Y. 312; Timpson v. Goodchild, 11 Reporter, 585.

One who accepts a mill and machinery erected for him under a contract binding him to execute a bond and mortgage to secure the price, and who subsequently promises to execute them when certain defects are remedied, cannot defend an action for the specific performance of the contract on the ground that the mill had not been completed at the time originally specified in the contract. Delts v. Sweet, 21 N. Y. Supp. 57.

See also as to change of objection. Grillenberger v. Spencer, 7 Misc. 601. Also as to defense of delay when not tenable. Styles v. Blume, 12 Misc.

421.

Vendee cannot have specific performance when he has refused to execute the formal contract unless there was a variation of the terms. Jones v. Witner, 79 Hun. 283.

Executors having power of sale, equity will decree specific performance.

Bostwick v. Beach, 103 N. Y. 414.

When contract provides for delivery of a warranty deed, specific performance may be had and payment of taxes, etc., may be required. Stone v. Lord, 80 N. Y. 60.

Specific performance may be counterclaimed by vendor when vendee sues for

his deposit. Moser v. Cochrane, 13 Daly, 159.

A vendee who is in default may yet have specific performance sometimes.

Day v. Hunt, 112 N. Y. 191.

Good faith on part of plaintiff seeking the equitable relief of specific performance is required. York v. Searles, 97 App. Div. 331.

Action may be prematurely brought, as before termination of certain other

litigation. Cowles v. Rochester Folding Box Co., 179 N. Y. 87. Where during sale by auction principal denies that property has been knocked down to proper party, and asks that sale be reopened, and on refusal of auctioneer to do so, revokes the agency, equity will not decree specific performance of a contract of sale subsequently executed by the auctioneer.

Byrne v. Fremont Realty Co., 120 App. Div. 692.

Parol Agreement.—Agreement to purchase for benefit of debtor or to waive a purchase in his favor, by purchaser at judicial sale, enforceable if debtor, relying on the agreement loses some remedy he might have had. Merrill v. Cooper, 65 Barb. 512. *Compare*, however, Canda v. Totten, 87 Hun, 72.

As to part parol, part written agreements, and proof by parol. See Beagle v. Harby, 73 Hun, 310.

Even where all of purchase price has been paid, equity will not decree specific performance of oral contract. Conlon v. Mission of Immaculate Virgin, 39 Misc. 215.

Readiness to Perform.— When the vendor does not show that he was ready and willing to perform, and where the purchaser shows that he was ready and offered to perform, the vendor cannot have judgment of specific performance. Haight v. Childs, 34 Barb. 186; Coggeshall v. Steele, 22 Wkly. Dig. 537; Eddy v. Davis, 23 id. 468.

Defective title is no defense if it be good at the time of the decree. Jenkins

v. Fahey, 73 N. Y. 355.

When defect has been removed before trial, performance may be decreed. Haffey v. Lynch, 143 N. Y. 241.

Delay .- Unless the parties have consented to the delay, these contracts will not be enforced after a long, unnecessary delay; and particularly if a serious injury has resulted therefrom, by defect of title, unless equitable circumstances explain the delay. McWilliams v. Long, 32 Barb. 194; Jackson v. Edwards, 22 Wend. 498; Voorhees v. De Meyer, 2 Barb. 37; 4 Sandf. 374; Leaird v. Smith, 44 N. Y. 618; 8 Pet. 420; Delavan v. Duncan, 49 N. Y. 485; Lawrence v. Ball, 14 id. 477; Tompkins v. Seely, 29 Barb. 212; Peters v. Delaplaine, 49 N. Y. 362; Finch v. Parker, Id. 1; Merchants' Bank v. Thompson, 55 id. 7; Haffey v. Lynch, 68 Hun, 507, revd., 143 N. Y. 241; Darrow v. Bush, 45 App. Div. 462.

They will be enforced where the remedy at law is insufficient. Morrill v.

Cooper, 65 Barb. 512.

Where there has been a waiver (which may be done verbally, even if the contract is written), courts will not enforce the contract. Wood v. Perry, 1 Barb. 115.

Infants; Lunatics.—When specific performance may be decreed against such persons, vide infra, Chap. XXV. See Code Civ. Proc., §§ 2345-2347, amd. as to lunatics, L. 1882, Chap. 399.

It is held that specific performance of the contract of a guardian will not be enforced, unless it be for the interest of the infant. Sherman v. Wright, 49

N. Y. 227.

Specific Performance in Favor of Deceased Persons .- Wheeler v. Crosby, 20 Hun. 140. See Rhoades v. Schwartz, 41 Misc. 648.

Specific Performance by Heirs, etc., of Deceased Persons .- Brown v. Brown, 29 Hun, 498; Code Civ. Proc., §§ 2346, 2347, as to deposit of deed in court before death. Webster v. Kings Co. Tr. Co., 80 Hun, 420.

Heirs may be compelled to convey. Kominsky v. Kominsky, 21 N. Y. Supp.

611: s. c., 2 Misc. 138.

Voluntary Agreements Without Consideration.— These will not be enforced. Acker v. Phoenix, 4 Paige, 305; Minturn v. Seymour, 4 Johns. Ch. 497; Hayes v. Kershow, 1 Sandf. 258. But see Ferry v. Stevens, 66 N. Y. 321, affg. 5 Hun, 109.

Demand not Necessary for the Action.—A party entitled to a conveyance, upon request, may bring an action for specific performance, without previous request. The previous demand only affects the question of costs. Bruce v. Tilson, 25 N. Y. 194. See also Freeson v. Bissell, 63 N. Y. 168.

Fraud.—If fraud is shown in making the contract, the purchaser may be dieved in equity. Denston v. Morris, 2 Edw. 37; Goodman v. Laborn, 11 relieved in equity. App. Div. 617.

And the contract may be reformed, if there is a fraudulent omission.

Matthews v. Terwilliger, 3 Barb. 50.

Married Women. -- See as to their powers, supra, Chap. III.

Where the wife refuses to join, the remedy is for damages, if the husband contracted that she should sign. Matter of Hunter, 1 Edw. 1; Roos v. Lockwood, 13 N. Y. Supp. 128; Bonnet v. Babbage, *Id.* 934. Nor can vendee enforce specific performance by offering to withhold a sum of money to meet the dower where such right is doubtful. Dixon v. Rice, 16 Hun, 422.

The court will not favor inequity. Haffey v. Lynch, 19 N. Y. Supp. 59, revd., 143 N. Y. 241.

Specific performance of a contract for the sale of real estate will be denied

where it would be inequitable or unjust. Hoch v. Cocks, 78 Hun, 253. Formerly, to enforce a contract against a feme covert or her heirs, she must have executed the contract with the husband, and duly acknowledged the same apart from him. Knowles v. McCamley, 10 Paige, 342.

Parol Rescission .- Equity will not compel specific performance where the parties have, upon default of one party, agreed, by parol, to rescind the contract. Arnoux v. Homans, 25 How. Pr. 427; 32 id. 382.

Agreements to Lease. - As to these, vide supra, Chap. VIII, Tit. 11.

Where There are Incumbrances. - Specific performance may be decreed, when there are liens, etc., if the vendee took, knowing of them, or where they may be compensated for; or the purchaser was to take the risk of title. Guynet v. Mantel, 4 Duer, 86; Winne v. Reynolds, 6 Paige, 407.
See Klawitter v. Hubner, 68 Hun, 338, allowing specific performance to

vendee where false statement was made by vendor as to amount of incum-

Specific Performance for Part .- Where the title fails for part, specific performance may be decreed in favor of the vendee for the balance, and damages awarded for what cannot be conveyed, or the consideration money rebated. Harsha v. Reid, 45 N. Y. 415.

The vendee, however, cannot be compelled to take a part. Faure v. Martin, 7 N. Y. 210; see also King v. Bardeau, 6 Johns. Ch. 38; Woodruff v. Bunce, 9 Paige, 443; Voorhees v. De Meyer, 2 Barb. 37; Gibert v. Peteler, 38 N. Y. 165; Roy v. Willink, 4 Sandf. 525; Talbot v. Adams, 12 Wkly. Dig. 410.

Since the Code, when jurisdiction has been once obtained in equity, it may be retained for the purpose of awarding damages, if specific performance cannot

be granted. Sternberger v. McGovern, 56 N. Y. 12.

The fact that an action at law cannot be maintained does not necessarily prevent equity from giving specific performance. Winne v. Winne, 166 N. Y. 263.

The vendor may, as a general rule, make title at any time before decree. Sheffer v. Dietz, 83 N. Y. 300; Jenkins v. Fahey, 73 id. 355; Haffey v. Lynch, 143 id. 241.

Interest.—In decreeing specific performance against a vendor he must pay interest on incumbrances during the delay. Selleck v. Tallman, 11 Daly, 141. As to interest and mesne profits in case of delay, vide Bostwick v. Beach, 103 N. Y. 414, and 105 id. 661.

Effect of Judgment for Vendor.—By Code Civ. Proc. § 1323, amd. L. 1877, Chap. 416; 1880, Chap. 529; 1899, Chap. 650, when judgment is rendered for the owner in an action for specific performance, he may sell the property as if no contract had been made, notwithstanding an appeal by the vendee, unless the latter gives an undertaking. This undertaking may be filed at any time; but will not affect the rights of a vendee under a contract made after judgment and before the filing of the undertaking.

How Judgment of Specific Performance is Enforceable.—Kittel v. Stueve, 11 Misc. 279.

Lands Situated Out of the State.—Specific performance relative to such lands may be enforced here, if the defendant were duly served here and subjected to the jurisdiction. Sutphen v. Fowler, 9 Paige, 280; Cleaveland v. Burril, 25 Barb. 532; Newton v. Bronson, 13 N. Y. 587; Bates v. Delavan, 5 Paige, 299; Meyers v. DeMier, 4 Daly, 343, affd., 52 N. Y. 647.

Appeals.—Appellate courts will not interfere greatly with exercise of the trial court's discretionary powers as to specific performance. Dunckel v. Dunckel, 141 N. Y. 427.

Part Performance.—A partial performance of a parol contract to convey lands will frequently take the case out of the statutes which require a written contract, and the contract will be enforced in equity, if its performance be consistent with the rules of equity, and required by the justice of the case. The theory of the interference of the court, in dispensing with the statutory requirement is, that unless the agreement were carried into complete execution, a mere partial performance would work a fraud against the party applying.

Generally, as to the above principles, vide Murphy v. Whitney, 69 Hun, 573; Davis v. Townsend, 10 Barb. 333; Wolfe v. Frost, 4 Sandf. Ch. 72; Murray v. Jayne, 8 Barb. 612; 3 Sandf. Ch. 279; Thomas v. Dickinson, 12 N. Y. 364, revg. 14 Barb. 90; Dodge v. Miller, 81 Hun, 102; Coles v. Bowne, 10 Paige, 526; McClasky v. Mayor, etc., 64 Barb. 310; Beardsley v. Duntley, 69 N. Y. 577; Winchell v. Winchell, 100 id. 159; Veeder v. Horstmann, 85 App. Div. 154.

In an action for specific performance of an oral agreement, the performance of a written agreement cannot be enforced. Lennon v. Farrell, 46 App.

Div. 621.

Payment of all the purchase price alone held not sufficient to take the case out of the statute. Conlon v. Mission of Immaculate Virgin, 39 Misc. 215; see Krainin v. Coffey, 119 App. Div. 516. See, however, Occidental Realty Co. v. Palmer, 177 id. 505.

While mere payment of the purchase-price of land is not sufficient to authorize the specific performance of a parol contract for its sale, yet where the consideration has been paid and possession under the contract taken, the contract will be specifically enforced. Dunckel v. Dunckel, 141 N. Y. 427.

The taking possession under parol agreement to convey held sufficient part performance to take the case out of the Statute of Frauds. Cooper v. Monroe, 77 Hun, 1; Young v. Overbaugh, 76 id. 151.

By the Revised Statutes, it was also provided that nothing in Title 1, Chap-VII, Part II, relative to fraudulent conveyances and contracts, shall be construed to abridge the powers of courts of equity, to compel the specific performance of agreements in cases of part performance of such agreements. This provision was re-enacted in the Real Property Law, § 234.

The part performance claimed must be substantial and by acts founded upon and referable solely to the agreement. Phillips v. Thompson, 1 Johns. Ch. 131; Wolfe v. Frost, 4 Sandf. Ch. 72; Wheeler v. Reynolds, 66 N. Y. 228. As to what will suffice, vide Favill v. Roberts, 50 N. Y. 222; McIneres

v. Hogan, 61 How. Pr. 446.

As to part performance of a void contract and the rescission thereof, vide Thomas v. Dickinson, 12 N. Y. 364, revg. 14 Barb. 90.

If the vendor admits the contract, and does not set up the Statute of Frauds in his pleading, specific performance will be decreed; and if the property has been transferred to another, with notice, the court will decree a conveyance by him. Duffy v. O'Donovan, 46 N. Y. 223.

A party who has voluntarily performed part of a void contract cannot, therefore, be compelled to perform the residue. Baldwin v. Palmer, 10 N. Y.

Verbal acceptance of written offer when good. Pettibone v. Pettibone,

75 Hun, 461.

Oral agreement to convey land followed by payment of purchase-money and entry into possession sustained, and specific performance decreed. v. Pawling, 86 Hun, 502; Kominsky v. Kominsky, 21 N. Y. Supp. 611.

Entry into possession as validating parol contract. Young v. Overbaugh, 145 N. Y. 158.

Specific performance of an oral contract for the sale of land which has been partly performed may be decreed in behalf of an assignee of the purchaser. Dodge v. Miller, 81 Hun, 102.

Specific performance will not be decreed where it has become inequitable to order its enforcement by reason of subsequent change in the conditions, as well as where it was originally unfair and oppressive. Hart v. Brown, 6 Misc. 238; Darrow v. Bush, 45 App. Div. 262.

Part Payment.— It was formerly held that payment of the purchase-money was part performance, but the more modern doctrine is, that payment of part or even of the whole of the purchase-money is not in itself, and without something more, a performance that will take the case out of the statute; for the money may be repaid. This would not be the case where the consideration was not money and could not be easily estimated. Rhodes, 3 Sandf. Ch. 279; 4 Kent, 451; Haight v. Child, 34 Barb. 186.

But in Morrill v. Cooper, 65 Barb. 512, it is held that, in equity, payment

of the whole purchase-money will take the case out of the statute.

Where a party has paid money upon a contract, and a recovery of the money will not restore him to his former condition, he is entitled to specific performance. Malins v. Brown, 4 N. Y. 403; Richmond v. Foote, 3 Lans. 244; Benedict v. Phelps, 2 Wkly. Dig. 150.

The later decisions, however, are to the effect that equity will not decree specific performance of an oral contract, even where all the purchase money has been paid on the ground of part performance. Cooley v. Lobdell, 153 N. Y. 596; Conlon v. Mission of Immaculate Conception, 39 Misc. 215.

Delivery of Possession .- Delivery of possession, even in part, will take the case out of the Statute of Frauds. Lowry v. Tew, 3 Barb. Ch. 407, 413; Harris v. Knickerbacker, 5 Wend. 638; Lord v. Underdunck, 1 Sandf. Ch. 46; Miller v. Ball, 64 N. Y. 286. So also part payment and occupation through a lease made to a third person. Merithew v. Andrews, 44 Barb. 200. And where there has been a parol agreement to straighten boundaries and exchange portions of adjoining lands, and parties have occupied. Davis v. Townsend, 10 Barb. 333.

Who Can Maintain the Action for Specific Performance .- Besides the purchaser the action may be maintained by the following persons: A trustee. Munro v. Allaire, 2 Cain. Ca. 183. A subpurchaser of part of the contracted land. Lord v. Underdunck, 1 Sandf. Ch. 46; Wood v. Perry, 1 Barb, 114. Personal representatives. Buck v. Buck, 11 Paige, 170.

Creditors.— The Revised Statutes provided that such contract might be enforced also by a judgment-creditor of the purchaser, but that the interest of a party therein shall not be bound by a judgment or sold under execution. 1 R. S. 744; see now Code Civ. Proc., § 1874, vide infra, Chaps. XXXVIII, XXXVIII, "Judgments" and "Sales by Execution;" also Title VI.

Limitation.—Actions for specific performance, whether the contract were under seal or not, must be brought within ten years after the cause of action accrued, as specified in the Statute of Limitations.

See Code of Civil Proc., §§ 380 to 388. So under the old Code, §§ 91, 97; Peters v. Delaplaine, 49 N. Y. 362; McCotter v. Lawrence, 4 Hun, 107. An action for specific performance of a contract under seal is not an action upon a sealed instrument. Peters v. Delaplaine, 49 N. Y. 362.

TITLE VI. MISCELLANEOUS PROVISIONS.

Interests of Purchasers Liable to be Sold by Order of Surrogates.— The proceedings with reference to the sale of lands of deceased persons by the order of surrogates, when there is not sufficient personal assets for the payment of the debts of the estate, have been fully given in a previous chapter.

The statutes of this State also provide for the sale of the interest of the deceased in land held under a contract of purchase, either as original party or as assignee, on applications similar to those set forth in the above chapter, in the same cases and in the same manner as if he had died seized of the land.

The former provisions with reference to such interests will be found in the Laws of 1837, Chap. 460; the present provisions in the Code of Civil Procedure. The details of these proceedings cannot be here given.

*Vide**Richmond** v. Foote, 2 Lans. 244; Code Civ. Proc., § 2749, amd. 1894,

Chap. 735.

Lien of Judgments on the Interest of Those Holding Contracts.

- By the Revised Statutes the interest of any person holding a contract for the purchase of lands was not to be bound by the docketing of any judgment or decree, nor to be sold by execution upon any such judgment or decree.

1 R. S. 744, § 4. So also by Code Civ. Proc., § 1253.

The manner in which the interest of the defendant may be reached or sold under the judgment of the court, and applied to the payment of what is due by him under the judgment, is considered hereafter. Chap. XXXVIII.

Code Civ. Proc., \$ 1253.

Pringle v. Spaulding, 53 Barb. 17; Pumpelly v. Phelps, 40 N. Y. 59, allow ing more than nominal recovery only when vendor knew he had no title. No compensation for defects can be allowed in an action at law for damages. Aliter of specific performance. Smith v. Sturgis, 108 N. Y. 495.

It is held that courts of equity will decree damages instead of a specific performance of a contract, when they have obtained jurisdiction on other grounds. Snow v. Monk, 81 App. Div. 206; Int. Paper Co. v. Hudson R. W. Pow. Co., 92 id. 56. Measure of damage in case of fire. Listman v. Hickey, 65 Hun, 8, affd., 143 N. Y. 630. Damages caused by closing a road belonging to the owner of the fee at that time — construction of a contract to sell. Conkling v. Zerega, 72 Hun, 134; Wiswall v. McGowan, 2 Barb. 270, affd., 10 N. Y. 465.

The purchaser to whom the deed is due may on a failure of title recover the purchase money paid by him, and interest, whether the purchaser has been in occupation or not. Fletcher v. Button, 4 N. Y. 396.

As to when the sum specified will be considered a penalty and when liquidated damages, vide Pearson v. Williams, 26 Wend. 630; Brinkerhoff v. Olf, 35 Barb, 27.

Damages on failure of quantity. O'Conor v. Philipsen, 74 Hun, 68. Expenses of examining title may be recovered. Bigler v. Morgan, 77 N. Y. 312; Wetmore v. Bruce, 118 id. 319; Sternberger v. McGovern, 56 id. 12; also other payments, and this without further tender. Hartley v. James, $50 \ id. \ 38$; Ziehen v. Smith, $73 \ Hun, 571$.

But a purchaser who entered into possession and made improvements before examining the title cannot recover therefor where the vendor had not good title though supposing in good faith that he had. But it seems he may offset taxes paid while in possession against charge for rental value of possession. McMulkin v. Bates, 46 How. Pr. 405. See further as to damages in such case. Walton v. Meeks, 120 N. Y. 79.

Where vendor could not obtain release of her dower by his wife, the damages were assessed at the difference between the contract price, and the value of the property at the time of the breach, besides the purchase money already paid, and the expenses. Pumpelly v. Phelps, 40 N. Y. 59; Bush v. Cole, 28 id. 261; Heimburg v. Ismay, 35 Super. 35. The same rule was applied in a case where a joint tenant would not join in deed. Timby v. Kinsey, 18 Hun,

See McMulkin v. Bates, 46 How. Pr. 405, holding that vendor who contracted in good faith and does not refuse to perform, but only has not the power to perform, is not liable in damages.

To recover vendee must show title bad - not doubtful. Aliter in specific

performance. Ingalls v. Hahn, 49 Hun, 104.

The courts will favor equity. Moore v. Williams, 115 N. Y. 586; Jenkins v. Fahey, 73 N. Y. 355.

Damages on Non-Performance by Vendee .- Where the purchaser fails to complete his contract, it seems that the vendor may recover damages. Herring v. Punnett, 4 Daly 543; 4 Den. 54; Van Brockelen v. Smealie, 19 N. Y. Supp. 788, revd., 140 N. Y. 70.

Cannot resell and charge difference to vendee unless so provided. Gudi v. West, 19 N. Y. Supp. 757; s. c., 65 Hun, 1; see also Van Brockelen v. Smealie, supra.

Effect on a Judgment Against Vendor.—A judgment against the vendor after contract would not bind the land, the vendee being treated as the owner of the estate. Swartout v. Burr, 1 Barb. 495; Smith v. Gage, 41 id. 60. And the vendee in possession would be protected. Moyer v. Hinman, 13 N. Y. 180, modifying 17 Barb. 139. Nor would a judgment against his assignee or devisee. See as to the effect of such a judgment. Smith v. Gage, 41 Barb. 60; see also Brewster v. Power, 10 Paige, 562; The Ocean Nat. Bk. v. Olcott, 46 N. Y. 12; and see infra, Chap. XXXVII. "Judgments," and "Execution," Chap, XXXVIII,

Subsequent Mortgage made by the vendor after execution of the contract for no consideration other than an old debt would not bind the land. Young v. Guy, 87 N. Y. 457. If the subsequent mortgagee, even for a valuable consideration, has notice of the contract, he must give the vendee notice, in order to enforce his claims against the balance of the purchase money. Trustees of Union College v. Wheeler, 61 N. Y. 88, 107.

Subsequent Deed.— One who buys only an equitable right is chargeable with notice that there may be other equities superior to his. Crippen v. Baumes, 15 Hun, 136. A grant without consideration of a right of way over land contracted to be sold, to one who knew of the contract, is held to be subject to the equities between vendor and purchaser. Townsend v. Bissell, 4 Hun, 297. Such an act would release the purchaser from the contract. James v. Burchell, 82 N. Y. 108.

Taxes. As to taxes payable under a contract to purchase: Vide Kern v. Towsley, 45 Barb. 150; also Tit. II, p. 499.

An assessment is not a lien until confirmed. Lounsbury v. Potter, 37 Super.

57. Or the warrant issues, Condert v. Huerstel, 60 App. Div. 83.
As to installments of a part payment assessment, vide McLaughlin v. Miller, 10 N. Y. Supp. 830.

Vide infra, as to the "Lien of Taxes," Chap. XLVI.

Reservation of Right to Remove Fixtures .- See Brunswick Construction Co. v. Burden, 116 App. Div. 468.

Damages on Non-performance by Vendor.—Where the title fails, the remedy of the purchaser, at law, is an action for damages.

The proper rule for damages on a breach of contract for sale of land is the amount paid by the purchaser on executing the contract, together with the difference between the contract price and the actual value of the premises at the time the contract was to be performed.

The vendor may also bring action in equity for specific performance or damages in the alternative.

See Reynolds v. Wynne, 121 App. Div. 272.

Fraudulent Conveyance.— The provisions in reference to fraudulent conveyances and contracts in relation to chattels, etc. (2 R. S. 134, Tit. II, Personal Property Law, G. L., Chap. XLVII, L. 1897, Chap. 417), have no reference to contracts concerning lands or any interest therein.

Young v. Dake, 5 N. Y. (1 Seld.) 463, revg. 7 Barb. 191.

Heirs or Devisees of the Vendor.—These are bound to convey.

Vide supra, Tit. II, and infra, Chap. XXV, as to "Infant Heirs;" and Hill v. Ressegieu, 17 Barb. 162; Hyatt v. Seely, 11 N. Y. 52; Holly v. Hirsch, 17 N. Y. Supp. 821; s. c., 63 Hun, 24, reversed, 135 N. Y. 590.

Even when the contract was parol, if it has been performed by the purchaser. Knapp v. Hungerford, 7 Hun, 588.

Defects Remediable After Performance.—An honest mistake as to quantity on both sides, discovered subsequent to delivery of deed, may be rectified. Paine v. Upton, 21 Hun, 306, affd., 87 N. Y. 327; Arend v. Laing, 79 Hun, 203; see also Chap. XX, Tit. IV.

The same rule applies where false representations as to description were made by vendor in verbal negotiations for purchase of a farm. Beardsley v. Duntley, 69 N. Y. 577.

But where a farm was conveyed by metes and bounds the contract adding a statement of acres "more or less," the deed merges the contract and a

defect of acres is irremediable. Gerhardt v. Sparling, 49 Hun, 1.

When a deed of conveyance is made and accepted, pursuant to an executory contract to sell and convey land, containing stipulations of which the conveyance is not necessarily a performance, the question whether such stipulations are surrendered is treated as one of intention; and, in the absence of evidence upon the subject, there is no presumption of intention to give up those benefits, or that they are satisfied by the conveyance. Morris v. Whitcher, 20 N. Y 41; Witbeck v. Waine, 16 id. 532; Murdock v. Gilchrist, 52 id. 242, Disbrow v. Harris, 122 id. 362; see also p. 504.

CHAPTER XX.

TITLE BY DEED.

TITLE

I .- DEEDS, HOW MADE.

II.— PARTIES TO DEEDS.
III.— THE CONSIDERATION.

IV .- DESCRIPTION OF LAND CONVEYED.

V .- THE ESTATE CONVEYED.

VI .- THE COVENANTS.

VII .- THE DATE, SEALING, SIGNING, AND ATTESTATION.

VIII.— DELIVERY AND ACCEPTANCE.

IX .- AVOIDANCE AND CANCELLATION.

X .- DEEDS GIVEN UNDER ADVERSE POSSESSION.

XI .- DIFFERENT FORMS OF CONVEYANCE.

XII .- FEOFFMENT.

XIII.— GIFTS AND GRANTS.

XIV.— LEASES.

XV .- EXCHANGE AND PARTITION.

XVI.— RELEASE.

XVII.— CONFIRMATION, SUBRENDER, ASSIGNMENT, AND DEFEASANCE, XVIII.— CONVEYANCES BY VIRTUE OF THE STATUTE OF USES.

XIX .- FINES AND RECOVERIES.

A Deed is defined as a writing in proper and efficient words, upon paper or parchment, sealed and delivered by the parties; its object being to pass some estate or interest in land.

Under the early principles of the common law, based upon the feudal system, the tenant of lands by livery from the feudal owner had no right to alien the lands without the consent of the latter. in whom and his heirs continued the right of reversion on forfeiture, or on failure of heirs of the feudatory.

Various changes in the law were made from time to time, as the oppressions of the system were gradually removed, and through the means of subinfeudations, the provisions of the Magna Charta, and the passage of various acts in the times of Henry I and Edward I, the right of free alienation by the subvassal, without the consent of the lord of whom he held, was finally established.

The principles of the statutes "De donis" and "Quia emptores," passed in the time of Edward I, which relate to the right to transfer real estate, have been adverted to in preceding chapters.

Subsequent statutes allowed the involuntary alienation of land through proceedings to enforce debts, and finally, the penalty of forfeiture on the alienation of lands by tenants in capite, holding immediately from the king, which had not been theretofore re-

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moved, was avoided through the substitution of a fine, by virtue of a statute passed in the reign of Edward III.

See for a fuller treatment of this subject, Fowler's Real Property Law, Introduction; and pp. 658, 659.

As regards the right of alienation in this State, and in what persons and to what extent the right exists, reference is made to Chapters III, IV, V of this treatise, where these subjects are treated of in detail, and the principles of the common law, in connection with statutory changes in the State, are reviewed. It has been seen that it is established as a principle of constitutional right and law in this State, that every owner of land therein has the *jus disponendi* as a right appurtenant to its ownership; and that, on parting with such ownership in fee, there is no reverter or possibility of reverter to him remaining, and that he can annex no conditions or restraints to the alienation which would prevent the alienee from disposing of the land so granted.

Whether the old English statute, called "Quia emptores" (18 Edw. 1), allowing every freeman to sell his lands at pleasure, became part of the law of the Colony and State of New York or not, the Act of October 22, 1779 (1 Jones & Varick, 44), and the Act of February 20, 1787 (1 R. L. 70) entirely removed the foundation on which the right of the grantor to clog and restrain the alienation of land had formerly rested, as an incident of the feudal tenure of real property.¹

Consequently, all reservations in a conveyance or lease in fee, restricting the alienation, would be repugnant to the estate granted, and void.

Van Rensselaer v. Hays, 19 N. Y. 68; De Peyster v. Michael, 6 id. 468, and supra, Chap. V, Tit. IV.

Prior to the Revised Statutes, the forms of conveyance hereafter referred to were employed in this State, and are to a certain extent still in use; the only ones expressly abolished being feoffments with livery of seizin and fines and recoveries.

1 R. S. 738, § 136; 2 R. S. 343, § 24. See Const. 1846, Art. I, § 15; 1894, Art. I, § 14.

The Revised Statutes, however, simplified alienation by deed, and recognized any deed clearly intended to transfer the ownership

¹This is Mr. Gerard's text, precisely as he wrote it. Cf. Fowler's Real Property Law, 2d ed., 83 note, 106, 175.

of real estate as sufficient for the purpose, within the restrictions and provisions referred to in this chapter.

They particularly provided that in the construction of every instrument creating or conveying, or authorizing the creation or conveyance of any estate or interest in lands, it should be the duty of the courts of justice to carry into effect the intent of the parties. as far as such intent could be collected from the whole instrument. and is consistent with the rules of law.

1 R. S. 748, § 2.

The same provisions have been incorporated without material change into the present Real Property Law.

Real Property Law, § 205.

Vide, as to the intent in deeds, Jackson v. Blodget, 16 Johns. 172; Jackson v. Myers, 3 id. 388; Jackson v. Beach, 1 Johns. Ca. 402; Fish v. Hubbard, 21 Wend. 651, 654.

The written portions will prevail over printed or formal parts. Matter of Brookfield, 176 N. Y. 138.

As to short form of conveyance provided by recent legislative action, see Real Property Law, § 223 (L. 1890, Chap. 475).

The Revised Statutes apply the general term "grant" (which formerly was applicable to the conveyance of incorporeal hereditaments only) to indicate the instrument by which a freehold estate is transferred, and provide that deeds of bargain and sale and of lease and release may continue to be used, and shall be deemed " grants."

1 R. S. 739, § 142.

For the same provision in the Real Property Law, see Real Property Law,

§ 211.

The Revised Laws of 1813.—The Revised Laws of 1813, Vol. I, p. 369, Chap. 97, contain embodied all the laws concerning deeds then in force, and how they are to be acknowledged and recorded. This act, with the exception of sections 7, 10 and 11, was repealed by the general repealing Act of 1828, and also an Act of March 8, 1817, as to records and acknowledgments.

The Real Property Law now regulates all these matters, the main features of the Revised Statutes concerning real property having been re-enacted

therein.

TITLE I. DEEDS, HOW MADE.

Formerly conveyances were chiefly made by parol, or by feoffments with "livery of seizin," through certain overt acts, without any writing, until by the Statute of Frauds (29 Charles II) they were required to be in writing, and to be signed by the grantor, in order to transfer interests in lands other than estates for three years or less.

This statute has been re-enacted in this State, as follows:

"No estate or interest in lands other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto shall hereafter be created. granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing."

2 R. S. 134, § 6 (see 1 R. L. 78).

And again in the Real Property Law, § 207.

"An estate or interest in real property other than a lease for a term not exceeding one year, or any trust or power over or concerning real property, or in any manner relating thereto, cannot be created, granted, assigned, surrendered or declared, unless, by act or operation of law, or by a deed or conveyance in writing, subscribed by the person creating, granting, assigning, surrendering or declaring the same or by his lawful agent thereunto authorized by writing."

Real Property Law, § 207.

Exception is made in favor of wills, implied trusts, declarations of trust,

Exception is made in favor of wills, implied trusts, declarations of trust, and fines; for which exceptions, vide supra, Chap. X, Tit, III.

As to contracts for the sale of lands, vide Chap. XIX.

As to leases, vide Chap. VIII, Tit. II.

Parol acts and declarations and gifts, may also effect by estoppel a transter, in equity, of the title to real estate, notwithstanding the statutes above cited, particularly if possession is taken and improvements made, and innocent parties are misled by acts or declarations of the owner. People v. Goodwin, 5 N. Y. 568; Moore v. Bk. 55 id. 41; Bassen v. Brennan, 6 Hill. 47; Embury v. Connor, 3 N. Y. 511, 516; Sherman v. McKeon, 38 id. 266; Reeves v. Kimball, 63 Barb. 120, affd., 40 N. Y. 299; Levick v. Sears, 1 Hill, 17; Freeman v. Freeman, 43 N. Y. 34; Wendell v. Van Renselaer, 1 Johns. Ch. 344; Town v. Needham, 3 Paige, 545; Storrs v. Barker, 6 Johns. Ch. 166; Mattoon v. Young, 5 Supm. 109; s. c., 2 Hun, 559; 45 N. Y. 696. But a parol agreement between opposite owners on a highway to change the way will not affect subsequent deeds bounding on the highway. DeWitt v. Van Schoyk, 35 Hun, 103, affd., 110 N. Y. 7.

Transfer by Statute—A statute or proceedings under a statute authorizing

Transfer by Statute.—A statute or proceedings under a statute authorizing the taking of land, would also vest title, without a deed, providing the transfer were made pursuant to constitutional provisions. But any transfer made by which land is transferred in invitum, even though compensation were made, would be void, if not made for a public purpose under the Constitution. Embury v. Conner, 3 N. Y. 511. Vide supra, "Eminent Domain," Chap. II.

Incorporeal Hereditaments.—These, including easements, water priviliges, and other interests in land, have to be in writing. Thompson v. Gregory, 4

Johns. 81; Wolfe v. Frost, 4 Sand. Ch. 72; Brown v. Woodworth, 5 Barb. 550; and infra, Chap. XXXVI, Tit. II.

Sale of a Pew .- This requires a deed. First Baptist Church v. Bigelow. 6 Wend. 28; and vide supra, p. 115, and Chap. XIX.

Cemetery Lot .-- A deed of a burial lot in a rural cemetery conveys an easement for burial only, and not the fee to the soil. Went v. Methodist Protestant Ch., 80 Hun, 266.

Contract.—A contract under seal, executed and delivered, may be sufficient to constitute a grant. Hunt v. Johnson, 44 N. Y. 27.

Presumption.— After long possession and claim under a deed the existence of a deed may be presumed. Deery v. Cray, 5 Wall. 795; De Meyer v. Legg, 18 Barb. 14; Vrooman v. Shepherd, 14 id. 441.

The Manner of the Writing .- The English rule is that the writing must be (printed or written) on paper or parchment and not on other substance. It may be either in ink or pencil. Merritt v. Classon, 12 Johns. 102, affd., 14 id. 484; Davis v. Shield, 26 Wend. 341, 354.

Word "grant" not necessary to create a conveyance of a right, if such

appears to have been the intention of the parties. Langdon v. Mayor, etc.,

of N. Y., 93 N. Y. 129.

Authentication.—A grant will not pass real estate unless either acknowledged or attested by subscribing witness, at least as against a purchaser, or incumbrancer. 1 R. S. 738, § 137; Real Property Law, § 208; Roggen v. Avery, 63 Barb. 65, affd., 65 N. Y. 592; criticised, 49 Hun, 408.

It is good against the grantor. 13 N. Y. 509; Chamberlain v. Spargur, 86

N. Y. 603.

Corporations; Infants, etc.—As to deeds by corporations, infants, etc., see Chaps, XXIV and XXV, infra.

Grants without Seals.—As seals are no longer necessary to conveyances, grants without seals present interesting questions. Stipulations in them in the language of former covenants probably run with the land where former covenants in the same language ran with the land.

Fowler's Real Property Law (2d ed.), 661, note 69, 695.

TITLE II. THE PARTIES.

A deed must have a competent grantor, grantee, and thing granted. The parties must be truly and sufficiently described or designated so as to be ascertained. If they are left uncertain the deed is void.

Cruise Dig. Tit. 32, Chap. 20. Still, a deed with a blank for grantee's name has been held not wholly void. Vanderbilt v. Vanderbilt, 54 How. Pr. 250.

A grant to the inhabitants of a town not incorporated, or to the people of a county, would be void. Jackson v. Cory, 8 Johns. 385; Hornbeck v. Westbrook, 9 id. 73. Vide infra, as to towns, villages and counties, Chap. XXIV. The grantee, however, need not be named if sufficiently designated. Webb v. Westberhead. 17 Horn (ILC) 578. Weatherhead, 17 How. (U.S.) 576.

The parties must be of sound mind and of full age, or the deed may be disaffirmed. Vide supra, Chap. III, as to those capable of aliening lands. The parties may be bodily infirm, e. g., blind, deaf and dumb, if of sound mind and made cognizant of their acts. Vide Lansing v. Russell, 13 Barb. 510, 3 Barb. Ch. 325; Jackson v. Croy, 12 Johns. 427.

A deed made by one who is non compos mentis held absolutely void. Van Deusen v. Sweet, 51 N. Y. 373.

Contra, the deed is voidable only where grantor has not been officially adjudged incompetent. Smith v. Ryan, 191 N. Y. 452.

Capacity .- As to what capacity a party acts in, when having two. See Mut. Life Ins. Co. v. Shipman, 108 N. Y. 19; s. c., 119 id. 324.

Deed by Public Officers.-A deed by a public officer in behalf of a State. is the deed of the State, although the officer is the nominal party. Sheets v. Selden, 2 Wall. 177. A sheriff's deed is treated as being the deed of the debtor. Hetzel v. Barber, 69 N. Y. 1.

Deed to One and Others.— Under a deed to A. B. and associates, the legal estate vests only in A. B. Jaskson v. Sisson, 2 Johns. Ca. 221.

To One's Self and Another. — The whole estate vests in the other. Martin v. Van Wagener, 1 Supm. 509.

To Trustees, His Heirs and Assigns Forever .- Held, absolute and power of conveyance by the grantee unlimited. Title G. & T. Co. v. Fallon, 101 App. Div. 187. See also Van Schaick v. Lese, 31 Misc. 610.

To a Deceased Person .- Such a deed would pass no title to his heirs. Doughty v. Edmiston, 1 Cooke (Tenn.), 134.

Fictitious Name. If one conveys to a fictitious person and then reconveys assuming the fictitious name, he is bound by it. David v. Williamsburg City

Fire Ins. Co., 83 N. Y. 265.
Initials or nicknames do not, without other proof, identify. People v. Smith, 45 N. Y. 772, 779; Russ v. Stratton, 11 Misc. 565.

To Heirs.—A deed to the heirs of a living person would be void unless it appear by the deed that a certain class, e. g., children or grandchildren, were intended. Huss v. Stephens, 51 Pa. St. 282; Washburn's Real Property Law, bk. III, 240; Umfreville v. Keeler, I Supm. 486, approved, 127 N. Y. 171.

Such a deed construed to be to those who would be heirs if he died then. Heath v. Hewitt, 49 Hun, 12, affd., 127 N. Y. 166.

See also Chap. XV, Tit. II.

Deed to Officer of a Corporation. — Construed to be an equitable title in corporation in certain cases. Seventh Wd. Nat. Bk. v. Elevated R. R. Co., 53 Super. 412. See also "Interpretation of Deeds," infra, Tit. IV.

Deed Poll.—Although a deed in form begins as an indenture, if it purports to be and in fact is only the deed of the grantor, it is a deed poll, and does not estop the grantee from denying the grantor's title. 1 N. Y. 242; 4 Barb. 180; Osterhout v. Shoemaker, 3 Hill, 513; Champlain Co. v. Valentine. 19 Barb. 484. Cf. Schaefer v. Thompson, 116 App. Div. 775.

Conveyances are good in many cases when made to a grantee by a certain designation without the mention of either the Christian or surname, as to the wife of I. S., or to his eldest son; for, id est certum, quod potest reddi certum. Co. Litt. 3 a; 4 Kent, 539; Friedman v. Goodwin, 1 McAl. C. C. Cal.

1; Griffing v. Gibb, Id. 212.

A grant of land to a class of persons is good, if the class is sufficiently

described, and if the individuals of the class are ascertainable.

It has been seen above, Chap. X, that since the Revised Statutes, where it is apparent, from a deed, that the property embraced in it was intended to be conveyed to the grantee merely as trustee, he will take no beneficial interest or legal estate therein. See also LaGrange v. L'Amoureux, 1 Barb. Ch. 18.

Under the practice of the English law, deeds were executed by both parties; and although now generally executed by the grantor alone, unless there are mutual covenants, they still retain, even in this State, the language and form of a mutual contract executed by both parties, and each of them is under the theory that the paper is an *indenture* (or a single piece of parchment cut into two), supposed to retain a copy.

Tenants by the Entirety .-- A deed by a wife of her interest in property held with her husband in entirety passes no title. Bram v. Bram, 34 Hun, 487. See also Chap. III, Tit. III.

Tiustee's Deed.-Good though made by him as an individual. Bradstreet v. Clark, 12 Wend. 602.

Word "as" is necessary to constitute an official capacity. U. S. Trust Co.

v. Stanton, 76 Hun, 32.
Omission of word "as" before official character makes the official designation mere descriptio personæ. Draper v. Salisbury, 11 Misc. 573; Crowley v. Murphy, 11 Misc. 579.

So where persons are described as trustees and there is no evidence of any trust. Kanenbley v. Volkenberg, 70 App. Div. 97.

The word "as" before the description of a person, makes it representative and not an individual act under the doctrine of descriptio persona. Farrington v. Am. Loan & Trust Co., 9 N. Y. Supp. 434, See also Merritt v. Seaman, 6 N. Y. 168; Stillwell v. Carpenter, 62 N. Y. 639, as to executors. Execution individually of instrument by party described therein officially held good. Myers v. Mutual Life Ins. Co., 99 N. Y. 1.

Likewise executors and administrators may purchase in to protect on foreclosure and sell again whether deed be taken in their names as such or foreing the control of t

as individuals. Clark v. Clark, 8 Paige, 152; Lockman v. Reilly, 95 N. Y. 64, 71; Haberman v. Baker, 128 N. Y. 253.

Sections 49 to 58 of the statute of uses and trusts held not to apply to a conveyance to persons as trustees of a land association not shown to be incorporated. In such case the grantees will be presumed to be members of the association and to hold the title for themselves and others, and as such they have authority to sell and convey a good title. King v. Townshend, 141 N. Y. 358; 78 Hun, 380.

Towns, Villages, Counties, States, etc.—Vide infra, Chap. XXIV, and supra. Chap. I.

Corporations.—As to them, vide infra, Chap. XXIV.

Married Women.— Supra, Chap. III.

Infants, Lunatics, etc.—Infra, Chap. XXV.

The deed of a person of unsound mind is voidable only. Smith v. Ryan, 191 N. Y. 452.

Partners.—One may make a deed in the firm name, if by the direction or with the assent of the others.

Gibson v. Warden, 14 Wall. 244; and supra, Chap. XI, Tit. III.

Agents.— As to an execution by agent, see Chap. XIX, Tit. I.

TITLE III. THE CONSIDERATION.

A deed of bargain and sale or a covenant to stand seized should be founded upon sufficient consideration, which may be either good or valuable, and must, to be valid, not partake of anything immoral, illegal, or fraudulent.

A good consideration is such as that of blood or of natural love and affection between near relations by blood.

A valuable consideration is such as money, marriage, goods, services, or whatever else may be esteemed in law an equivalent for the grant.

A consideration was not required in conveyances under the common law, by reason of the fealty and homage incident to such conveyances, which were deemed sufficient consideration therefor.

A consideration became necessary, however, to conveyances operating under the Statute of Uses, such as are hereafter enumerated; and it became settled that a consideration, expressed or proved, was necessary to conveyances so operating.

The consideration need not be expressed in the deed, but it had to exist. The general expression of a consideration was not sufficient, but a monetary or valuable consideration had to be expressed to raise the use, or be proved as existing. Since the Revised Statutes a consideration is not essential, as between the parties.

Jackson v. Schoonmaker, 2 Johns. 230; Goodell v. Pierce, 2 Hill, 659; Jackson v. Alexander, 3 Johns. 484, 491, 5 Barb. 455; Cunningham v. Freeborn, 11 Wend. 240, 248; Barnum v. Childs, 1 Sandf. 58 affd., 11 Barb. 14; Meriam v. Harsen, 2 Barb. Ch. 232; Ring v. Steele, 3 Keyes, 450; s. c., 4 Abb. Ap.

Neither the grantor nor his assignee can attack a deed made by him for illegality of consideration. Marpass v. Newman, 21 Week. Dig. 86. The relation of uncle and nephew held sufficient consideration of blood.

Eysaman v. Eysaman, 24 Hun, 430.

The relation of husband and wife, and his duty to support her, is held a good consideration, except as against creditors. Hunt v. Johnson, 44 N. Y. 27. Marriage as a consideration. Anderson v. Blood, 86 Hun, 244.

Seal.—A seal is presumptive evidence of consideration, which may be rebutted if the defense is pleaded. 2 R. S. 406; Code Civ. Proc., § 840; Livingston v. Tremper, 4 Johns. 416; Hunt v. Johnson, 19 N. Y. 279; but a seal upon a deed is conclusive of consideration to the extent that it cannot be rebutted so as to invalidate it. Baird v. Baird, 81 Hun, 300. Cf. Fowler's Real Property Law, 661.

Extent to which parol evidence is admissible. Baird v. Baird, 81 Hun, 300.

As to necessity of seal, Tit. VII.

As to inadequacy. Wilmerding v. Jarmulowsky, 85 Hun, 285.

Seal and Record.—In Todd v. U. D. S. Institution, 118 N. Y. 337, the question arose upon the failure of the record to show that the grantor had sealed the deed. And it was held that the absence of proof that the deed was sealed when delivered made it ineffectual as evidence of the conveyance of title to the premises; that the record was essentially defective for purpose of evidence or notice, except as it was notice of the conveyance of an equitable interest.

Natural love and affection is held in this State a good consideration between those of the same blood, and the insertion of a small nominal pecuniary conas a purchase, and not a gift. Morris v. Ward, 36 N. Y. 587; Loeschegk v. Hatfield, 51 id. 660; Cushman v. Addison, 52 id. 628.

Natural love or affection will not render valid a covenant, promise, or executory agreement. Duvoll v. Wilson, 9 Barb. 487.

An agreement to support a party is a valuable consideration. Spalding v. Hallenbeck, 30 Barb. 292.

A deed to children of the grantor requires no pecuniary consideration. Russ v. Maxwell, 94 App. Div. 107.

Prospective Marriage. This is a valuable consideration, and a voluntary deed ceases to be so, if a marriage were induced by its provisions. Whelen v. Whelen, 3 Cow. 537; Verplank v. Sterry, 12 Johns. 536.

An heir cannot set up want of consideration in the deed of his ancestor. Jackson v. King, 4 Cow. 207.

Nonpayment of the nominal consideration in a sealed instrument does not render it void. Barnum v. Childs, 1 Sandf. Chan. 58, affd., 11 Barb. 14; Ring v. Steele, 4 Abb. Ap. Ca. 68.

Execution of a Trust Power.-A nominal consideration of one dollar, executed in pursuance of a trust power, is sufficient to pass the legal estate. Meakings v. Cromwell, 5 N. Y. 136.

See infra, as to consideration under deeds of "Bargain and Sale."

Failure of Consideration. Where a conveyance was made in consideration of the assignment to the grantor of a bond and mortgage which both parties supposed valuable, but which were not so, the conveyance was set aside for mistake. Knapp v. Fowler, 30 Hun, 512.

Inadequacy of Consideration.—A valuable consideration does not necessarily mean an adequate consideration, and if the consideration for the sale of real estate is valuable and substantial, although inadequate as to amount, it will be sufficient to sustain the grantee's title to the premises conveyed, unless he is chargeable with notice of a fraudulent intent on the part of his grantor. Wilmerding v. Jarmulowsky, 85 Hun, 285.

Vide also Anderson v. Blood, 86 Hun, 244; Truesdell v. Sarles, 104 N. Y.

Deeds in consideration of care and support will not be set aside merely for inadequacy of consideration. York v. Dick, 61 App. Div. 620.

Expression of Consideration.—As the expressed consideration may be always inquired into, the only effect of the clause acknowledging a consideration paid is to estop the grantor from denying that there was any consideration. For every other purpose it may be explained, varied, or contradicted by parol. It is not necessary that it be shown to have been paid, if the deed recite that it was paid. Its extent or amount may be questioned, and another or different one be proved, and fraud or illegality may be shown.

Parol evidence as to a promise made by landlord, but not included in the written lease, admitted as part of the consideration. Lynch v. Hunnecke,

19 N. Y. Supp. 718.

. It is a general rule that a written agreement, complete in itself, is presumed to embrace within its stipulations the conclusion to which the parties had arrived when it was made, and their prior and simultaneous negotiations on the subject are not admissible as evidence to change or modify it, but it is also a general rule in the State of New York that the consideration clause of an instrument is open to explanation and modification by parol evidence for all purposes except to defeat the legal effect of the contract and to vary the terms of its stipulations; the consideration clause is only evidence of a fact, and as such is susceptible of explanation by page 1. Pilot v. Pilot 22. by parol. Riley v. Riley, 83 Hun, 398.

Recitals in deeds held not to be proof of payment of the purchase

money. Simmons Creek Coal Co. v. Doran, 142 U. S. 417.

Neither the grantee nor the grantor is estopped from proving that there were other considerations than the one expressed, or from showing how it was to be paid.

Wooden v. Shotwell, 3 Zabr. (N. J.) 465; Goodspeed v. Butler, 46 Maine, 141; Emmons v. Litchfield, 13 id. 233; Meakings v. Cromwell, 2 Sandf. 512, affd., 5 N. Y. 136; Spalding v. Hallenbeck, 30 Barb. 292; Stackpole v. Robbins, 47 id. 212, affd., 48 N. Y. 644; Seaman v. Hasbrouck, 35 Barb. 151; Delameter v. Bush, 63 id. 168; Winans v. Peebles, 31 id. 371, revd., 32 N. Y. 423, on other grounds; Webster v. Van Steenberg, 46 Barb. 211; Wheeler v. Billings, 38 N. Y. 263; Meriam v. Harsen, 2 Barb. Ch. 232; see also 5 Barb. 455; Sheppard v. Little, 14 Johns. 210; Bowen v. Bell, 20 id. 338; McCrea v. Purmort, 16 Wend. 460; Hibbard v. Haughian, 70 N. Y. 54.

If a nominal valuable consideration be expressed no other expressed recitals of inducement or consideration in the same instrument need be proven. Rockwell v. Brown, 54 N. Y. 210.

Rockwell v. Brown, 54 N. Y. 210.

Voluntary Conveyances.— Deeds upon good considerations only are considered as merely voluntary, and in certain cases are set aside in favor of creditors and bona fide purchasers. A voluntary conveyance is one without valuable consideration.

A gift or voluntary conveyance would be effectual, as between the parties, without consideration, and is only liable to be questioned when the rights of creditors and subsequent purchasers are concerned. By the Revised Statutes no conveyance or charge shall be considered fraudulent as against creditors or purchasers solely on the ground that it was not founded on a valuable consideration.

2 R. S. 137, § 4.

The provision is re-enacted in the Real Property Law.

Real Property Law, § 229.

This provision of statute was in opposition to the Statute of Elizabeth. This provision of statute was in opposition to the Statute of Elizabeth, 27, Chap. 24, under which a voluntary conveyance, even for a meritorious purpose, was deemed to have been made with fraudulent views, and was set aside in favor of a subsequent purchaser for a valuable consideration, even, as sometimes held, though he had notice of the prior deed.

The question of fraudulent conveyances is reviewed in a subsequent chapter (infra, Chap. XXI), to which reference is made for the laws regulating the validity of voluntary conveyances, made with the intent to defraud creditors or purchasers, or otherwise.

A conveyance in expectation of death may be revoked upon recovery. Houghton v. Houghton, 34 Hun, 212.

TITLE IV. DESCRIPTION OF THE LAND CONVEYED.

In order to pass title to land, the word "land," or something equivalent, should be used. The word "land" includes, in legal signification, any ground or soil whatever, and all structures and things that are attached to or growing thereon. The word also includes "water," which, if the subject of conveyance as realty, must be described as land covered by water. Land has also legally an indefinite extent upward as well as downward.

The general principles to be observed in the matter of description are illustrated by the following cases:

As to the definition of the word real estate, land, property, real property, vide supra, Chap. IV, Tit. II.

Insufficient Description.—If the description is not sufficiently specific, the deed will be void, or if it is so ambiguous that it cannot be determined which of several tracts is intended to be conveyed. Rollins v. Pickett, 2 Hill, 552; Jackson v. Ransom, 18 Johns. 107; Mason v. White, 11 Barb. 173; Dygert v. Pletts, 25 Wend. 402.

The name of the State, county or town has been held unnecessary where other means of identification existed. Slater v. Breese, 36 Mich. 77; Robinson v. Brannan 115 Mass. 582. Stockwell v. The State. 101 Ind. 1.

v. Brennan, 115 Mass. 582; Stockwell v. The State, 101 Ind. 1.
As to description in tax deeds, vide infra, Chap. XLVI. Peck v. Mallams, 10 N. Y. 509.

A conveyance of "all my estate" is sufficiently certain. Jackson v. Delancy, 4 Cow. 427; The Chautauqua Bank v. White, 6 N. Y. 237.

"All other lands not hertofore conveyed being a part, etc.," will carry lots within its terms not expressly described. Sanders v. Townshend, 89 N. Y. 623.

A general description in a railroad mortgage of all its lands in a certain county adjoining its road and designed to be used in its business is sufficient to protect mortgages against subsequent judgment-creditors. Durant v. Kenyon, 32 Hun, 634. See also Coleman v. Manhattan Beach Imp. Co., 94 N. Y. 229; Scully v. Sanders, 44 Super. 89.

A grant of a stream or pond would not carry the land thereunder, but only water privileges. Nostrand v. Durland, 21 Barb. 478.

The words, "being the same premises, etc.," have been held in certain cases to enlarge the description. Thayer v. Fenton, 22 Weekly Dig. 85; see, however, Dardonville v. Lewis, 7 Weekly Dig. 188. Later words may restrict the estate granted. Green v. Cummings, 23 Weekly Dig. 282. Reference to a prior deed is held to cure misdescription. Grandin v. Heresche 20 The 200 The 2 nandez, 29 Hun, 399.

The boundaries given must inclose the land. Wheeler v. Spinola. 54

N. Y. 378.

Under the grant of a house or messuage the garden or curtilage passes, but not a close adjoining it. Ogden v. Jennings, 62 N. Y. 526; People v.

Gedney, 10 Hun, 151.

If there are certain particulars stated sufficient to designate the thing to be conveyed, the additional circumstances, false or mistaken, will not frustrate the deed; and they will be rejected as surplusage. The description, however, must agree with necessary particulars, and if they all are necessary and the description cannot be made certain by them, no title passes. Raynor v. Timerson, 46 Barb. 518; Hathaway v. Powers, 6 Hill, 453; Jackson v. Clark, 7 Johns. 217; Flay v. Cook, 54 Barb. 9; Jackson v. Marsh, 6 Cow. 281. See also, as to certainty of description, Jackson v. Roosevelt, 13 Johns. 97; Same v. Delancey, Id. 537; Same v. Ransom, 18 id. 107; Dygert v. Plitts, 25 Wend. 402; Jackson v. Parkhurst, 9 id. 209; Corbin v. Fackson, 14 id. 619: Jackson v. Livingston, 7 id. 136: Coleman v. Man Jackson, 14 id. 619; Jackson v. Livingston, 7 id. 136; Coleman v. Man. Beach Imp. Co., 94 N. Y. 229; 5 N. Y. Supp. 766.

A description by metes and bounds will control that by a street number (9 N, Y. Supp. 219), and the giving of a right street number to a wrong description by metes and bounds will not impose a duty of inquiry.

Thomson v. Wilcox, 7 Lans. 376, but see infra.

If there be two phrases which cannot be reconciled, one of which will defeat, and the other sustain the instrument, the former will be rejected. People ex rel. Myers v. Storms, 97 N. Y. 364.

A particular description appearing as if made upon survey is held to control a general description. Burnett v. Wadsworth, 57 N. Y. 634.

Intention must govern if possible. Masten v. Olcott, 101 N. Y. 152;
Norton v. Hughes, 17 Abb. N. C. 287 n.

The intention of the parties may, at times, be supplied. Reed v. Proprietors, etc., 8 How. 274; Mason v. White, 11 Barb. 173; but not to overrule certain and material description. Jones v. Smith, 73 N. Y. 205. But where grantor had no such land at the place described, but had in the vicinity, this was allowed to be shown. Thayer v. Finton, 108 N. Y. 394.

A deed conveying a half interest in a certain lot, among other things containing also a general conveyance of all lands upon a certain stream in a certain town, will convey only one-half the lot, though it be within the

general description. Gowdy v. Cords, 40 Hun, 469.

Where an owner of land built a house thereon, fenced off a separate lot with the house on it, and conveyed the lot by deed, describing it by metes and bounds, and according to such description one line of the lot would cut off three inches of the house and the house formed the chief part of the purchase, held, that the wall of the house formed the line of the lot. Breene v. Stone, 5 N. Y. Supp. 5.

Party Wall Line .- The use of the words "through the center of a party wall" is held not to control simple fixed courses and distances. Smyth v. McCool, 22 Hun, 595; 72 N. Y. 94. As to easement in use of the wall to the center, see Popper v. Peck, 14 Week. Dig. 235.

Street number and party walls as controlling courses and distances. Bernstein v. Nealis, 19 N. Y. Supp. 739; Muhlker v. Ruppert, 124 N. Y. 627; Nat. Com. Bk. v. Gray, 71 Hun, 295.

Acquiescence. A mutual acquiescence for many years, in a dividing line well defined and known, estops all parties, and declarations and acts may well defined and known, estops all parties, and declarations and acts may be proved to show acquiescence. 8 N. Y. Supp. 715; McCormick v. Barnum, 10 Wend. 104; Dibble v. Rogers, 13 id. 536; Rockwell v. Adams, 7 Cow. 761; Pierson v. Mosher, 30 Barb. 81; Baldwin v. Brown, 16 N. Y. 359; Vosburgh v. Teator, 32 id. 561; Jackson v. Van Corlear, 11 Johns. 123; Jackson v. McConnell, 19 Wend. 175. This case requires twenty years' acquiescence. Hunt v. Johnson, 19 N. Y. 279; as to forty years, vide, Ford v. Schlosser, 13 Misc. 205; Laverty v. Moore, 33 N. Y. 658; Hubbell v. McCulloch, 47 Barb. 287. Twenty years necessary. Corning v. The Troy, etc., Factory, 44 N. Y. 577. See also Jackson v. Dieffendorf, 3 Johns. 269; Jackson v. McCall. 10 id. 377; Adams v. Rockwell. 16 Wend. 285; Van Wyck Jackson v. McCall, 10 id. 377; Adams v. Rockwell, 16 Wend. 285; Van Wyck v. Wright, 18 id. 157; Townsend v. Haight, 51 N. Y. 656; Robinson v. Philips, 65 Barb. 418, affd. 56 N. Y. 634; Kingsland v. Mayor, 45 Hun, 198, affd., 110 N. Y. 569, approved, Langdon v. The Mayor, etc., of New York, 133 id. 628.

When owing to an inaccuracy or unintelligible description, etc., in a deed. Ford v. Schlosser, 13 Misc. 205; Smith v. Faulkner, 48 Hun, 186; Dale v. Jackson, 8 N. Y. Supp. 715.

Actual Location .- An actual location, on the strength of which improvements have been made, concludes parties and privies. So also an actual location where the description is vague. Corning v. The Troy Co., 44 N. Y. 577; Laverty v. Moore, 33 id. 658; Jackson v. Wood, 13 Johns. 346.

An actual location may be maintained even contrary to the boundaries in the deeds, where there have been acts sufficient to make an estoppel, or adverse possession, or mutual acquiescence, or obscurity of description. Adams v. Rockwell, 16 Wend. 285; Clark v. Wethey, 19 id. 320; Hubbell v. McCulloch, 47 Barb. 287; Van Wyck v. Wright, 18 Wend. 157; Rouse v. Cline, 1 Supm. 2; Ratcliffe v. Cary, 4 Abb. Ap. Ca. 4; Jones v. Smtih, 64 N. Y. 180; Buchanan v. Ashdown, 71 Hun, 327.

Closing clauses in a description, summing up the intention of the parties as to the premises conveyed, have a controlling effect upon all prior parts of the description.

Ousby v. Jones, 73 N. Y. 621.

Fraud and Mistake.— In case of misrepresentation or fraud as to the description, also in case of mutual mistake, equity will relieve. Wiswall v. Hall, 3 Paige, 313; Johnson v. Taber, 10 N. Y. 319; Voorhees v. De Meyer,

A vendor is guilty of fraud, if, knowing that he has no title he willfully suppresses the facts from the purchaser, and an action for damages will lie. Clark v. Baird, 9 N. Y. 183.

A true and certain description in a grant of land is not invalidated by the insertion of a falsity in the description, when, by rejecting the erroneous part, the conveyance can be supported according to the intention of the parties. Abbott v. Pike, 33 Maine, 204; Dodge v. Potter, 18 Barb. 193; Harvey v. Mitchell, 11 Foster, 575; Bell v. Sawyer, 32 N. Y. 72.

The mistake of a scrivener in preparing a writing may be shown by parol evidence, and the instrument reformed accordingly. Such reformation is an exercise of the equity powers of the court. This would be especially so when the correction is made to render valid and effectual what would otherwise be void for informality. Mistakes may be so apparent on the face of an instrument that courts will construe it as it ought to have been drawn. The liberality of courts has been particularly exercised as to the statement of the consideration, both in correcting what is wrong and inserting what has been omitted.

Where there is a mistake as to the street number of the premises and testator owned but one house on such street, the number given may be

stricken out. Govin v. Metz, 79 Hun, 461.

Misrepresentation and mutual mistake in quantity requiring reduction in price. Wheeler v. Robinson, 86 Hun, 561.

Use of the words "more or less" does not affect the right to relief from misrepresentations of grantor. Paine v. Upton, 21 Hun, 306, affd., 87 N. Y.

The rule caveat emptor applies to representations as to quality where an examination will show the fact, e. g., a representation that a farm had no daisies on it. Vandewalker v. Osmer, 1 Supm. 50; s. c., 65 Barb. 556.

Parol Evidence.- Parol evidence may be given to explain and identify the description. A parol understanding, however, cannot control the express terms of the deed. Extrinsic evidence of a documentary character may also explain what is ambiguous. But as a general rule parol evidence will not be received to engraft on a deed any condition, limitation or restriction inconsistent with its terms.

Jackson v. Wood, 13 Johns. 346; Clark v. Baird, 9 N. Y. 183; Rathbun v. Rathbun, 6 Barb. 98; Dygert v. Pletts, 25 Wend. 402; Hunt v. Johnson, 19 N. Y. 279; Clark v. Wethey, 19 Wend. 320; Mason v. White, 11 Barb. 173; Nightengale v. Walker, 3 Iowa, 96; see also Blake v. Doherty, 5 Wheat. 359; Jackson v. Parkhurst, 4 Wend. 369; Ratcliffe v. Cary, 4 Abb. Ap. Ca. 4; Putzel v. Van Brunt, 40 Super. 501; Pangburn v. Miles, 10 Abb. N. C. 42; Van Mater v. Burns, 76 Hun, 3; Johnson v. St. Louis, etc., 141 U. S. 602; House v. Walch, 144 N. Y. 418. Parol evidence of a guaranty considered inadmissible. Van Winkle v. Crowell, 146 II S. 42. inadmissible. Van Winkle v. Crowell, 146 U. S. 42.

Latent ambiguities may be explained. Seaman v. Hogeboom, 3 Barb. 215; Brady v. Cassidy, 9 Misc. 107; House v. Walch, 144 N. Y. 418.

Parol agreements between adjoining owners may be upheld by way of estoppel, when to settle boundaries, if they are indefinite or uncertain otherwise they would be void by the statute of frauds. Clark v. Baird, 9 N. Y. 183; Vosburgh v. Teator, 32 N. Y. 561; Terry v. Chandler, 16 N. Y. 354; Clark v. Wethey, 19 Wend. 320; Ambler v. Cox, 13 Hun, 295; Williams v. Montgomery, 16 Hun, 50.

A deed in fee may not be contradicted by parol so as to show that it

was not intended to operate at all. Hutchins v. Hutchins, 98 N. Y. 56.

An exception to the rule is to admit the evidence when it tends to show that a part only of an agreement was reduced to writing. Chapin v. Dobson, 78 N. Y. 74; Brigg v. Hilton, 99 id. 517; Routledge v. Worthington Co., 119 id. 592; Vickers v. Battershall, 84 Hun, 496.

The general rule does not apply to collateral undertakings or where the written instrument was executed in part performance only of an entire oral agreement. Beagle v. Harby, 73 Hun, 310; Grand Rapids Veneer Works v. Forsythe, 83 Hun, 230.

Oral agreement admissible when it refers to matters on which the written agreement is silent. Seitz v. Brewers' Ref. Mach. Co., 141 U. S. 510. Or where the original contract is verbal and entire, and a part only re-

duced to writing. Grand Rapids Veneer Works v. Forsythe, 83 Hun, 230. Parol evidence is competent to show that a deed was intended as an ad-

Palmer v. Culbertson, 143 N. Y. 213.

Where the words of an ancient deed are equivocal, the usage of parties under the deed may be given to explain it. An ambiguity apparent on the face of the instrument cannot be explained extrinsically, but a latent ambiguity may. See on this head Fish v. Hubbard, 21 Wend. 651; French v. Carhart, 1 N. Y. 96; Swick v. Sears, 1 Hill, 17; Livingston v. Ten Broeck, 16 Johns. 14; Parsons v. Miller, 15 Wend. 561. A granteemay take any uncertainty in his favor. Jackson v. Hudson, 3 Johns. 375; Jackson v. Gardner, 8 id. 394.

As to a suit in equity to fix boundary lines, see Boyd v. Dow, 65 Barb. 237. On questions of fraud in the reducing of contract to writing, the whole of it is open to parol proof, and the court will disregard the writing, and treat the whole transaction as a verbal contract. Van Alstyne v. Smith, 82 Hun, 382,

Monuments and Boundaries.-Visible, known and fixed boundaries, monuments or natural objects, as existing at the time, as a river, a spring, a marked tree, etc., referred to in a deed, control quantity, courses and distances, where they conflict. The least certain and material parts of a description must yield to those that are most certain and material.

The above rules are subject to the modification that the entire description must be read so as to determine its fair import. Damziger v. Boyd, 53 Super. 398; West v. Hamilton, 12 Weekly Dig. 335; Masten v. Olcott, 101 N. Y. 152; Robinson v. Kime, 70 id. 147; Yates v. Van De Bogert, 56 id. 526; Raynor v. Timerson, 46 Barb. 518; Schoonmaker v. Davis, 44 id. 463; People v. Wendell, 8 Wend. 183, affig. 5 id. 142; Jackson v. Clark, 7 Johns. 217; Jackson v. Camp, 1 Cow. 605; Doe v. Thompson, 5 id. 371; Jackson v. Frost, Id. 346; Jackson v. Ives, 9 id. 661; Van Wyck v. Johnson, 10 Word 157; Saaman v. Handbarm 2 Park alls. Clark v. Baird a N. V. 183. 18 Wend. 157; Seaman v. Hogeboom, 3 Barb. 215; Clark v. Baird, 9 N. Y. 183; Northrop v. Sumney, 27 Barb. 196; Jones v. Holstein, 47 id. 311; Cronk v. Wilson, 40 Hun, 269; White v. Nichols, 64 N. Y. 65; White v. Luning, 3 Otto, 514; Lovejoy v. Tietjen, 47 Hun, 321; Thayer v. Finton, 108 N. Y. 394.

A line described as beginning at a tree may be construed to begin at the side of the tree most in conformity with possession of grantor. Stewart. v. Patrick, 68 N. Y. 450.

In cases of ambiguity courts hold parties to the actual location. Sherman

v. Kane, 86 N. Y. 57.

Effect will be given to fixed lines or known boundaries or monuments rather than mathematical divisions which have never been made. People v. Hall, 43 Misc. 117.

As an exception to the above general rule it has been held that where the courses and distances are right in themselves, they will prevail against monuments, so as to carry out the intent of the parties. Higginbotham v. Stoddard, 72 N. Y. 94. See also Townsend v. Hayt, 51 id. 656.

Natural boundaries are more to be regarded than artificial ones, or those not permanent. Jackson v. Smith, 9 Johns. 100; Baldwin v. Brown, 16 N. Y. 359.

A distinct boundary, as by a stream, referring to a map where the boundary is different, will control the map. Jamison v. Cornell, 5 Supm. 629.

But where the courses and distances are to form a fixed line, or to inclose a fixed quantity, they will control natural boundaries. The Buffalo, etc., Co. v. Stigler, 61 N. Y. 348; Higginbotham v. Stoddard, 9 Hun, 1, affd., 72

Also as to natural boundaries controlling, vide Robinson v. Kime, 70 N. Y. 147.

As to artificial monuments governing. Muhlker v. Ruppert, 124 N. Y. 627. A fixed line will control general words of occupation. Jones v. Smith, 73 N. Y. 205.

A general clause of intention controls special clauses. Ousby v. Jones, 73 N. Y. 621.

If the boundaries are definite and distinct, no extrinsic facts or parol evidence can be resorted to. Jackson v. Freer, 17 Johns. 29; Drew v. Swift, 46 N. Y. 204; Van Wyck v. Wright, 18 Wend. 157.

The rule that natural boundaries control is not inflexible and applies

only in case of doubt. People v. Jones, 112 N. Y. 597.

When it appears from the designation of quantity, or other elements of description, that the course and distances from a fixed and determined line were intended to control monuments, then the latter should be disregarded. The intention of the parties, as evidenced by the deed, is in all cases to determine the location of the premises. Benjamin v. Welch, 73 Hun, 71.

An erroneous boundary, though continued for twenty years, may be altered.

Smith v. McNamara, 4 Lans. 169.

As to agreement to settle boundaries, vide Wood v. Lafayette, 46 N. Y. 484. A grant from one terminus to another means a direct line; but if the line is to run along a river or creek from one terminus to another, it must follow the river or creek, however sinuous it may be; and if that description will not reach the terminus, it must be pursued so far as it conducts towards the terminus, and then relinquish for a direct line to it. Lessee of Wyckoff v. Stephenson, 14 Ohio, 13; Shultz v. Young, 3 Ired. (N. C.) 385; Jackson v. Carey, 2 Johns. Ca. 350; Kingsland v. Chittenden, 6 Lans. 15, affd., 61 N. Y. 618.

If there be nothing to control the course and distance, the line is run by

the needle.

So also the line of another tract referred to in the deed as matter of description, controls "courses and distances." Corn v. McCrary, 3 Jones (N. C.), 496.

As to verbal declarations as to boundaries, vide Smith v. McNamara,

4 Lans. 169.

A known and well-ascertained place of beginning cannot be varied by the incidental mention of it in a subsequent patent. Jackson v. Wilkinson, 17 Johns. 146; Jackson v. Wendell, 5 Wend. 142, affd. 8 id. 183.

Where a lot and "building" is contracted for, the grantors must convey the building and lot on which it is, although it may not be within the boundaries as specified. White v. Williams, 48 N. Y. 344; Breene v. Stone. 5 N. Y. Supp. 5.

Order of Description.— The lines of the survey must be run from the place of beginning in the deed. Elliott v. Lewis, 10 Hun, 486.

Description held to be ascertainable by running the courses in reverse as to public lands. Simmons Cr. Coal Co. v. Doran, 142 U. S. 417.

Collateral References.-Apparent mistake may be corrected by other parts of the description and by natural monuments. Donahue v. Case, 61 N. Y. 631. A misdescription cured by reference to another deed. Grandin v. Hermandez, 29 Hun, 399; Bernstein v. Nealis, 144 N. Y. 347.

Erroneous reference to another deed rejected as surplusage. -Zink v.

McManus, 49 Hun, 583.

Reference to another deed or survey. Cox v. Hart, 145 U.S. 376.

Courses and Distances.—The words of a course or distance have been frequently construed to mean the reverse of the natural sense in order to rectify a mistake, where the intent was plain.

Word "southeast" construed to mean "southwest." Brookman v. Kurzman, 94 N. Y. 272.

Mistake in points of compass disregarded. Lovejoy v. Tietjen, 47 Hun, 321.

Quantity.—In the absence of fraud in selling land in bulk, e. g., as a farm, representations by the vendor, as to the quantity of a tract, where the sale is for a gross sum; or the mere mention of a quantity of acres, after descriptions by boundaries, is but matter of description, and does not amount to a covenant of warranty of quantity, or bind the vendor to make compensation for any deficiency.

Roat v. Puff, 3 Barb. 353; Jackson v. McConnell, 19 Wend. 175; Jackson v. Defendorf, 1 Cai. 493; Mann v. Pearson, 2 Johns. 37; Johnson v. Taber, 10 N. Y. 319; Moore v. Jackson, 4 Wend. 59, revg. 6 Cow. 706; Northrop v. Sumney, 27 Barb. 96; Gerhardt v. Sparing, 49 Hun, 1.

The enumeration of the quantity of land conveyed after a description thereof, is superfluous, immaterial and only matter of description. Benjamin v. Welch, 73 Hun, 371.

Nor do the words "more or less" extend the grantee's boundary or description as given. A sale of land at a fixed price stating the number of

scription as given. A sale of land at a fixed price, stating the number of acres, is a sale in bulk. Butterfield v. Cooper, 6 Cow. 481; Brady v. Hennion, 8 Bosw. 528; Marvin v. Bennett, 26 Wend. 169; Faure v. Martin, 7 N. Y. 210.

A conveyance of "lot 14," "it being 160 acres," would convey the whole, though it contained 185 acres. Hathaway v. Power, 6 Hill, 453.

A grantee may claim all the lands embraced by monuments, boundaries, etc., although the tract is stated to contain less than the actual number of acres. Roat v. Puff, 3 Barb. 353; Jackson v. McConnell, 19 Wend. 175; The Morris Canal Co. v. Emmett, 9 Paige, 168.

A very great difference however between the actual and the estimated

A very great difference, however, between the actual and the estimated quantity of acres of land sold in the gross, would entitle a party to relief in chancery on the ground of gross mistake. Quesnel v. Woodlief, 2 Hen. & Munf. 173, note; Nelson v. Matthews, 2 id. 164; Harrison v. Talbot, 2 Dana (Ken.), 258; Voorhees v. DeMeyer, 2 Barb. 37; Belknap v. Sealy, 14 N. Y. 143; Paine v. Upton, 21 Hun, 306, affd., 87 N. Y. 327.

As to a mutual mistake of contents, where land was sold at a certain price per acre, vide George v. Tallman, 5 Lans. 392; Wilson v. Randall, 7 Hun, 15, affd., 67 N. Y. 338.

Equity will not relieve against a mistake in the conveyance of lands, in respect to the quantity conveyed, where a deed is executed and delivered by the vendor, and a mortgage given in return to secure the purchase money,

unless the proof be clear, direct, and positive.

Also to entitle the purchaser to relieve in equity, where land was conveyed and a mortgage taken back, the quantity must have constituted a condition of the sale, as agreed upon between the parties; it is not enough that it may have operated as an inducement to the purchase in respect to which the purchaser, in the absence of fraud, will be deemed to have assumed the risk. Nor will relief be granted, if the purchaser, with ordinary vigilance before the completion of the contract, by viewing the premises or properly settling the terms of the description, might have guarded against the alleged mistake.

It is also held that equity will only interfere where the sale had been made by the acre or foot, unless there has been fraud or willful misrepresentation. The Morris Canal Co. v. Emmet, 9 Paige, 169; Marvin v. Bennet,

26 Wend. 169; Wilson v. Van Pelt. 5 Hun. 414.

The words "more or less" do not affect the right to relief for mistakes in quantity caused by the vendor's misrepresentation. Paine v. Upton, 87 N. Y. 327.

If parties contract to sell by the acre the passing of the deed does not prevent the vendee from showing a deficiency and recovering surplus paid, if such right be reserved. Murdock v. Gilchrist, 52 N. Y. 242.

Equity may reform a deed for mutual mistake and the mistake may be shown by parol. Bush v. Hicks,, 2 Supm. 356, affd., 60 N. Y. 298; Paine v. Upton, 87 N. Y. 327.

The intent, as gathered from the context, is to be considered. Mott v. Mott, 68 N. Y. 246, revg. 8 Hun, 474.

Courts will give effect to the instrument according to the intention of the parties, if that is discoverable from legitimate sources of information. In giving effect to such intention, it is also their duty to reject false or mistaken particulars, provided there be enough of the description remaining to enable the court to locate the land intended to be conveyed. Benjamin v. Welch, 73 Hun, 371.

An error in description, whereby one of two grantees gets less, and the other more than he should, is a defense to ejectment for the erroneous portion by the latter. Reformation of the deed is unnecessary. Glacken v. Brown, 39 Hun, 294; Gallup v. Bernd, 132 N. Y. 370.

Streams.— Land bounded in general terms by a small lake, pond or stream, above tide-water, and not "navigable," as so generally understood, is not bounded by the bank, but by the middle of the stream, unless otherwise specified (subject to its use by the public as a highway), and the grantee has a right to use the land and water in any way not inconsistent with the public easement.

Canal Apprs. v. People, 17 Wend. 571; Commrs. of Canal Fund v. Kempshall, 26 id. 404; Child v. Starr, 4 Hill, 369; The Seneca Nation v. Knight, 23 N. Y. 498; Luce v. Carley, 24 Wend. 451; People v. Seymour, 6 Cow. 579; Jackson v. Hathaway, 15 Johns. 447; Jackson v. Louw, 12 id. 252; Jackson v. Halstead, 5 Cow. 216; Wetmore v. Law, 34 Barb. 515; Demeyer v. Legg, 18 id. 14; Case v. Haight, 3 Wend. 632; Kingsland v. Chittenden, 6 Lans. 15; Morgan v. King, 35 N. Y. 454.
Boundaries by or up a greek would also take through the content of the second states.

Boundaries by or up a creek would also take through the center, or along the meanders thereof, running from a post on the bank. Seneca Nation v. Knight, 23 N. Y. 498; Jackson v. Louw, 12 Johns. 252. So held where bounded

only on the margin of a creek. Ex parte Jennings, 6 Cow. 518.

The above principle applies to small inland lakes, but does not apply to the great lakes; when such small lakes are filled in, the adjoining owner has title to the land made.

Nor does it seem to apply in the case of canals. Hoff v. Tobey, 66 Barb.

And extraneous circumstances may change the general rule. Hall v. White-

hall, etc., Co., 103 N. Y. 129.

In large natural ponds a boundary carries only to low water and the opening of a channel letting in salt water will not affect prior rights. Aliter of artificial ponds. Wheeler v. Spinola, 54 N. Y. 377.

Filum aquae applies to ponds. Gouverneur v. National Ice Co., 134 N. Y. 355, revg. 11 N. Y. Supp. 87.

Beach.—A boundary on a beach gives to high-water mark in default of the expression of a different intent. Trustees v. Kirk, 68 N. Y. 459. But intent

will control. People v. Jones, 112 N. Y. 599.

The owner on large lakes, unless it is otherwise expressed, owns to low water, on the flats. Champlain, etc., Co. v. Valentine, 19 Barb. 484; Howard v. Ingersoll, 13 How. (U. S.) 318; Ledyard v. Ten Eyck, 36 Barb. 102; Banks v. Ogden, 2 Wall. 57; Kingman v. Sparrow, 12 Barb. 201; 30 id. 9.

The rule does not apply to a national boundary where it is a river. Champlain, etc., Co. v. Valentine, 19 Barb. 484, supra; Kingman v. Sparrow, 12 id. 201; 30 id. 9, supra. Contra it extends only to high-water mark. People v. Jones, 112 N. Y. 599.

"To the north bounds of a river" would carry to the center. Walton v.

Tiff, 14 Barb. 216.

The rule has been held to apply to the Mississippi river. Jones v. Soulard,

24 How. (U.S.) 41.

Actual possession of the upland under a deed purporting to convey to lowwater mark is not adverse possession of the land between high and low water as against the true owner. Roberts v. Baumgarten, 51 Super. 482, affd., 110 N. Y. 380.

Descriptions "by the river," or "along the river," or "upon the margin," or "to the bank" of a river, or along the waters of an "outlet," also "to the river, and thence along the shore," etc., restrict the grant to the margin. Storer v. Freeman, 6 Mass. 435; Hatch v. Dwight, 17 id. 298; Child v. Starr, 4 Hill, 369. So a boundary by the bank of a river excludes the river. man v. Sparrow, 12 Barb. 201; Starr v. Child, 5 Den. 599; Babcock v. Utter, Ct. Ap. Ca. 27.

But would take to the margin at low-water mark where the stream was not navigable. Walton v. Tift, 14 Barb. 216; Halsey v. McCormick, 13 N. Y. 296. So would a boundary by the shore. Child v. Starr, 4 Hill, 369, revg. Starr v. Child, 20 Wend. 149. So of a creek though the boundary be by courses and distances along the bank. Yates v. Van de Bogert, 56 N. Y. 526.

One whose land is bounded by the bank gets no interest in the water-power. Hall v. Whitehall, etc., Co., 103 N. Y. 129.

The rule as to grants bounded on the shore or bank of the sea or navigable.

rivers is not applicable to streams not navigable. Helsey v. McCormick, 13 N. Y. 296.

Alluvial Increment and Attrition.—As to these subjects, vide Child v. Starr, 4 Hill, 369; also Livingston v. Jefferson, 1 Brock, 203. As a general rule the title of a riparian owner is changed by alluvion or dereliction only where the accretion of dry land is by imperceptible degrees; Halsey v. McCormick, 18 N. Y. 147; and the accretion belongs to the contiguous strip. The Mayor, etc. v. The U. S., 10 Pet. 662; Saulet v. Shepherd, 4 Wall. 502; Banks v. Ogden, 2 id. 57; County of St. Clair v. Covington, 23 id. 46. See also Chap. XLIII.

Alluvion, however, at the end of the wharf does not affect the right of the

State. 31 Cal. 118.

Where the accretion is sudden and large on tide-water, it belongs to the State. Emans v. Turnbull, 3 John. 313; 2 Black. Coms. 261; Harg. Law Tracts, 28.

Avulsion held to work no change of original boundary. Nebraska v. Iowa, 143 U.S. 359.

Islands.—A description to and up the river would not include an island. Nor would the grant of a river pass the soil under it, but only the piscary. Jackson v. Halstead, 5 Cow. 216; Co. Litt. 4b; Coms. Dig. (Grant E.) 5.

When a portion of an island becomes detached by the action of the sea, held that the description of the original island included the detached portion.

Morton v. Manhattan Beach Imp. Co., 29 Hun, 266.

When an owner of an island in a navigable river divides the land into lots, laying out a road skirting the river, and conveys a lot facing on the road, the presumption is that the grantee receives title to the street and riparian rights of wharfage, etc., subject to an easement in other grantees, to pass over the street. Johnson v. Grenell, 112 App. Div. 620.

Patents from the United States .- Persons taking lands under patent from the United States do not, in taking lands bordering on navigable streams, take beyond the border of the stream, although the stream be beyond tidewater. St. Paul, etc., R. R. Co. v. Schurmier, 7 Wall. 272.

Grants by the United States of lands bounded on streams and other waters, without any express restrictions or reservations, to be construed by the laws of the State in which the lands lie. Hardin v. Jordan, 140 U. S. 371.

Navigable Streams.- In the case of The People v. The Canal Appraisers, 33 N. Y. 461, it is held, as to the Mohawk river, that it is a "navigable stream," and the title to the bed is in the people, who are not liable in damages for any diversion of the stream. This case held that the common law ages for any diversion of the stream. This case held that the common law rules as to the ownership of the bed of fresh water streams, beyond tidewater, whether navigable or not, were not applicable to this country, but as to this is overruled by Smith v. Rochester, 92 N. Y. 463, which holds the Mohawk and Hudson to be governed by the civil law, by which the reparian owners did not hold the bed of the stream, but considers the common law rule to be applicable to streams in general.

The case of the People v. The Canal Appraisers, 33 N. Y. 461, upholds the decision of the Court of Errors in the case of the Canal Appraisers v. The People, 17 Wend. 571, reversing 13 id. 335, which is to the effect that the great navigable fresh water streams of this country are not subject to the principle of individual appropriation allowed by the common law of England.

See also McManus v. Carmichael, 2 Clarke's Ca. (Iowa); Bowman v. Watheu, 2 McL. 376; St. Paul v. Schurmeir, 7 Wall. 272; Crill v. City of Rome, 47 How, Pr. 398. See also infra, Chap. XLIII.

Tide-Waters and Arms of the Sea. - When the sea, bay, or navigable river, or tide-water is named as the boundary of land in a grant of the title of land, the line of ordinary high-water mark is intended and inferred where the common law prevails. Where the grant, however, is one of jurisdiction, the boundary would extend to low-water mark.

Martin v. Waddell, 16 Pet. 367; United States v. Pacheco, 2 Wall. 587; Palmer v. Hicks, 9 Jonhs. 133; Gough v. Bell, 1 Zabriskie (N. J. R.) 156; The Railroad Co. v. Schurmier, 7 Wall. 272; Lansing v. Smith, 4 Wend. 9; Wiswall v. Hall, 3 Paige, 313; People v. Tibbets, 19 N. Y. 523; Gould v. Hudson R. R. R., 6 id. 522; declared overruled in Rumsey v. The N. Y. & N. E. R. Co., 133 id. 79; People v. Canal Appraisers, 33 id. 461; The Champlain R. R. Co. v. Valentine, 19 Barb. 484; vide also Smith v. Maryland, 18 How (II S.) 71; Don v. Jassey Co. 15 id. 422 18 How. (U. S.) 71; Den v. Jersey Co., 15 id. 426.

But where it is evident from the description that it is meant to include low-water mark, it has been so held. Oakes v. DeLancey, 133 N. Y. 227. The title of the State to the sea coast and the shores of tidal rivers is an

incident and part of its sovereignty, which cannot be surrendered, alienated

or delegated, except for some public purpose or some reasonable use which

can fairly be said to be for the public benefit.

A grant made by the Legislature within the limits of its powers does not constitute a contract between the State and the grantee which is beyond the power of revocation by a subsequent Legislature. Coxe v. State of N. Y., 144 N. Y. 396.

See a case where the boundary was held to be low-water mark in order to fill out the description. Oakes v. DeLancey, 133 N. Y. 227.

A grant to the town of Harlem was held to extend to high-water mark in Mayor v. Hart, 95 N. Y. 543, revg. 16 Hun, 380.

A conveyance by the city of New York to an individual "by the Hudson River" does not include the tideway vested in the city under the Dongan Charter of 1686, which is held by it by virtue of the sovereign power delegated by that instrument in trust for the use of the public and for commerce. Matter of Mayor, etc. of New York, 182 N. Y. 361.

Streets and Highways.— Land in a highway may pass not only by special description in a conveyance, but constructively. If a person, over whose land a highway is laid out, convey the land on either side of it, by describing the land by such special boundaries as not to include the road or any part of it, the property in the road would not pass to the grantee by the deed, nor would it pass as an incident or appurtenance.

And if the street were closed under Laws 1867, Chap. 697, the owner declared entitled would be the original owner of the road-bed. Fearing v. Irwin, 4 Daly, 385, affd., 55 N. Y. 486.

The intent as shown by the context must govern. Mott v. Mott, 68 N. Y.

246, revg. 8 Hun, 474.

If, however, lots are conveyed by description bounding them "by," "upon" or "along" roads or streets in which the grantor has an interest or estate, the respective grantees will take the fee of the land in front of their respective lots to the center of the streets. This applies equally to city lots as to rural property.

Halloway v. Delano, 18 N. Y. Supp. 700; s. c., 64 Hun, 27, affd., 139 N. Y. 390; Matter of Gilbert Elevated R. R. Co., 38 Hun, 438; Greer v. N. Y. Cen. R. R. Co., 37 id. 346; Story v. N. Y. E. R. R. Co., 90 N. Y. 122; Van Winkle v. Van Winkle, 184 N. Y. 193; Hudson River Tel. Co. v. Forestal, 56 Misc. 133; Osborn v. Auburn Tel. Co., 189 N. Y. 393; Miller v. N. Y. & North Shore Ry. Co., 183 id. 123; Mott v. Eno, 97 App. Div. 580; Matter of Mayor, etc. of New York, re Leggett Ave., 80 id. 618.

But a specific bounding by the side of the road is effective to limit to the road and no further. Miller v. Einstein, 105 App. Div. 413; Tietgen v. Palmer, 121 App. Div. 233.

Or probably if a municipal corporation were to grant land bounded by a public street.

Unless the city had an interest in retaining control of the strip. Gere v. McChesney, 84 App. Div. 39; Graham v. Stern, 168 N. Y. 517.

So also if a strip of land were the only means of access to lots, and they were bounded on that, they would be considered as bounded to the center (unless words were used showing an intention to restrict the grant); subject, in all cases, to the public easement.

Perrin v. The N. Y. C. R. R. Co., 36 N. Y. 120, affg. 20 Barb. 65; Herring v. Fisher, 1 Sandf. 344; Sherman v. McKeon, 38 N. Y. 266; Jackson v. Yates, 15 Johns. 477; Jones v. Cowman, 2 Sandf. 234; Hammond v. McLachlan, 1 id. 323; 23 N. Y. 61; The People v. Law, 34 Barb. 494; Wetmore v. Story, 22 id. 414; Anderson v. James, 4 Robin. 35; Wetmore v. Law, 34 Barb. 515; Dunham v. Williams, 36 id. 136, and 37 N. Y. 251. The court will not take judicial notice of the width of sidewalks, etc. Porter v. Waring, 2 Abb. N. C. 230; s. c., 69 N. Y. 250.

Whether or not fee of an adjacent street or road passes is question of intention. Matter of City of New York (Jerome Ave.), 120 App. Div. 297; Hudson River Tel. Co. v. Forrestal, 56 Misc. 133.

It applies to a grant by the State. Gere v. McChesney, 84 App. Div. 639.

The Presumption as to Ownership .- The legal presumption, both as to grantor and grantee, as respects a highway or road, is that one who owns grantor and grantee, as respects a lighway or road, is that one who owns both sides of a highway, is presumed entitled to the fee of the road, subject to the public easement. Matter of Johnst, 19 Wend. 659; Van Amringe v. Barnett, 8 Bosw. 358; Mott v. Mayor, 2 Hilton, 358; Herring v. Fisher, 1 Sandf. 344; Wetmore v. Story, 22 Barb. 414; Bissell v. N. Y. C. R. R. Co., 23 N. Y. 61; The People v. Law, 34 Barb. 494; Dunham v. Williams, 37 N. Y. 251; Williams v. N. Y. C. R. R., 16 id. 97; Adams v. Rivers, 11 Barb. 390; English v. Brennan, 60 N. Y. 609; White's Bank of Buffalo v. Nichols, 64 id. 65; Pollock v. Morris, 51 Super 112, affd. 105 N. Y. 676; Van Winkle 64 id. 65; Pollock v. Morris, 51 Super. 112, affd., 105 N. Y. 676; Van Winkle v. Van Winkle, 184 id. 193.

But land bounded by a street, it has been held, does not take to the center, unless the street is a highway, and has been held, does not take to the center, in re Mayor of New York, 2 Wend. 472; Livingston v. The Mayor, 8 id. 85; Wyman v. The Mayor, 11 id. 486; 5 Duer, 70; 17 id. 650; 18 id. 411; 19 id. 128; In re Twenty-ninth Street, 1 Hill, 189; In re Mayor of New York, 1 Wend. 262; Willoughby v. Jenks, 20 id. 96. This view, however, is overruled in the latter case of Bissell v. N. Y. Central R. R. Co., 23 N. Y. 61, revg. all the cases. Augustine v. Britt, 15 Hun, 395, affd., 80 id. 647.

A boundary generally "by the street" gives to the center, whether the land be in the city or country, subject only to the public easement. Bissell v. N. Y. C. R. R. Co., 23 N. Y. 61; 42 Barb. 465; 20 Barb. 52; Hammond v. McLachlan, 1 Sandf. 323; Terrett v. N. Y., etc., Co., 49 N. Y. 666; The People v. Law, 34 Barb. 494; Banks v. Ogden, 2 Wall. 57, and cases above cited. Not if the grantor has no title beyond the side of the street. Bliss v. Johnson, 73 N. Y. 529.

See where grantor owned whole of street to water on further side. Johnson

v. Grenell, 112 App. Div. 620.

v. Grenell, 112 App. Div. 620.

Not so if bounded by the "line" by metes and bounds and feet. Jones v. Cowman, 2 Sandf. 234; Falkner v. N. Y. W. S., etc., R. R. Co., 17 Abb. N. C. 279. See, however, Van Winkle v. Van Winkle, 184 N. Y. 193. Or the contrary clearly appears in the deed. Lee v. Lee, 27 Hun, 1.

Boundaries to a road and "along a road," take to the center. Sizer v. Devereaux, 16 Barb. 160. Also "by" or "upon." Mott v. Mott, 68 N. Y. 246. Distinguished, Patten v. N. Y. Elevated R. R. Co., 3 Abb. N. C. 306, where the point of beginning was in the side of the street. See also English v. Brennan, 60 N. Y. 609, and 13 Wkly. Dig. 534; Haberman v. Baker, 128 id. 253.

So also, if there is reference to a map, and the map shows the premises adjacent to a street, the grantee would take to the center.

A boundary along the "line" of a street would take to the middle. Sherman v. McKeon, 38 N. Y. 266. To the contrary was Wetmore v. Law, 34 Barb. 515, reversing previous cases "To the exterior line of a street" will not carry to the center. White v. Michels, 64 N. Y. 65; Mead v. Riley, 50 Super. 20.

If in a conveyance the description bounds on a street as an entirety, in distinction from the side, the law will presume the grant to be to the center.

Miner v. Mayor, etc., of N. Y., 37 Super. 171; see also 46 Super. 274.

A description beginning "at the side of the road" and returning "along the road" excludes the road. Tag v. Keteltas, 48 Super. 241.

But it has been held that "along," "upon" or "running to" a highway would not take to the center. Walton v. Tift, 14 Barb. 216; Kings Co. Fire Ins. Co. v. Stevens, 87 N. Y. 287. See, however, Van Winkle v. Van Winkle, 184 id. 193.

But where the description in a deed commences at the junction of two roads and continues "by," "along" or "upon" them, the place of beginning is the point at the junction of the center lines of the roads and the line runs with the center of said roads. Cochran v. Smith, 73 Hun, 597.

A deed on road skirting water front may convey the title to the further side of the road. Johnson v. Grenell, 112 App. Div. 620, affd., 188 N. Y. 407. If an intention is shown not to convey to the center, that governs. Jones

N. Y. 486; Deering v. Reilly, 167 id. 184. But this construction may be controlled by other parts of the deed and surrounding circumstances. Hussner v. Brooklyn City R. R. Co., 96 N. Y. 18.

A deed bounded on a highway, prima facie carries the title to the center on the assumption that the grantor owned it. But if it appear to have been owned by another, the terms of the deed are satisfied by a title extending only to the road side. Dunham v. Williams, 37 N. Y. 251; see Lozier v. N. Y. C. R., 42 Barb. 464. See also Bliss v. Johnson, 73 N. Y. 529.

A deed executed in 1809 of certain lands in the city of New York, described them as in two parcels, the one lying on the east and the other on the west of the Bloomingdale road. The parcel on the east was described as beginning "at a point on the east side" of said road, and thence running certain courses and distances until the line is brought to the place of beginning. Held, that the deed did not convey any portion of the land forming the bed of said road. Blackman v. Riley, 138 N. Y. 318.

A deed which bounds land upon a street conveys title to the center of the Gorham v. Eastchester Electric Co., 80 Hun, 290; Tinker v. Met. El.

R. R. Co., 81 Hun, 591.

A deed giving boundaries by courses and distances, without mentioning street by which land is bounded on one side, though it appears that the distance does in fact carry to the street and along it, conveys to the center of the street. Van Winkle v. Van Winkle, 184 N. Y. 193.

A conveyance of part of a lot abutting on an alley on the north, by a description which makes the point of beginning the northeast corner of the lot, as shown on the map of the block, and then runs along the north line of the lot a certain distance, carries the fee to the center of the alley, subject to the easement of the other lot owners. Hennessy v. Murdock, 137 N. Y. 317.

A deed describing the land conveyed as being on the west side of a street, beginning at the corner of a lot at a certain distance from the intersection of the side of said street with another, and running along said street, does not convey the fee to the center of the street. Morison v. New York El. R. R. Co., 74 Hun, 398.

The rule as to bounding upon a road not limited to city and village property. Baker v. Mott, 78 Hun, 141; Paige v. Schenectady Ry. Co., 178 N. Y. 102.

Extrinsic Evidence of intent may be given where the terms of the deed are ambiguous as to this point. Stevens v. Mayor, etc., of New York, 46 Super. 274, affd., 84 id. 296; Matter of City of New York (Jerome Ave.), 120 App.

Div. 297; Potter v. Boyce, 73 App. Div. 383.

Boundary by tow-path of a canal means the beaten track; not all the land

used in connection therewith. Hunt v. Raplee, 44 Hun, 149.

Deeds may be read to conform to each other. Smith v. Trustees, etc., of Brookhaven, 89 App. Div. 475.

Award.— An award, however, does not pass, unless there be a definite assignment of it. Harris v. Kingston Realty Co., 116 App. Div. 704.

Parks.— Where the open space on a map referred to, on which the lots are bounded, and by which only they can be approached, is called a "park," the lots are bounded by the center of such open space.

Perrin v. N. Y. C. R. R. Co., 36 N. Y. 120.

Maps.— Where lots are sold by a map number bounded by a private street, the boundary extends to the center of the street, although the street is not referred to in the conveyance. (Hammond v. McLachlan, I Sandf. 323; Bissell v. N. Y. C. R. R. Co., 23 N. Y. 61; Perrin v. N. Y. C. R. R. Co., 36 id. 120; Matter of City of New York (178th St.), 188 id. 581.) As a general rule, streets laid down on maps, by reference to which lots are conveyed, are considered dedicated as streets, so far at least as purchasers are concerned, and also where they are used as approaches to land for a continuous time without restriction of the easement. The acquisition of rights by dedication is fully considered in Chap. XXXV, infra.

But see a case where a lot was marked street and nothing to indicate it was ever opened. Held a deed did not convey any part of it. Downes v. Dimock & Fink Co., 75 App. Div. 513.

See also Haight v. Littlefield, 71 Hun, 285.

As to right to use an alley under a dedicatory map. See Howe v. Bell, 143 N. Y. 190,

Bounding a lot described by map number "in front, by — street," carries to the center of the street. Tinker v. Met. El. R. R. Co., 81 Hun, 591.

The rule held not to apply in case of artificial basin, and lots abutting. India Wharf Bldg. Co. v. Brooklyn W & W. Co., 173 N. Y. 167.

Surveys .- Bounding along a highway, where the quantity of land named in the conveyance is obtained by a survey, which includes only that outside the highway, does not carry to the center. Kennedy v. Mineola, Hempstead & Freeport Traction Co., 178 N. Y. 508.

Actual Line.—Street line as located for forty years would govern, though not following map location. Smith v. Stacey, 68 App. Div. 521.

Reference to a Map .- If a deed refer to other papers, as maps or plans, Reference to a Map.—If a deed refer to other papers, as maps or plans, for the purpose of fixing a boundary, the effect is the same as if they were inserted in the deed, and controls the description. Kingsland v. Chittenden, 6 Lans. 15; Noonan v. Lee, 2 Black. 499; Glover v. Shields, 32 Barb. 374; Townsend v. Hayt, 51 N. Y. 656.

If the description refers to a map number, but includes by bounds and quantity more land than the lot corresponding to the map number, the extra land held included. Frost v. Hirschberg, 17 Wkly. Dig. 224.

A purchaser at an auction sale, according to a map showing streets, acquires right to have the streets opened as incident to his purchase. Cumberson, 39 Hun, 456; Re Village of Olean, 14 N. Y. Supp. 54.

As to variations of street lines from official map. Burrows v. Webster. 144

The fact that the street is not thereafter opened as indicated on the map, does not affect the extent of the property conveyed or deprive grantee of the property which he would otherwise take to the center of the proposed street. Trowbridge v. Ehrich, 116 App. Div. 457; modified, 191 N. Y. 361.

Street Number.—The metes and bounds control a street number. Thompson v. Wilcox, 7 Lans. 376. Compare supra, pp. 513, 539.

Appurtenances and Fixtures.—As a general rule, whatever is affixed to, or on, or essential to the beneficial use of the land, passes with the land, although this rule has been modified at times to suit the customs of different localities or trades.

If a house or store be conveyed, everything usually passes which belongs to and is in use for it as an incident or appurtenance; also rights of way, easements, water privileges, and growing crops.

See supra, pp. 115, 217.

Meaning by Law of the Word Appurtenances, Estates, etc.— The Real Property Law provides as follows:

"In any grant or mortgage of freehold interest in real estate the words 'together with the appurtenances and all the estate and rights of the grantor in and to said premises' must be construed as meaning, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and also all the estate, right, title, interest, dower and right of dower, curtesy, and right of curtesy, property, possession, claim and demand, whatsoever, both in law and equity, of the said grantor of, in and to the said granted premises and every part and parcel thereof, with the appurtenances."

Real Property Law, § 220; formerly L. 1890, Chap. 475, § 2. Gas chandeliers attached to pipes in the ordinary manner held not to pass by deed of the realty. Kirchman v. Lapp, 19 N. Y. Supp. 831.

by deed of the realty. Kirchman v. Lapp, 19 N. Y. Supp. 331.

A wooden barn, resting on large stones at the corners, and smaller ones at other places, is a part of the realty. Leonard v. Clough, 133 N. Y. 292.

The general rule as to fixtures, as between grantor and grantee, is that their character depends on the purpose, nature, and extent of the annexation (McRhea v. Cent. Nat. Bank, 66 N. Y. 489), but intent will not govern where third parties are concerned. McKeage v. Hanover Fire Ins. Co., 81 N. Y. 38. Gas fixtures screwed on pipes, and mirrors or mantels merely on hooks, removable without injury to the walls, are not generally fixtures. McKeage v. Hanover Fire Ins. Co., 81 N. Y. 38; Cottrell v. Griffin, 18 Wkly. Dig. 270, 19 N. Y. Supp. 331; Kirchman v. Lapp, 19 id. 331.

For other cases on this subject, see Snedecker v. Warring, 12 N. Y. 170; Murdock v. Gifford, 18 id. 28; Voorhees McGinnis, 48 id. 278; Potter v. Cromwell, 40 id. 287; Ward v. Kilpatrick, 85 id. 414; McKeage v. Hanover Fire Ins. Co., 81 id. 38; Ford v. Cobb, 20 id. 344; McRhea v. Cent. Nat. Bank, 66 id. 489; Sisson v. Hibbard, 75 id. 542; Lacustime Fertilizer Co. v. L. G. & F. Co., 82 id. 476.

As between mortgagor, mortgagee and others, see Chap. XXIII, Tit. X.

Everything essential to the beneficial use of the property designated is, unless specially excepted, to be considered as passing by the conveyance. Shuts v. Selden, 2 Wall. 177; Noyes v. Terry, 1 Lans. 219; Dubois v. Kelly, 10 Barb. 496; Huttemeier v. Albro, 18 N. Y. 48; Rood v. N. Y. & E. R., 18 Barb. 80; Jackson v. Hathaway, 15 Johns. 447; Winchester v. Osborn, 61 N. Y. 555; Voorhees v. Burchard, 55 id. 98; Ocean Causeway of Lawrence v. Gilbert, 54 App. Div. 118.

If severed they cease to be realty and will not pass. O'Dougherty v. Felt,

65 Barb. 220.

An appurtenance, to pass by general words, must be something necessarily attaching of right to the lands conveyed. Green v. Collins, 86 N. Y. 246; Griffiths v. Morrison, 106 id. 165; Burke v. Nichols, 1 Abb. App. Cas. 261.

A thing is appurtenant only when it stands in relation of an incident to a principal; one parcel of land cannot be appurtenant to another. Humphreys v. McKissock, 140 U. S. 304.

Manure generally passes to the grantee. Goodrich v. Jones, 2 Hill, 142; Middlebrook v. Corwin, 15 Wend. 169; Elling v. Palen, 60 Hun, 306.

A verbal agreement may modify terms of deed in relation to fixtures. Tyson v. Post, 22 Wkly. Dig. 492, affd., 108 N. Y. 217.

Under appurtenances would pass rights of way, common of piscary and pasture, the use of a mill-dam and water, conduits of water from other lands of the grantor, raceways; a right to use adjoining roads, and a passage even over other land of the grantor to the highway. Also a right to overflow other lands of the grantor, if necessary, for the use of a water-privilege. Co. Litt. 121, b; Kent v. Waite, 10 Pick. 138; Story v. Odin, 12 Mass. 157; Blaine v. Chambers, 1 Serg. & Raw. 169; Strickler v. Todd, 10 id. 63; Oakley v. Stanley, 5 Wend. 523; Pomfert v. Bieroft, 1 Saund. 321; Child v. Chappel, 9 N. Y. 246; Jordan v. Mayo, 41 Maine, 552; Cromwell v. Selden, 3 N. Y. 353; Olmstead v. Lewis, 9 id. 423; Badeau v. Mead, 14 Barb. 328.

A water-course will pass without the word "appurtenance." Babcock v.

Utter, 1 Ct. App. Cas. 27.

Question as to passing of an appurtenance not visible. Patten v. N. Y. E.

R. R. Co., 3 Abb. N. C. 306; Simon v. Cloonan, 81 N. Y. 557.

Appurtenances, however, signify something appertaining to another thing, as principal, which passes as incident to the principal thing, and which is of a different though congruous nature. Land cannot pass as appurtenant to land. Nor can a right not connected with the enjoyment or use of a parcel of land be annexed as an appurtenance incident to it. Jackson v. Hathaway, 15 Johns. 447; Harris v. Elliott, 10 Pet. 25; Lawrence v. Delano, 3 Sandf. 333; United States v. Harris, 1 Sum. 37; Linthicum v. Ray, 9 Wall. 241; Tabor v. Bradley, 18 N. Y. 109; Badeau v. Mead, 14 Barb. 328; Grant v. Chase, 17 Mass. 443; Woodhull v. Rosenthal, 61 N. Y. 382; Ogden v. Jennings, 62 id. 526. But profits á prendre may be annexed to land and pass as appurtenant to it, though they may also be conveyed in gross. Huntington v. Asher, 96 N. Y. 604.

A purchaser at an auction sale according to a map showing streets, acquires a right to have the streets opened as incident to his purchase. Tibbits v.

Cumberson, 39 Hun, 456.

The word "appurtenances" in a deed carries only necessary incorporeal

rights. , Griffiths v. Morrison, 106 N. Y. 165.

See King v. St. Patrick's Cathedral, 50 Super. 406, holding that rights of grantor to damages for highway closed do not pass as appurtenances to the grantee. Also King v. Mayor, etc., of N. Y., 102 N. Y. 171.

Easements as Appurtenances.—(See, also, Chap. XXXVI.) A deed bounding along a stream is construed not to convey interest in water-power. Hall v. Whitehall Water Power Co., 103 N. Y. 129.

The right to support from an adjoining building on another lot, the beams of the first being carried across into the second building, though both lots were owned and both buildings constructed by the same man, was held not to pass by a deed of the first lot which described by metes and bounds, though the words, "with the buildings and appurtenances" were used. The word "appurtenances" cannot pass land, and a mere conveyance does not create an easement. Griffiths v. Morrison, 36 Hun, 337, affd., 106 N. Y. 165, citing Parsons v. Johnson, 68 N. Y. 62. But where, in a similar case, one of the courses was "through the center of a party wall," it was held to give an easement even though the wall referred to stood entirely on the second lot. Popper v. Peck, 14 Wkly. Dig. 235; see, however, Higinbotham v. Stoddard, 72 N. V. 64 and 29 Hun, 505 72 N. Y. 94, and 22 Hun, 595.

Whether an easement is embraced in a conveyance of land is always a question of construction of the deed, having reference to its terms and the practical incidents belonging to the grantor at the time of conveyance. Whatever is in use as an incident or appurtenant to the land passes with it on a

conveyance. Parsons v. Garner, 5 Hun, 112.

In such a construction it is not essential that at the time of sale the apparent incidents should be in actual use by the grantor in connection with the part conveyed. Knowledge on the purchaser's part of their existence is sufficient. Simmons v. Cloonan, 81 N. Y. 557.

The owner of two lots, to one of which is annexed an easement over the other, extinguishes it by a conveyance of the servient tenement without reservation and with full covenants. A subsequent purchaser of the dominant tenement will not take it as an appurtenance. Longendyck v. Anderson, 101 N. Y. 165.

Land not contained within the lines of the grant will not pass as an

appurtenance.

A deed held to convey to city only an easement for purposes of a road. Mitchell v. Einstein, 42 Misc. 358.

Pier Property, Adjacent Rights.—(See Chap. XLIII.) A conveyance with covenants, of pier property "with all and singular the appurtenances, etc.," by a grantor who also owned the adjoining land, held to carry with it all that was necessary to the use of the pier as a pier, and consequently an easement in the use of the adjoining water for a reasonable distance. Knickerbocker Ice Co. v. Forty-second St. R. R. Co., 65 How. Pr. 210. As to this subject, see also Parsons v. Johnston, 68 N. Y. 62; Voorhees v. Burchard, 55 id. 95; Comstock v. Johnston, 46 id. 615; Huttemeier v. Albro, 18 id. 48; Adams v. Conover, 87 id. 422; Simmons v. Cloonan, 47 id. 3; Lampman v. Milks, 21 id. 505.

Land Under Water is included by the words "water rights and water privileges, hereditaments and appurtenances." Beach v. Mayor, etc., of N. Y., 45 How. Pr. 357, 368.

Mill Site.—Conveyance of a mill site by metes and bounds carries the right to use land to deposit logs on for the purposes of the mill when necessary to the beneficial enjoyment of the site. Voorhees v. Burchard, 55 N. Y. 95, 98.

Dam .- The word "appurtenances" passes the right to maintain a dam at its former height. Voorhees v. Burchard, 55 N. Y. 98; Adams v. Conover, 22 Hun, 424, affd., 87 N. Y. 422.

Exceptions and Reservations.—A reservation is a clause by which the grantor reserves something to himself issuing out of the thing granted and not a part of it. An exception is part taken out afterward of the thing previously granted, or out of the general

words and description of the grant. A reservation operates at times as an implied covenant or estoppel.

Case v. Haight, 3 Wend. 632; Craig v. Wells, 11 N. Y. 315. See also 1 Barb. 399; Starr v. Child, 5 Den. 599; Thompson v. Gregory, 4 Johns. 81; Provost v. Calder, 2 Wend. 517; Dygert v. Matthews, 11 id. 35; Burr v. Mills, 21 id. 290; Cromwell v. Selden, 3 N. Y. 253; 34 Barb. 566; 8 id. 28; Bridger v. Pierson, 45 N. Y. 601; Mason v. Thwing, 94 App. Div. 77.

Reservation of burial plot in plot conveyed. Blackman v. Striker, 21 N. Y. Supp. 563, affd., 60 N. Y. St. Rep. 316.

Conveyance of land with growing hemlock trees thereon — contract reserving the hemlock bark - right to the bark of an assignee of the contract as against a subsequent grantee, from the party reserving the bark, of his interest in it. Schoonmaker v. Hoyt, 72 Hun, 407.

If the exception is as large as the substance of the grant, it would be repugnant to the deed and void. So it would be if the excepted part were specifically granted, as if a person grant two acres, excepting one of them. Hill v. Priestly, 52 N. Y. 635; Wells v. Garbutt, 132 id. 430.

As to reservation of water rights, vide Cromwell v. Selden, 3 N. Y. 253; Hill v. Priestly, 52 id. 635. See Andrus v. Nat. Sugar Refining Co., 72 App.

Div. 551.

As to reservation of standing timber and necessity of removal within reasonable time. Decker v. Hunt, 111 App. Div. 821.

A reservation is strictly construed against a granter in a deed. Ives v. Van Auken, 34 Barb. 566; Brady v. Smith, 181 N. Y. 178.

As to reservation of "quarter sales," vide supra, Chap. V, Tit. IV.

A valid restriction of the use of property conveyed, may be imposed by a condition upon covenant of the grantee. But a prohibition of the use or alienation of property granted inconsistent with the title conveyed is void. Craig v. Wells, 11 N. Y. 315. And see fully as to restraints upon alienation and estates on condition, supra, Chap. V.

A reservation cannot be made in favor of a stranger to the deed, e. g., as a right to use water in a well for third persons. Ives v. Van Auken, 34 Barb. 566; Craig v. Wells, 11 N. Y. 315; Stevens v. Adams, 1 Supm. 587. But such a reservation may be given effect as an exception. Bridger v. Pierson, 48 N. Y. 601, revg. 1 Lans. 481. See Sterling v. Sterling, 98 App. Div. 426.

As to reservation of a right to dig clay and sand, etc., vide Ryckman v. Gillis, 57 N. Y. 68, revg. 6 Lans. 99; Ludlow v. The Hudson R. R., 6 Lans.

As to parol reservation. Leonard v. Clough, 133 N. Y. 292.

A parol reservation is held not valid. Hutchins v. Hutchins, 98 N. Y. 56. Interchange of words "reservation," and "exceptions" sustained. Sisso v. Cummings, 35 Hun, 22, revd. on other grounds, 106 N. Y. 56.

Words construed to create an exception. See Salsburgh v. Hynds, 13 Wkly.

Dig. 359.

Reservation of street rights. See Munn v. Worrall, 53 N. Y. 44; Mayor of City of New York v. Law, 125 N. Y. 380. Of right of way. Rexford v. Marquis, 7 Lans. 249; Whitman v. City of New York, 85 App. Div. 468; Consolidated Ice Co. v. Mayor, 166 N. Y. 92.

An exception as to a right of way of necessity will not enlarge such a right. Carbonic Acid Gas Co. v. Geysers Natural Carbonic Acid Gas Co., 72 App.

Div. 304.

A reservation to one of grantors of right to occupy portion of premises until certain day, held absolute and grantee not entitled to collect rent for use and occupation during the period. Becker v. Davis, 87 N. Y. Supp. 422.

As to reservation of minerals and rights to work same, see Marvin v.

Brewster Iron Mining Co., 55 N. Y. 538.

As to oils and minerals. First Nat. Bank v. Dow, 41 Hun, 13. As to reservation of a spring. Matthews v. Delaware & H. C. Co., 20 Hun, 427; Read v. Erie R. R. Co., 13 Wkly. Dig. 321; Brady v. Brady, 31 Misc. 411. A grantor cannot reserve the purchase price on a subsequent sale, for the reservation would be repugnant to the grant and consequently void. Dennison v. Taylor, 15 Abb. N. C. 439.

v. 1aylor, 10 Add. N. C. 439.

A reservation to be construed most favorably to grantee. Blackman v. Striker, 142 N. Y. 555; Meyers v. Bell Tel. Co., 83 App. Div. 623.

As to when reservation upon condition runs with the land in favor of subsequent grantees, see Baker v. Mott, 78 Hun, 144.

As to implied reservation of an easement to overflow land conveyed. Wells v. Garbutt, 132 N. Y. 430. See also infra, Chap. XXXVI, Tit. II.

When right of way reserved to grantor passes to his grantee of other property. Wells v. Tolman, 88 Hun, 438.

Severance of easement from the restly by a reservation thereof.

Severance of easement from the realty by a reservation thereof. Shepard

v. Met. El. R. R. Co., 82 Hun, 527.

v. Met. El. R. R. Co., 82 Hun, 527.

Severance of a fixture. Schoonmaker v. Hoyt, 72 Hun, 407.

A reservation in a deed by a common grantor of a right to use a portion of the premises conveyed for the purpose of passing and repassing to and from a neighboring street, and a conveyance of such right to another grantee does not give to the latter a right to erect any permanent structure, such as fire escapes, thereon. Gillespie v. Weinberg, 6 Misc. 302.

A grantor, who states in his deed that he excepts therefrom a certain purpose capacity has been converted.

portion of the land for a certain purpose, cannot be held to have conveyed that which he has expressly excluded by the deed, because he afterward devotes it to a different purpose. Mayor, etc., v. N. Y. C. & H. R. R. Co., 69

Hun, 324.

Since the Revised Statutes, a reservation may operate in favor of grantor and his assigns without words to that effect. Schaefer v. Thompson, 116 App. Div. 775. See further on this subject, Chap. XXXVI.

Conditions.— Conditions differ from covenants in providing only for a forfeiture of the estate granted, while covenants offer the remedy of specific performance. A condition can be enforced or released only by the grantor and his heirs, but a covenant may provide for general benefit, and can be released only by all who are concerned in its enforcement.

Erwin v. Hurd, 13 Abb. N. C. 91; Uppington v. Corrigan, 79 Hun, 488, 151 N. Y. 143.

In certain cases conditions have been construed as covenants. Countryman v. Deck, 13 Abb. N. C. 110; Allen v. Lester, 81 App. Div. 376.

While neglect to perform a condition precedent avoids the conveyance ipso facto, a breach of condition subsequent renders the deed voidable merely at the election of the grantor. Duryee v. Mayor, etc., of N. Y., 96 N. Y. 477.

No express form of words is required to create a condition; the construction of a condition must always be founded upon the intention of the parties.

Towle v. Remsen, 70 N. Y. 303, 311.

A condition in a deed to a municipal corporation against the building of houses or other erections upon the land conveyed for the purposes of a street, is not violated by the construction of an area therein which does not interfere with the use by the public of the sidewalk. Rose v. Hawley, 141 N. Y. 366. Conveyance of land, on condition that a church be built thereon within a

reasonable time - death of the grantee upon whom the condition was imposed - intention that the condition should follow the land. Underhill v. Corrigan, 69 Hun. 320.

Conveyance of right of way to defendant on condition it should build a dock—held devisee of grantor could close the right of way for breach of condition. Ellis v. Town of Pelham, 106 App. Div. 145.

On condition to build a city hall. Trustees of Union College v. City of

New York, 173 N. Y. 38.

How Construed.—Conditions are strictly construed. Woodworth v. Payne, 74 N. Y. 196.

See also Krekeler v. Aulbach, 51 App. Div. 591. Whether words create a condition. Bd. of Ed. of Greenburgh v. Reilly, 71 App. Div. 468.

Right of Re-entry does not pass; it can be exercised only by the grantor or his heirs. Towle v. Remsen, 70 N. Y. 303.

Trustees' deed restricting character of buildings, where they, as trustees, owned no adjacent lands, and where the right of forfeiture was lodged in grantors or their heirs, held no one had the right to re-enter or enforce the forfeiture. Richter v. Distelhurst, 116 App. Div. 269.

On abandonment of street, right of grantor to convey. Downs v. Dimock

& Fink Co., 75 App. Div. 513.

A reasonable time should be given to fulfill the condition. Baker v. Woman's C. T. U., 57 App. Div. 290.

Interpretation and Validity of Deeds.— If it is the clear intent of the grantor that apparently inconsistent provisions shall all stand, such limitations upon an interpretation of the literal signification of the language used must be imposed as will give some effect, if possible, to all the provisions of the deed.

Real Property Law, § 205; Fowler's Real Property Law, 646, 647. Coleman v. Beach, 97 N. Y. 545; Care v. Dexter, 21 Wkly. Dig. 32, holding that a particular description prevails against general terms of the deed.

A clause repugnant to the grant is inoperative. Mors v. Stanton, 51 N. Y.

The rule that the language of the conveyance must be taken most strongly against the grantor has no application when the dispute is between parties claiming under same conveyance. Coleman v. Beach, 97 N. Y. 545.

Nor has the rule requiring all grants by the sovereign of exclusive privileges to be strictly construed against the grantee as respects a grant of land for a valuable and adequate consideration. Langdon v. Mayor, etc., of N. Y., 93

Unless there is a repugnance in its clauses no part of a deed should be

The manifest purpose of a covenant in a deed is not outweighed by the fact that it is preceded by the habendum. Phenix Ins. Co. v. Continental Ins.

Co., 87 N. Y. 400.

Right by parol agreement to a cemetery lot held an easement and void under the Statute of Frauds. Matter of O'Rourke, 12 Misc. 248. By deed, also an easement. Went v. Meth. Ch., 80 Hun, 266.

Grantee of a deed may deny title of his grantor. Bybee v. O. & C. R. R.

Co., 139 U. S. 663.

When written and printed portions are irreconcilable, effect must be given

to the written part. Hutt v. Zimmer, 78 Hun, 23.

Construction of a power of sale as between grantor and grantee. Hume v. Randall, 141 N. Y. 499.

Conditional Deed .- In a conveyance to "the heirs" of H., a living person Conditional Deed.— In a conveyance to "the heirs" of H., a living person and the grantor's son, who has at the time living children, where the deed is in terms immediate, recognizes the fact that H. is then living and reserves a life estate in the grantor, and, after his death, in H., the words "the heirs" mean the children of H. Heath v. Hewitt, 127 N. Y. 166.

A deed to "E., wife of A., and her heirs, the children of A.," gives an estate to the children, as tenants in common with E. Umfreville v. Keeler, 1 Supm. 486, approved, Heath v. Hewitt, 127 N. Y. 166. See also Chap. XV.

Construction as to an alley-way. Dexter v. Beard, 130 N. Y. 549.

A conveyance by one habitually intemperate, to his physician, held obtained by undue influence, and set aside. Wager v. Reid, 3 Supm. 332; Williamson v. Lawrence, 8 Misc. 71.

son v. Lawrence, 8 Misc. 71.

See further as to undue influence. Jones v. Jones, 137 N. Y. 610.

A purchaser in good faith and for value protected though transfer was with

fraud on the part of the grantor. Dorr v. Beck, 76 Hun, 540.

It seems that where the intention of the grantor is to convey a fee and the deed is otherwise effectual, it is not invalid because it purports to be executed in pursuance of an invalid judgment. Rockwell v. McGovern, 69 N. Y. 294. See a previous decision. Rockwell v. Brown, 54 N. Y. 210.

Habitual Drunkard is not incompetent eo facto to execute a deed. The burden of proof is on the party seeking to avoid the deed. Van Wyck v. Brasher, 81 N. Y. 260.

Collateral Agreements not expressed in the deed do not affect the deed. The remedy for their breach is damages. Wilson v. Deen, 74 N. Y. 531.

Conveyances by Husband to Wife, even before the recent acts, might be sustained in equity against the husband's creditors. Lowry v. Smith, 9 Hun, 514. See also Chap. III, "Married Women."

Adverse Possession .- Deeds given under. See Tit. X.

TITLE V. THE ESTATE CONVEYED.

The clauses usually known as the "habendum and tenendum" (i. e., "to have and to hold") were, and are still, in a measure. used to designate what estate or interest is granted. This may lessen, enlarge, explain, or qualify, but not totally contradict or be repugnant to the estate granted in the previous parts of the deed. They would be void if entirely repugnant to the estate theretofore granted, although they may limit its extent and duration, and qualify its nature.

As to the law on this head, vide supra, Chap. V, Titles III and IV; also Jackson v. Ireland, 3 Wend. 99; Kenney v. Wallace, 24 Hun, 478.

If the premises convey a fee, a habendum clause limiting it to a life estate is void. Mott v. Richtmyer, 57 N. Y. 49. See also Wood v. Taylor, 9 Misc. 640. See the words "estate" and "appurtenances" defined, p. 552.

The "Tenendum" Clause, was formerly used particularly to signify the tenure by which the estate was to be held, as "per servitium militare," "in burgagio," etc. It is now usually coupled with the habendum, as "to have and to hold."

Reddendum, etc.—Next in the old deeds follows the terms of stipulation, if any, upon which the grant was made, as upon the rendition of a service, produce, or sum certain, etc., to the grantor. Next also were inserted the conditions, if any, defeating or terminating the estate.

Words of Inheritance.—Before the Revised Statutes, unless the land were conveyed or devised in terms to the grantee and "his heirs," etc., i. e., unless there were words of inheritance connected with the transfer, the grantee or devisee, by the common law, took only an estate for life.

See supra, pp. 124, 417, the cases cited; see, as to reforming a deed, where a fee was not conveyed as supposed, Wright v. Delafield, 23 Barb. 498, revd. on other grounds, 25 N. Y. 266.

Although the omission of the words "heirs," might not in devises prevent the estate vesting in fee, if the intent were manifest, the word was indispensable in a deed to pass the fee.

In conveyances to corporations sole, the word successors carried the fee. A corporation is supposed to be always in life. So also deeds to a sovereign or a State. See also Jackson v. Waltermire, 7 Cow. 353; 10 Paige, 140; Nicoll v. N. Y. & E. R. R., 12 N. Y. 121.

It was the rule also that if those words were omitted in the *prior* part of the deed, a life estate could not be enlarged into a fee by the use of those

words in the covenant of warranty, on the principle that a warranty cannot enlarge the estate.

By the Revised Statutes, however, it is provided that the term "heirs." or other words of inheritance, should not be requisite to create or convey an estate in fee, and every grant or devise of real estate, or any interest therein, thereafter to be executed, should pass all the estate or interest of the grantor or testator, unless the intent to pass a less estate or interest should appear by express terms, or be necessarily *implied* in the terms of such grant.

1 R. S. 748, § 1.

These provisions were embodied in the Real Property Law.

Real Property Law, §§ 205, 210. Applied in Crain v. Wright, 114 N. Y. 307 as to devise.

A deed by a life tenant without warranty will be construed as passing only the life interest of the grantor. Culver v. Rhodes, 87 N. Y. 348. See supra, Chap. XV, Tit. IV.

In examining title to land by conveyance, before the Revised Statutes, therefore, it is very necessary to see that words of inheritance are used, if a fee is to be passed.

Rule in Shelley's Case. - As regards the "Rule in Shelley's Case," and its abolition, vide supra, Chap. IX, Tit. II.

Rule held not to apply in case of an equitable interest in parent, followed later by legal estate in her heirs. Brown v. Wadsworth, 168 N. Y. 225.

Implication of Estate Conveyed.—By the Revised Statutes, also, "no greater estate or interest shall be construed to pass by any grant or conveyance, hereafter executed, than the grantor himself possessed at the delivery of the deed, or could then lawfully convey, except that every grant shall be conclusive as against the grantor and heirs claiming from him by descent."

I R. S. 739, § 143.

The Real Property Law contains a similar provision.

Real Property Law, § 210.

As to the effect of a warranty modifying this provision, see infra, this Chapter, p. 569.

Growing Trees or Timber, etc.-These must be conveyed by writing (formerly under seal); Warren v. Leland, 2 Barb. 613; 57 Barb. 243; McIntyre v. Barnard, 1 Sandf. Ch. 52. A parol license to cut timber may be given. Pierreport v. Barnard, 6 N. Y. 279. Growing grass might be transferred by a chattel mortgage. Jencks v. Smith, 1 N. Y. 90. Reservation and severance of trees. Schoonmaker v. Hoyt, 72 Hun, 407. And see *supra* pp. 115, 495, as to crops and growing timber, and what agreements and transfers of land have to be in writing.

The words "Lands" and "Real Estate."—These words, as used in Chap. I. Part II, of the Revised Statutes, relative to the conveyance of land, etc., are to be construed as co-extensive with lands, tenements, and hereditaments.

1 R. S. 750, § 10. As to definition of "land" and "estate in land" generally, vide supra Chap. IV, Tit. II; see also as to the estate granted, "Covenants," Tit. VI., infra.

See also laws with recent definitions, pp. 113, 411.
So likewise the words "real property." Real Property Law, § 240.
Held not to pass rights under oil leases. Wagner v. Malory, 169 N. Y. 501.

Conditional Deeds .- See infra, "Mortgages."

Husband and Wife .- Deeds to; see "Joint Tenants," Chap. XI.

Instantaneous Seisin.—A grantee introduced into the chain of title without beneficial interest, does not it seems encumber the title by earlier acts of his, or claims against him, under the Recording Act. Hallinan v. Murphy, 88 Hun, 72.

Dower, Judgments, etc.—As to questions of Dower, see p. 154. As to Judgments, etc., see Chap. XXXVII, Tit. I. As to questions of award and when it does not pass by a deed under L. 1871, Chap. 559, see Timms v. The City of Brooklyn, 87 Hun, 35.

TITLE VI. THE COVENANTS.

A conveyance in fee, by the common law, as modified and understood in this State, does not of itself imply a covenant of title, and in order that there may be recourse to the grantor or his privies, on failure of title, express covenants of warranty are used. Without them a simple deed, made in good faith, and without fraudulent representations, does not make the grantor responsible for defects of title. A deed without covenants of warranty purports to convey no more than the grantor's estate at the time, and would not operate to pass or bind an interest not then in existence.

Sherman v. Johnson, 56 Barb. 59; Gouverneur v. Elmendorf, 5 Johns. Ch. 79; Tallman v. Green, 3 Sandf. 437; Thorp v. Keokuk Co., 48 N. Y. 253, see also Bates v. Delevan, 5 Paige, 299; Tallmadge v. Wallis, 25 Wend. 107; Abbott v. Allen, 2 Johns. Ch. 519. The rule has not been held to apply to purchase from trustees. Adams v. Humes, 9 Watts, 305.

The ancient warranty bound the grantor and his heirs to warrant the title, and to yield other lands to the value of those from which there might be existing by paramount title. This is now obsolute.

might be eviction by paramount title. This is now obsolete.

By the old English law, the heir of the warrantor was bound only on condition that he has, as assets, other lands of equal value by descent, which he was bound to apply in case of eviction of the warrantee.

Covenant under seal need not express a consideration. Smith v. Northrup,

80 Hun, 65

Can be enforced only by parties named in and obligated thereby. Williams v. Magee, 76 App. Div. 512.

Lineal and Collateral Warranties.—. Lineal warranty was where the heir derived title to the land warranted, either from or through the ancestor who made the warranty; in which case, he was bound to give land of equal value, on eviction of the alience, if he had real assets by descent.

Collateral Warranty was where the heir's title was not derived from the warranting ancestor, and yet it barred the heir from claiming the land by any collateral title, upon the presumption that he might thereafter have assets by descent from or through the ancestor.

Collateral warranties were abolished in 1788. Vide 1 R. L. 525; Trolan

v. Rogers, 88 Hun, 422.

See also as to the abolition of warranties by tenants for life, and collateral warranties by ancestors not actually seized, Colonial Act of 1773, 2 Van. S. 767.

By the Revised Statutes, both *lineal and collateral warranties*, and all their incidents, are abolished, and heirs and devisees of every person who shall have made any covenant or agreement are made "answerable upon such covenant or agreement, to the extent of the lands descended or devised to them, in the cases and in the manner prescribed by law."

1 R. S. 739, § 141.

The Real Property Law re-enacted this provision of the Revised Statutes.

Real Property Law, § 217.

None but parties named and who have signed the instrument held liable on covenants. See Henricus v. Englert, 137 N. Y. 488.

By the Revised Statutes, also, no greater estate or interest shall be construed to pass by any grant or conveyance thereafter executed than the grantor himself possessed at the delivery of the deed, or could then lawfully convey; except that every grant shall be conclusive as against the grantor and his heirs claiming from him by descent.

1 R. S. 739, § 143.

Every grant shall also be conclusive as against subsequent purchasers from such grantor, or from his heirs claiming as such, except a subsequent purchaser in good faith and for a valuable consideration, who shall acquire a superior title by a conveyance first duly recorded.

1 R. S. 739, § 144.

These provisions are re-enacted in the Real Property Law. Real Property Law, § 210.

By the covenants in a deed the parties stipulate as to the validity of the title, or other facts, or bind themselves to the performance of certain conditions.

Words Necessary.— No particular words are necessary to make a covenant, but such as import an agreement between the parties. Bull v. Follett,

As to when words will be construed as a covenant and when as a condition. vide Aiken v. The Albany, etc., R. R., 26 Barb. 289; and supra, Chap. V. Tit. III.

Divisibility of Covenants.— It may be remarked that covenants are divisible, and a discharge of part is not a release of the whole, although the rule is otherwise as to conditions subsequent affecting title to real property, where, if the condition is partially dispensed with, it is wholly extinguished. Williams v. Dakin, 22 Wend. 201.

Covenants by Married Women.—As to these vide supra, Chap. III, Tit. III.

Covenants bind one falsely personating the owner of land sought to be conveyed.

Preiss v. LePoidevin, 19 Abb. N. C. 123.

Implied Covenants.—As seen in the previous chapter, there is an implied covenant of title in every executory contract for the conveyance of land (unless the terms of the instrument exclude it), and it is continued down to the execution of the conveyance, and is then extinguished by it. The settled common law rule is that an express covenant will restrain or destroy a general implied covenant (Kent v. Welch, 7 Johns. 258), but the Revised Statutes further declared that no covenant should be implied in any conveyance of real estate, whether such conveyance contain special covenants or not.

Similar provisions were re-enacted in the Real Property Law.

See I R. S. 738, § 140; Real Property Law, § 216.
See Kinney v. Watts, 14 Wend. 38; Hone v. Fisher, 2 Barb. Ch. 559; Pierce v. Fuller, 36 Hun, 179.
The word "demise" or "grant," however, in a lease for years, implies a covenant for warranty and quiet enjoyment, and a power to let. See Barney v. Keith, 4 Wend. 502; Tone v. Brace, 8 Paige, 597; 11 id. 566; Vernam v. Smith, 15 N. Y. 327; Mayor v. Mabie, 13 id. 151; Folts v. Huntley, 7 Wend. 210; Frost v. Raymond, 2 Cai. 188; Granniss v. Clark, 8 Cow. 36; Lynch v. Onondaga Salt Co., 64 Barb. 558; Stott v. Rutherford, 2 Otto, 108.
But such covenant does not extend beyond the leased premises nor override the necessary implications of the lease. Gallup v. Albany Ry. Co., 65 N. Y. 1, affg. 7 Lans. 471, explaining Mack v. Patchen, 42 N. Y. 167. There is no implied covenant that a road on which property is bounded shall remain open. King v. Mayor, 102 N. Y. 171.

The case of The Mayor v. Mabie, 13 N. Y. 151, holds that a demise implies a covenant for quiet enjoyment, questioning Kinney v. Watts, 14 Wend. 38. The subsequent case of Edgerton v. Paige, 20 N. Y. 281, seems to limit such

The subsequent case of Edgerton v. Paige, 20 N. Y. 281, seems to limit such implied covenants to leases not exceeding three years, although the point was not directly involved. See also Boreel v. Lawton, 90 N. Y. 293.

The case of Mack v. Patchen, 42 N. Y. 167, holds that, on a breach of this implied covenant in a lease, the damages are the value of the unexpired term, less the rent reserved. If there is a special covenant as to enjoyment, the other will not be implied. See Burr v. Stenton, 43 N. Y. 462. No covenants are implied in a lease in a fee. Carter v. Burr, 39 Barb. 59. But they may be implied in agreements relative to land. Sandford v. Travers, 40 N. Y. 140.

Leases for three years and under are not within the above statutes. Moffat

v. Strong, 9 Bos. 57.

A covenant of a good right to sell and convey does not imply a warranty of absolute title, but only of actual seizin and possession. Raymond v. Raymond, 10 Cush. (Mass.) 134.

Before the Revised Statutes, it was held that the word "gift," in a conveyance, implied a warranty for the life of the grantor. Kent v. Welch, 7 Johns. 258; Frost v. Raymond, 2 Caines, 188; Bunnell v. Jackson, 9 N. Y.

In New Hampshire it has been held (semble) that any words showing the intent of the parties to do or not to do a certain thing will make an express covenant. Lovering v. Lovering, 13 N. H. 513.

Actions lie, however, for fraud or misrepresentation, even if there are no covenants. Haight v. Hayt, 19 N. Y. 464; Sherman v. Johnson, 56 Barb. 59. See also 5 Abb. N. S. 331.

But where there are no covenants a vendee who has taken a deed has no remedy at law or in equity, in the absence of fraud or misrepresentation, if incumbrances be subsequently discovered. Whittemore v. Farrington, 76 N. Y. 452. But see Sage v. Truslow, 88 N. Y. 240, holding that covenants

in a contract to assume and pay taxes and mortgages may be enforced, though a deed without covenants has passed; and that there is no merger.

Implied Covenants by Grantee.—The acceptance by the grantee of a conveyance containing a covenant by him, his heirs and assigns, is equivalent, without his signing the deed, to an express agreement on his part to perform the covenant; and the obligation affects the title of his grantees.

Atlantic Dock v. Leavitt, 50 Barb. 135, affd., 54 N. Y. 35; Spaulding v. Hallenbeck, 30 Barb. 292, affd., 35 N. Y. 204; Plumb v. Tubbs, 41 id. 442; Fairchild v. Lynch, 42 Super. 265; 99 N. Y. 359.

Where the conveyance, under which a party holds, refers to a deed of the same premises, which contains a restrictive clause, and which is on record, it will be presumed that he has notice of the restrictive covenant. Gibert v. Peteler, 38 N. Y. 165.

A covenant not to put up an obstruction binds the land. Id.

A covenant of assumption of a mortgage will not be implied by reason of its deduction from the purchase price alone. Bennett v. Bates, 94 N. Y. 354. See also Chap. XXIII, Tit. III, as to obligations of a vendee with regard to mortgage on premises; also p. 571.

Covenants Running with the Land.—Generally the covenants in a deed do not run with the land, but affect only the covenantor and the assets in the hands of his representatives after his death.

by an action to recover a compensation in damages for the land lost upon eviction for failure of title. As a general rule, also. all covenants concerning title run with the land, with the exception of those that are broken before the land passes; as, for example, the covenant of seizin being broken the instant it is made, if at all. becomes a chose in action, and therefore does not run with the land.

See Fowler, Real Prop. Law (2d ed.), 695-710.

The right of action, on breach of such a covenant, descends to the personal representatives, and not the heirs. Withy v. Mumford, 5 Cow. 137. See also Beddoe's Ex'r v. Wadsworth, 21 Wend. 120; and infra.

As a general rule, also, no covenant runs with the land, unless it touch or relate to the land itself. Another general rule is that though the benefit of a covenant pass with the land, the burden is confined to the original covenantor, unless there be privity of estate between him and the covenantee.

Cole v. Hughes, 54 N. Y. 444, and cases cited.

If the covenantor covenants for himself and his heirs, it is then a covenant real, and descends upon the heirs, who are bound to perform it, if they have assets by descent, but not otherwise. If he covenant also for his executors and administrators, his personal assets are likewise pledged for the performance of the covenant. Covenants running with the land have relation to the *land* only, and the assignee is not bound as to things *collateral*. Dolph v. White, 12 N. Y. 301; Spencer's Case, 5 Co. 16. See also Party-walls, Chap. XXXVI.

A covenant to keep up a partition fence, or to make and repair fences, is a covenant running with the land, and when it imposes a liability other than that imposed by the statute as to division fences, it is an "incumbrance" under the covenant against incumbrances. Vide 19 Abb. 228; 1 Bradf. 41; Moxley v. N. J. & N. Y. R. R. Co., 21 N. Y. Supp. 347, affd., 60 St Rep. 874; Countryman v. Deek, 13 Abb. N. C. 110.

Covenants not to build, etc., run with the land; also those against nuisances. Trustees of Watertown v. Cowen, 4 Paige, 510; Piggott v. Mason, 1 id. 412; Rutgers v. Hunter, 6 Johns. Ch. 215; Garlock v. Closs, 5 Cow. 143; Beddoe's Exr. v. Wadsworth, 21 Wend. 120; 8 Paige, 451. Also a covenant to keep a street open. Story v. N. Y. E. R. R., 90 N. Y. 122.

Covenant not to sell sand from lands conveyed will be enforced by injunction against grantee by warranty deed with notice. Hodge v. Sloan, 107 N. Y. 244.

Semble, covenant may be so worded as to cause it to run with the land. Mott v. Oppenheimer, 15 N. Y. Supp. 167, affd., 48 St. Rep. 75; see also Dexter v. Beard, 130 N. Y. 549; Nye v. Hoyle, 120 id. 195; Kountze v. Helmuth, 67 Hun, 343, affd., 140 N. Y. 432.

A person owning a tract of land and selling a portion thereof may, for the benefit of his remaining land, impose any restrictions not against public policy he sees fit upon the land granted, and a court of equity will, as a general rule, enforce them. Roland v. Miller, 139 N. Y. 93, distinguishing Trustees v. Thatcher, 87 N. Y. 31.

Covenants run in favor of purchasers through foreclosure. Mygatt v. Coe,

142 N. Y. 78.

Mere possession of land sufficient to sustain covenants of deed transferring the same in favor of subsequent grantees in the chain of title. Mygatt v. Coe, 142 N. Y. 78.

Covenant in a deed by the grantee to pay a mortgage on other property of grantors binds the land. Binghamton Savings Bank v. B. Tr. Co., 85 Hun, 75. Land taken with full knowledge of parol restriction binds party. Hayward Homestead, etc., Assn. v. Miller, 6 Misc. 254.

Covenants by a lessor to repair, also run with the land. Allen v. Culver, 3

Den. 285; 33 Barb. 401. See also on this head, supra, p. 181.

As to who can sue on these covenants, vide Kane v. Sanger, 14 Johns. 89, declared overruled, 19 Abb. N. C. 130. Compare Withy v. Mumford, 5 Cow. 137, holding that an assignee, with or without warranty, can maintain an action for breach happening after assignment. Gulock v. Closs, 5 Cow. 14; see also Beddoe's Exr. v. Wadsworth, 21 Wend, 120.

All the covenantees must sue for a breach. Smith v. Kerr, 3 N. Y. 144.

A purchaser in possession under a contract cannot maintain an action for breach to which the owners are not parties. Haynes v. Buffalo, etc., R. R. Co., 38 Huu, 17.

If one covenantor die the action is against survivor. Gere v. Clarke, 6

Hill, 350.

No covenant relating to things not in esse will bind the assignee of a lease

unless named. Tallman v. Coffin, 4 N. Y. 134.

A covenant by the owner of land not to allow a mill, etc., to be erected thereon, does not run with the land or bind an unnamed assignee. Harsha v. Reid. 45 N. Y. 415.

It has been held that such a covenant would bind assigns if named. Norman

v. Wells, 17 Wend, 136, 148.

A covenant to pay ground rent runs with the land. Hurst v. Rodney, 1 Wash. C. C. 375.

Covenants to pay rent charge. Vide supra, Chap. V. Tit. IV.

A covenant of the surety of the lessee passes to the grantee of the reversion. Allen v. Culver, 3 Den. 284.

Covenant to Pay Taxes.— A covenant to pay taxes and assessments is broken when a lessee neglects to pay them. A lessor may therefore recover the amount immediately against the lessee. The covenant runs with the land, and binds the assignee of the term; but not under-tenants, or their assignees. Trinity Church v. Higgins, 48 N. Y. 532; Post v. Kearney, 2 N. Y. 394; Martin v. O'Connor, 43 Barb. 514.

Such a covenant includes taxes and assessments that may be imposed, though not legal at the time. Post v. Kearney, 2 N. Y. 394; Oswald v. Giffert, 11 Johns. 443; Corporation v. Cushman, 10 id. 96; Bleecker v. Ballou,

3 Wend. 263; Astor v. Hoyt, 5 id. 603.

Party Wall.- A party wall agreement runs with the land and may be enforced against a remote grantee of the covenantor though not mentioned in intervening deeds. 15 N. Y. Supp. 167; Bedell v. Kennedy, 38 Hun, 510, affd., 109 N. Y. 153.

A party wall is not an incumbrance. Hendricks v. Stark, 37 N. Y. 106;

Mohr v. Parmelee, 43 Super. 320.

Grantee covenanting to assume obligations of a party wall agreement is bound like one assuming payment of a mortgage. Stewart v. Aldrich, 8 Hun, 241.

Compare as to this Chap. XXXVI. Tit. VI; also Chap. XIX.

Covenants against Nuisances, as to Buildings, etc.—These also run with the land, and may be enforced by injunction; also covenants relative to buildings, repairs, renewals of leases, to pay rent, to make no claim, etc. Piggott v. Mason, 1 Paige, 412; Rutgers v. Hunter, 6 Johns. Ch. 215; Norman v. Wells, 17 Wend. 136; 50 Barb. 135; 3 Abb. N. S. 311; 32 Barb. 48; Trustees of Watertown v. Cowen, 4 Paige, 510; Allen v. Culver, 3 Den. 284. See that case as to covenants running with the land generally; and also, infra, p. 567.

A covenant against nuisances may be enforced even by those not parties

to the deed. Barron v. Richard, 8 Paige, 351; 23 Barb. 153.

As to covenant respecting other lands not being enforceable after such lands are conveyed to other parties without restrictions. See Clark v. Devoe, 124 N. Y. 120.

Restrictive covenants relative to the use of buildings are to be construed most strictly against the covenant. Clark v. Jammes, 87 Hun, 215.

The Usual Covenants.— The usual covenants in deeds of "full warranty" in this State are:

- I. That the grantor is lawfully seized.
- 2. That he has good right to convey.
- 3. That the land is free from incumbrances.

These covenants are personal covenants, not running with the land or passing to the assignee, because if broken the breach occurs on the execution of the deed, and they become choses in action. which are not technically assignable. These covenants, however. create an estoppel against the grantor and all his privies in blood, estate or law.

Cf. Fowler's Real Property (2d ed.), 698.

Greenby v. Wilcocks, 2 Johns. 1; Hamilton v. Wilson, 4 id. 72; Abbott v. Allen, 14 id. 248; Dimmick v. Lockwood, 10 Wend. 142; Kelley v. Dutch Church, 2 Hill, 105; Beddoe's Exr. v. Wadsworth, 21 Wend. 120 (see also cases cited in notc); Webb v. Alexander, 7 Wend. 281; Mitchell v. Warner, 5 N. Y. 497; Bingham v. Weiderwax, 1 id. 509; Tefft v. Munson, 57 id. 97; Crane v. Turner, 67 id. 437.

If the purchase money has not been all paid, courts will offset damages arising from a breach of these covenants. Woodruff v. Bunce, 9 Paige, 443.

Short Substitute Form of Covenant.—This was provided by Laws of 1890, Chap. 475. This law enacted that the old forms. of covenants should be understood and implied from the use of the short forms authorized.

Special statements were made of what might be substituted and a set of forms provided by the Act. The old forms, of course, may be still employed, but an additional fee is imposed as to New York county, if used.

The provisions of this statute were embodied in and now form part of the Real Property Law.

Real Property Law, § 218.

Covenant of Seizin .- The purchaser, on the breach of this covenant, recovers

Covenant of Seizin.—The purchaser, on the breach of this covenant, recovers back the consideration money and interest, and nothing more. Pitcher v. Livingston, 4 Johns. 1; see also Staats v. Exrs. of Ten Eyck, 3 Cai. 111; Bennet v. Jenkins, 13 Johns. 50; Bingham v. Weiderwax, 1 N. Y. 509; unless there has been fraud. Wilson v. Spencer, 11 Leigh, 261.

It is broken even if the grantor has no title to the appurtenances. Mott v. Palmer, 1 N. Y. 564. The right of action is immediate, and a subsequently acquired title is no bar. McCarthy v. Leggett, 3 Hill, 134; Bingham v. Weiderwax, 1 N. Y. 509; Abbott v. Allen, 14 Johns. 248; Fitch v. Baldwin, 17 Johns. 161. The covenant is broken if the grantor was not seized of the 17 Johns. 161. The covenant is broken if the grantor was not seized of the entire estate. Sedgwick v. Hollenbeck, 7 Johns. 376. The covenant that the grantor "has good right to convey" is synonymous with the covenant of seizin. Rickert v. Snyder. 9 Wend. 421.

See as to recovery of costs and interest, Staats v. Exrs. of Ten Eyck, 3 Cai. 111; Pitcher v. Livingston, 4 Johns. 1; Bennet v. Jenkins, 13 id. 50,

It is no defense that the grantee was dispossessed under a mortgage which he had assumed. Bingham v. Weiderwax, 1 N. Y. 509, supra.

This covenant is not broken by a wrong estimate in the description. Mann v. Pearson, 2 Johns. 37; Stannard v. Eldridge, 16 id. 254.

Nor by the fact that part of the land is a highway. Whitheck v. Cook.

15 Johns. 483.

The action may be maintained on this covenant even where there has been no eviction. Pollard v. Dwight, 4 Cranch. 421; Le Roy v. Beard, 8 How. 451; Fitch v. Baldwin, 17 Johns. 161.

A covenant of "a good right to sell and convey" does not imply a warranty of absolute title, but only of actual seizin and possession. Raymond v. Ray-

mond, 10 Cush. (Mass.) 134.

See the case of Tefft v. Munson, 57 N. Y. 97, for an instance of the extraordinary manner in which the covenants of "seizin" and "right to convey" were held to convey by estoppel, a mortgage interest, although the mortgagor was not owner at the time the mortgage was made, and the title of an intermediate bona fide purchaser, without notice, was defeated. See also Crane v. Turner, 67 N. Y. 437. See as to purchase money mortgages, Dusenbury v. Hurlburt, 59 N. Y. 541.

Covenant of seizin when not broken by fact that buildings project over

Stearn v. Hesdorfer, 9 Misc. 134.

Covenant against Incumbrances .- On breach of this covenant, the rule of damages is the amount paid to extinguish the incumbrances, provided the same does not exceed the consideration money and interest. Hall v. Dean, 13 Johns. 105. Where the deed recites an incumbrance, subsequent covenants are understood as subject to that exception. Jackson v. Hoffman, 9 Cow. 271.

The effect of the covenant against incumbrances is to release any claim which the covenantor may have on the land. Holcomb v. Holcomb, 2 Barb. 20.

Covenant against incumbrances is not broken by filing of a lis pendens before delivery of deed, where the mortgage sought to be foreclosed is excepted in the contract from the covenant against incumbrances. Monell v. Douglass, 17 N. Y. Supp. 178.

Covenant against incumbrances cannot be sued upon for breach thereof for more than nominal damages until the plaintiff has paid the incumbrance.

Stearn v. Hesdorfer, 9 Misc. 134.

A party who sues on a covenant against incumbrances is entitled, if he has extinguished the incumbrance, to recover the price he has paid for it, but if he has not extinguished it, his damages are but nominal. McGuckin v. Milbank, 83 Hun, 473.

Assessment payable in installments, under a prior laying, when an incum-

brance running with land. McLoughlin v. Miller, 124 N. Y. 510.

Measure of damages, vide Doctor v. Darling, 68 Hun, 70. Apparent noticeable incumbrances or restrictions relieve the covenantor from his obligation. Bacharach v. Van Eiff, 74 Hun, 533.

If a party contract to give a good and sufficient deed, it implies a warranty against incumbrances. Burwell v. Jackson, 9 N. Y. 535, overruling Giles v. Dugro, 1 Duer, 331; and supra, p. 507.

A public highway over the land is not an incumbrance in this State. Huyck v. Andrews, 113 N. Y. 81. But any other easement is. *Id.* See contra, 4 Mass. 627; 2 id. 97; Rutter v. Gale, 27 Vt. 739.

The grantee may recover on breach of this covenant, where there is a judgment or other incumbrance, by paying the same. Eviction is not necessary. Hall v. Dean, 13 Johns. 105.

An assignee may recover when the covenant is with the grantee, "his

heirs or assigns." Colby v. Osgood, 29 Barb. 339.

The covenant does not apply to a tax on the premises not confirmed at the execution and delivery of the deed. Lathers v. Keogh, 39 Hun, 576; 109 N. Y. 583; Harper v. Dowdney, 113 id. 644; 9 N. Y. Supp. 563. See as to tax as an incumbrance, supra, p. 501.

Under this covenant, grantee may pay a judgment lien and recover the amount. The grantee is subrogated to the rights of the judgment-creditor. Barnes v. Mott, 64 N. Y. 397.

The covenant is fulfilled if the grantee retain the amount of incumbrances out of the consideration. Reading v. Gray, 37 Super. 79.

A merely meritorious consideration will not sustain it. Matter of Wilbor

v. Warren, 104 N. Y. 192.

Restriction against Buildings of a Specified Character .- Such restrictions Restriction against Buildings of a Specified Character.—Such restrictions are held incumbrances. So also against building beyond a certain line. Roberts v. Levy, 3 Abb. N. S. 318; Perkins v. Coddington, 4 Robtn. 647; Anonymous, 2 Abb. N. C. 56.

Or against the use of a building for certain purposes, commonly called nuisances. Gibert v. Peteler, 38 N. Y. 165; Roberts v. Levy, 3 Abb. N. S. 311; In re Whitlock, 10 Abb. 316.

The existence of a lease assigned, with assent of parties, held not a breach of this covenant. Pease v. Christ, 31 N. Y. 141.

Covenant in a deed restricting the use of real property cannot be enforced by one who has acquiesced in its violation. Moore v. Murphy, 89 Hun, 175.

A forfeiture for breach of covenant when not enforceable against subsequent purchaser without notice. Doorlev v. McConnell, 78 Hun, 580.

purchaser without notice. Doorley v. McConnell, 78 Hun, 580.
When a parcel of land is conveyed by its owner to several grantees by independent conveyances containing similar restrictive covenants, an equitable negative easement is created in favor of each lot against all the others, which the respective owners may enforce. Equitable Life Assurance Soc. v. Brennan, 74 Hun, 576.

Such easement is not destroyed by a subsequent release of the covenant by the original grantor or his devisee. Raynor v. Lyon, 46 Hun, 227.

See also as to what are incumbrances, Chap. XIX.

The other usual covenants are:

4. Of quiet enjoyment.

5. That the grantor will warrant and defend the title against all lareful claims.

The covenants are prospective, and actual ouster or disturbance of the possession, or eviction by lawful title, is necessary to constitute a breach of them, and such title must have existed at the time of conveyance to the covenantee. They are therefore in the nature of real covenants, and run with the land conveyed, as being annexed to the estate, and descend to heirs, and vest in assignees of the purchaser as being privies in estate.

Withy v. Munford, 5 Cow. 137; Hunt v. Amedon, 4 Hill, 345; Kelly v. The Dutch Church, 2 Hill, 105, 111; Fowler v. Poling, 6 Barb. 165; Wood v. Fornerook, 3 Supm. 303.

But an actual eviction is not necessary to a breach of the covenant of quite enjoyment, where there is an actual holding under a paramount title. Shattuck v. Lamb, 65 N. Y. 499.

Vide Cornish v. Capron, 136 N. Y. 232, as to covenant for quiet enjoy-

ment - how broken.

The law also is that the assignee or purchaser of a covenant of warranty running with the land, who is evicted, may sue any one or more of the covenantors, whether immediate or remote; but he must show a damage to himself from the breach alleged, by first making satisfaction upon his own covenant to the person evicted.

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Miller v. Watson, 5 Cow. 195; Norman v. Wells, 17 Wend. 136; Hunt v.

Amidon, 4 Hill, 345; Baxter v. Byers, 13 Barb. 267.

The damages on these two covenants belong to the personal representatives, and not to the heirs. Beddoe's Exor. v. Wadsworth, 21 Wend. 120. See, as to the measure of damages. Baxter v. Byers, 13 Barb. 267.

Covenant of Quiet Enjoyment.— This covenant goes to the possession only, and not to the title, and is broken only by actual entry and ouster or expulsion from or disturbance in the possession. There can be no breach while the grantee is in possession. Mead v. Stackpole, 40 Hun, 473.

A party is not liable for mere defect of title under this covenant. Whitney

v. Lewis, 21 Wend. 131.

It was formerly held that a mere recovery in ejectment against the covenantee would not be sufficient. Waldron v. McCarthy, 3 Johns. 471; Kortz v. Carpenter, 5 id. 120; Kerr v. Shaw, 13 id. 236; Whitbeck v. Cook, 15 id. 483. But in Shattuck v. Lamb, 65 N. Y. 499, Kortz v. Carpenter, 5 Johns. 120 was overruled, and Waldron v. McCarthy, 3 Johns. 471, distinguished, the court holding that actual possession against the covenantee under a paramount title was enough.

A covenant for quiet enjoyment is not broken by the interruption of an apparent easement to which grantor had no right, and which is not specifically mentioned in the deed. Green v. Collins, 86 N. Y. 246. But it is broken

mentioned in the deed. Green v. Collins, 86 N. Y. 246. But it is broken by an outstanding title to an easement in another which materially impairs the value of the premises. Scriver v. Smith, 100 N. Y. 471, affg. 30 Hun, 129. Nor is an entry by a trespasser or one having no lawful claim at the time of conveyance, a breach of this covenant. The eviction or disturbance must be by title paramount. Kelly v. The Dutch Church, 2 Hill, 105; 3 Duer, 464; Ogilvie v. Hull, 5 Hill, 52; Levy v. Bend, 1 E. D. Smith, 169; The Mayor v. Mabie, 13 N. Y. 151; Beddoe's Exor. v. Wadsworth, 21 Wend. 120; Webb v. Alexander, 7 Wend. 281; 58 Barb. 136.

To recover where grantee has bought off hostile title he must show that it would have supported an action for ejectment. Berger v. Schultze,

54 Super. 212; Petrie v. Folz, Id. 223.

Damages lie for loss both of possession and title. Id.

The tortious entry by the covenantor, however, is held a breach. Sedgwick

v. Hollenbeck, 7 Johns. 376.

The mere commencement of a suit is not a breach of this covenant; the possession must be disturbed. Waldron v. McCarthy, 3 Johns. 471; Kerr v. Shaw, 13 id. 236; Hunt v. Amidon, 4 Hill, 345; Fowler v. Poling, 6 Barb. 165; Whitbeck v. Cook, 15 Johns. 483. Semble, if possession is surrendered on demand of the true owner, it would be eviction. Id.; Greenvault v. Davis, 4 Hill, 643. Also under a decree and sale under foreclosure. Hunt v. Amidon, 4 Hill, 345; Cowdrey v. Cort, 44 N. Y. 382; Van Slyck v. Kimball, 8 Johns. 198.

The damages under this covenant held to be the consideration money paid, with six years' interest. Kelly v. The Dutch Church, 2 Hill, 106. See Sedg-

wick on Dam., Chap. VI, 166.

As to part of the land being a highway, vide Whitbeck v. Cook, 15 Johns. 483.

The remaindermen of a life tenant are not liable for a breach of this covenant, by reason of his decease before the termination of the lease. Coakley v. Chamberlain, 8 Abb. N. S. 37.

The Covenant of Warranty .- A covenant by a party to deed who is not an owner, does not run with the land. Mygatt v. Coe, 124 N. Y. 212. Under this covenant, the plaintiff to recover must show an eviction, or an actual dispossession under a lawful claim, by a paramount title. Kent v. Welch, 7 Johns. 258; Fowler v. Poling, 6 Barb. 165; Miller v. Watson, 5 Cow. 195; Talliard v. Wallace, 2 Johns. 395.

There is a breach though the grantees buy in the property at a sale under title paramount, and so are never actually out of possession. Tucker

v. Coony, 34 Hun, 227.

Action for breach of covenant of warranty will not lie until the plaintiff has been disturbed in title or possession. Stearn v. Hesdorfer, 9 Misc. 134.

There can be no breach of covenant of warranty and peaceable enjoyment without an eviction or the establishment of facts showing a paramount

title. Kidder v. Bork, 12 Misc. 519.

A trespass is not an eviction. The Mayor v. Mabie, 13 N. Y. 151. Nor the mere commencement of a suit. Waldron v. McCarthy, 3 Johns. 471. If an entire failure of the title is shown, semble the purchaser may recover back the price paid, without eviction. Lamans v. Garnier, 10 Rob. (La.) 425.

The eviction need not be by process of law, but may be by surrender to the true owner. Fowler v. Poling, 6 Barb. 165. But it must be by title paramount. Webb v. Alexander, 7 Wend. 281; Beddoe's Exor. v. Wadsworth.

21 Wend. 120, and cases cited, supra.

The eviction may be for a mere right of possession. Rickert v. Snvder.

9 Wend. 416.

The covenant of warranty extends to the possession as well as to the title; and whenever there is a disturbance of either under title paramount the covenant is broken. Rea v. Mingler, 5 Lans. 196; Bridget v. Pierson, 1 id. 481, revd. on another ground in 45 N. Y. 601.

An easement existing by prior grant is a breach regardless of notice. Mohr v. Parmelee, 43 Super. 320.

Action for breach will lie against the executors, etc., of the warrantor. Townsend v. Morris, 6 Cow. 123.

A mere easement of the public in a highway covering part of the land is no breach. Hymes v. Esty, 36 Hun, 147; 116 N. Y. 501.

As to contradicting the consideration clause in the deed, under an action

for breach, vide Greenvault v. Davis, 4 Hill, 643.

See, as to joinder of wife, and proceedings in the action, Griffin v. Reynolds, 17 How. 609.

Measure of Damages.—Rule as to the amount. Brown v. Allen, 73 Hun, 291, as to measure of damages. See also Jenks v. Quinn, 137 N. Y. 223; Fowler's Real Property Law, 701.

Eviction.— As to eviction under a lease, vide supra, Chap. VIII, Tit. IV.

Estoppel by Warranty.— By a covenant of warranty, a subsequently acquired Jackson v. Bull, 1 Johns. Ca. 81; Jackson v. Stevens, 16 Johns. 110; Jackson v. Murray, 12 id. 201; 6 Barb. 98; Sweet v. Green, 1 Paige, 473; Bank of Utica v. Mersereau, 3 Barb. Ch. 528; 63 Barb. 31. But no title not in esse will pass by deed by way of estoppel, unless the deed contain a warranty. Jackson v. Wright, 14 Johns. 193; Jackson v. Bradford, 4 Wend. 619; Doyle v. Peerless Pet. Co., 44 Barb. 239; Irvine v. Irvine, 9 Wall. 617; Van Rensselaer v. Kearney, 11 How. 297; House v. McCormick, 57 N. Y. 310. See Mutual Life Ins. Co. v. Corey, 135 N. Y. 326, as to grantor not being able to attack his acknowledgment of the deed creating the estoppel.

Estoppel binds only privies in estate, not those who, though such, also

claim by a superior title. Lyon v. Morgan, 143 N. Y. 505. Kinship alone, whether by affinity or consanguinity, cannot create a privity which can be made the basis of an estoppel; this can arise only where the heir represents the ancestor and continues the ancestor's estate.

Where the heirs of a warranting ancestor do not take the property from her nor claim under her, but claim as remaindermen by an independent title, there is no privity of estate between such heirs and their ancestor and no estoppel against them can arise upon her covenant. Trolan v. Rodgers, 88 Hun, 422.

The rule that an estoppel binds the parties and their privies in estate and blood applies only to a subsequent party when he simply represents the rights and interests of the party who created it, and does not apply to one who, in the process of transferring real estate, acquires a better title than his predecessor. Lyon v. Morgan, 143 N. Y. 505.

In case of a mortgage by one without title it is held that subsequently acquired title will enure to the benefit of his mortgagee, and the record of the mortgage is notice to a bona fide purchaser for value from the mortgagor. Tefft v. Munson, 57 N. Y. 97.

A married woman's covenant of warranty, however, did not estop her. Martin v. Dwelly, 6 Wend. 1; Dominick v. Michael, 4 Sandf. 374; compare 20 Barb. 123. All covenants made by her, except as trustee or for lands held as her separate estate, were void (Martin v. Dwelly, 6 Wend. 1) until the Law of 1862, Chap. 172, enabling her to make covenants in a deed. Before that act, however, she would be estopped where her action would be otherwise a fraud. 20 Barb. 123.

Her covenants now (under Acts of 1860, 1862, supra, p. 92) bind her separate estate. Sigel v. Johns, 58 Barb. 620; Kolls v. DeLeyer, 41 Barb. 211.

Release. - A release of this covenant for valuable consideration does not affect grantee's rights in an action of ejectment. Dowley v. Rugg, 35 Hun,

The Action on this Covenant .- An assignee of the grantee may recover of the original warrantor. Whitby v. Mumford, 5 Cow. 137.

The warrantor is concluded by a verdict in ejectment of which he had notice. Cooper v. Watson, 10 Wend. 202.

A verbal agreement cannot be set up in an action for breach of this covenant. Miles v. Avery, 2 Barb. Ch. 583.

Before one can recover, under a breach of warranty, he must offer to recon-

vey to the grantor. Meyer v. Shoemaker, 5 Barb. 319.

The covenant of warranty does not cover an obvious defect in quality. Vandewalker v. Osmer, 65 Barb. 556.

A covenant for further assurance is also generally inserted in warranty deeds. By it the grantor binds himself and his heirs, and all persons deriving title through them, at the request of the grantee, his heirs and assigns, to execute such further and other conveyances and assurances as may at any time be necessary further to vest and confirm the title to the grantee, his heirs or assigns.

This covenant runs with the land. Spencer v. Noyes, 4 Vesey, 370; Colby v. Osgood, 29 Barb. 339; Campbell v. Lewis, 3 Barn. and Ald. 392. A release of a mortgage is a further assurance. Colby v. Osgood, 29 Barb.

This covenant is broken, after demand and refusal or neglect. Miller v. Parson, 9 Johns. 336.

Covenant and Stipulations by Grantee.—(See also "Implied Covenants by Grantee," supra; also Chap. XXIII, Tit. III, "Obligations of a Vendee," and supra, p. 563.)

Acceptance of a deed containing covenants on his part by the grantee will bind him, though he has not executed it. Atlantic Dock Co. v. Leavitt, 54 N. Y. 35; Bowen v. Beck, 94 N. Y. 86. So, too, if the purchase were by an authorized agent, though the grantee never knew of the covenant. Sikley v. Fryer, 100 N. Y. 71.

Record of the deed is prima facie evidence of acceptance, and so is delivery. Laurence v. Farley, 9 Abb. N. C. 371. See also Tit. VIII, infra; and

Fowler's Real Property Law (2d ed.), 701.

Assumption of Mortgage.—The rule, that a mortgagor who has conveyed the mortgaged premises to one who assumes payment of the mortgage debt thereafter stands as a surety, Comstock v. Drohan, 71 N. Y. 9, and is discharged by an unauthorized change of the terms of the obligation by his grantee and the holder of the mortgage, does not apply where the holder of the mortgage was not aware of the terms of the assumption at the time of the acts claimed to effect the discharge. Star Fire Ins. Co. v. Waddington, 18 Wkly. Dig. 307.

Such a release operates only to the extent of the value of the land at the time of the extension. Murray v. Marshall, 94 N. Y. 611, disapproved,

73 Hun, 236.

Milliken v. Golden, 73 Hun, 212, holds that a clause in a deed making it subject to a mortgage may be eliminated by the judgement of a court without

notice to or consent of the mortgagee.

An action to enforce a covenant in a deed to assume and pay a mortgage on the premises conveyed cannot be maintained, unless it is alleged and proved that the grantor was in some way liable to pay to the mortgagee the debt secured by the mortgage, or at least that he had a legal interest in having

the covenant performed. Carrier v. United Paper Co., 73 Hun, 287.

But where the deed was made to the grantee by her husband without her knowledge, and after his death she joined in a conveyance of it, she was held not bound by a covenant of assumption contained in it. Kelly v. Geer,

101 N. Y. 664.

Such a covenant inserted by mistake is not binding. Real Est. Trust Co. v. Balch, 45 Super. 528.

Neither delivery nor record is conclusive evidence of acceptance. Gifford v. Corrigan, 105 N. Y. 223.

A covenant to assume a mortgage by grantee of a portion of the premises from the mortgagor enures to the benefit of the grantee of the remaining portion. Wilcox v. Campbell, 106 N. Y. 325.

One who assumes payment of a mortgage by a conveyance to him can-not deny the personal liability of his grantor for the payment of the mortgage, and thus escape the obligation. Thayer v. Marsh, 11 Hun, 501, affd., 75 N. Y.

340.

The words creating the assumption should be clear; words "subject to the payment of" a mortgage do not alone create such assumption. Colins v. Rowe, 1 Abb. N. C. 97; Equitable L. A. Soc. v. Bostwick, 100 N. Y. 628. But words "hereby assumes and agrees to pay, the same forming part of the consideration," do create an assumption. Wales v. Sherwood, 1 Abb. N. C. See also as to other words creating such assumption. Douglass v. Cross, 56 How. Pr. 330.

A grantee who has covenanted to assume a mortgage is not liable on his covenant after eviction by title paramount. Dunning v. Leavitt, 85 N. Y. 30. But a release by his grantor will not affect his liability. Murray v. Fox, 39 Hun, 108, affd., 104 N. Y. 382.

A covenant by a grantee of land, as part of the consideration of the deed, to pay the incumbrances on the land, is not a promise for the benefit of the grantor's widow, who did not join in the deed, but whose dower was expressly reserved, which will entitle her to sue the grantee on his failure to pay such incumbrances, which were afterward foreclosed and her dower thereby cut Durnherr v. Rau, 135 N. Y. 219.

The ordinary assumption clause does not render grantee personally liable for the mortgage debt assumed, unless grantor was himself liable when deed

was given. Williams v. Van Geison, 76 App. Div. 592.

Restriction of Building.— Covenant not to build within a certain distance of the street is not violated by a balcony projecting over the line put up in good faith. Aliter of a bay window built on the ground. Dubois v. Darling, 44 Super 436. Vide supra, p. 525.

Release.— A common grantor cannot by release impair the rights of a grantee under such covenant. Dubois v. Darling, 44 Super. 436.

Use of Streets, etc.— Vide Duryea v. Mayor, 62 N. Y. 592; Patton v. N. Y. El. R. R. Co., 3 Abb. N. C. 306.

Remedies of Heirs and Grantees of Lessor.—As to their remedy on covenants by lessees, vide supra, Chap. VIII, Tit. III.

Remedies of Lessees, Assignees, and their Representatives for the Breach of Covenants.—As to these, vide supra, Chap. VIII, Tit. III. By law of 1890, Chap. 475, and the short forms applied thereunder the rights of representatives and assignees are protected although they are not expressed in the instrument. This enactment was embodied in and now forms part of the Real Property Law. Real Property Law, § 222.

Dependence and Mutuality of Covenants.— The general rule is that where mutual covenants go to the whole consideration, on both sides, they are mutual conditions, the one precedent to the other, but where the covenants go only to a part of the consideration, then a remedy lies on the covenant to recover damages for a breach of it, and it is not a condition precedent. The dependence or independence of covenants is determined by the time in which their performance is required.

The subject of the mutuality of covenants is discussed in the following cases: McCullough v. Cox, 6 Barb. 386; Pepper v. Haight, 20 id. 431; Evans v. Harris, 19 id. 416; Grant v. Johnson, 5 N. Y. 247; The Meriden, etc., Co. v. Zingsen, 48 id. 247; Morris v. Sliter, 1 Den. 59; and see supra, Chap. V, Tit. III, as to covenants operating as conditions.

Breach before Assignment.—A covenant broken before assignment or transfer does not bind the assignee; as a covenant to pay a mortgage, if the mortgage becomes due before the sale.

Tillotson v. Boyd, 4 Sandf. 516.

Covenant in a Void Deed.—A covenant of title, etc., in a void deed is void.

Lewis v. Baird, 3 McLean, 56.

But in an action against the grantee upon his covenant the invalidity of the deed forms no defense while he retains possession. Gifford v. Father Matthew, etc., Soc., 104 N. Y. 139.

Transfer and Descent of Covenants.—A release of quit-claim deed passes covenants as well as a deed with covenants.

Beddoe v. Wadsworth, 21 Wend. 120; Hunt v. Amidon, 4 Hill, 345; Fowler v. Poling, 6 Barb. 165.

On a sale by foreclosure the purchaser acquires the covenant.

Andrews v. Walcott, 16 Barb. 21; Preiss v. De Poidevin, 19 Abb. N. C. 123; Slattery v. Schwannecke, 44 Hun, 75, affd., 118 N. Y. 543; Mygatt v. Coe, *Id.* 31, revd. on another point, 124 N. Y. 212. See also "Foreclosure."

Discharge of Covenants.— The general rule is that covenants under seal must be discharged by acts of as high a nature as those which create them, a covenant under seal, therefore, not being discharged by a parol agreement before breach.

Kav v. Waghorn, 1 Taunt. 427; Wall v. Munn, 5 N. Y. 239; Blake's Case, 6 Co. 43: Suydam v. Jones, 10 Wend. 180.

The Real Property Law, however, permits conveyances in fee without a seal; hence, quære, whether a covenant might not be discharged by parol since the enactment of the Real Property Law. Real Property Law, L. 1896, Chap. 547, § 208.

Expiration of Covenants.—This may be by their own terms. or by change of relation under operation of law.

College v. Thacher, 87 N. Y. 311.

Also the change of circumstances making the enforcement of the covenant no longer equitable.

Amerman v. Deane, 6 N. Y. Supp. 542; see 132 N. Y. 355.

Recitals.—As a general rule, all parties to a deed are bound by the recitals therein; and they operate as an estoppel, working on the interests in the land, and binding all parties and their privies. in blood, in estate, and in law, and them only. They do not bind strangers or parties claiming by title paramount.

Deery v. Cray, 5 Wall. 795; Jackson v. Parkhurst, 9 Wend. 209; Chautauqua Co. Bank v. Risley, 4 Den. 480; 1 Barb. 610; 10 id. 454; 3 Duer, 73; Jackson v. Wilson, 9 Johns. 92; Reed v. McCourt, 41 N. Y. 435; Demeyer v. Legg, 18 Barb. 14; Hardenburgh v. Lakin, 47 N. Y. 109; Tefft v. Munson, 63 Barb. 31, affd., 57 N. Y. 97; Scott v. Rutherford, 2 Otto, 108; Van Winkle v. Van Winkle, 95 App. Div. 605.

A recital, however, cannot control the plain words of the body of the deed. Huntington v. Havens, 5 Johns. Ch. 23. Nor if it be general, and not of a particular fact. Id.

A recital also works no estoppel in a deed poll, nor when the allegations A recital also works no estoppet in a deed poil, nor when the allegations in the deed are immaterial to the contract therein contained, nor when an action is not founded on the deed, but it is wholly collateral to it. Huntington v. Havens, 5 Johns. Ch. 23; Champlain, etc. v. Valentine, 19 Barb. 484. Nor is it evidence against strangers, nor against one claiming under the party executing the reciting deed by prior title or adversely to him. 10 Barb. 454; see also Torrey v. Bank of Orleans, 9 Paige, 649 at p. 659; 17 Barb. 109; Carver v. Astor, 4 Pet. 1; Crane v. Morris, 6 id. 598.

A recital not true in fact or founded in mistake will not be a bar. Stoughton v. Lynch 2, Johns. Ch. 200

ton v. Lynch, 2 Johns. Ch. 209.

To operate an estoppel, a recital must be a direct and precise allegation. Dempsey v. Tylee, 3 Duer, 73.

As Notice.— A recital of facts forming a link in the title is constructive notice of any defect, incumbrance, etc., but it must be unambiguous. Acer v. Westcott, 46 N. Y. 384; Gibert v. Peteler, 38 id. 165. Vide Chap. XXVI, "Acknowledgments." $\it Vide\ Titles,$ "Lease and Release," $\it infra, and$ "Sheriff's Deeds," as to recitals therein, Chap. XXXVIII.

A person entering into possession under a party bound by a recital is a privy in law of such party, and bound by the recitals. Jackson v. Parkhurst,

An infant is bound by recitals in the deed of his special guardian. Ester-

brook v. Savage, 21 Hun, 141, 145, criticised 64 Hun, 69.

An error in the recitals of a sheriff's deed in naming the day of sale was disregarded where the certificate described the same judgment and sale, and stated the date correctly, and there was no other judgment or sale had. Holman v. Holman, 66 Barb. 215.

TITLE VII. THE DATE, SEALING, SIGNING, AND ATTESTATION.

The Date.— The date of a deed is immaterial to its validity. the date of its delivery controlling and giving it effect. (U. S. v. Le Baron, 19 How. (U. S.) 73; Jackson v. Bard, 4 Johns. 230; Fowler's Real Property Law 665.) The date, however, is presumptively the true time of the execution and delivery of a deed.

Jackson v. Hill, 5 Wend, 532; Robinson v. Wheeler, 25 N. Y. 252. Presumption of delivery on day of date is not affected by a subsequent date of acknowledgment, failing other evidence. Crager v. Reis, 12 N. Y. Supp. 729, and see Tit. VIII, "Delivery."

A deed executed in pursuance of a previous contract is good by relation from the time of making the contract, so as to render valid every intermediate sale or disposition by the grantee (Jackson v. Bull, 1 Johns. 81), but not so as to do wrong to strangers. Jackson v. Bard, 4 Johns. 230; Parmelee v. Simpson, 5 Wall. 81.

But it will take effect from that date as regards purchasers with notice.

Demarest v. Ray, 19 How. Pr. 574.

Signing and Sealing.—At common law the grantor must seal as well as sign the deed, a written instrument not under seal being. in general, held inoperative and ineffectual to pass the legal title to land, though it may pass an equitable interest.

By the Real Property Law, however, a seal may now be dispensed with. Real Property Law, § 208.

The terms writing and written, when used generally in a statute, include every legible representation of letters upon a material substance, except when applied to the signature of an instrument.

The term signature includes any memorandum, mark or sign, written or placed upon any instrument or writing with intent to execute or authenticate such instrument or writing.

L. 1892, Chap. 677, § 12. As to capacity in which a party signs, see Chap. XX, Tit. II. Executors need not sign as such if so described in the deed. Myers v. Mut.

Life Ins. Co., 99 N. Y. 1.

Execution by attorney in fact. See Robins v. Austin, 42 Hun, 469. The seal has always, by the common law as well as by statute until the Real Property Law of 1896, been necessary for the conveyance of a freehold. The signature does not appear to have been essential until the Statute of

Frauds (29 Car. II), re-enacted in this country February 26, 1787. Vide 1 R. L. 78.

A deed, however, cannot bind a party sealing or signing it, without words expressive of an intention to be bound. There must be words of grant or release. Catlin v. Ware, 9 Mass. 278; Lufkin v. Curtis, 13 id. 223.

Signing individually of party in an official capacity held good. Myers v. Mutual Life Ins. Co., 99 N. Y. 1. See also supra, Chap. XX, Tit. II.

The Revised Statutes required that every grant in fee, or of a freehold estate, should be subscribed and sealed by the person from whom the estate or interest is intended to pass, or his lawful agent. and either duly acknowledged previous to its delivery, or its execution and delivery be attested by at least one witness; or if not so attested, it should not take effect as against a purchaser or incumbrancer until so acknowledged.

1 R. S. 738, § 137; see also Morse v. Salisbury, 48 N. Y. 636; Jackson v. Wood, 12 Johns. 73; Commissioners, etc. v. Chase, 6 Barb. 37; Mann v. Pentz, 2 Sandf. Ch. 630. It may be recorded and is then notice. Grandin v. Hernandez, 29 Hun, 399.

But it is good as against the grantor and between the parties, whether acknowledged and attested or not. Voorhees v. Presbyterian Ch., 17 Barb. 103; Wood v. Chapin, 13 N. Y. 509; Genter v. Morrison, 31 Barb. 155; Title II, p. 533.

The statute refers to subsequent incumbrancers. Wood v. Chapin, 13 N. Y.

The place of signing in the instrument is immaterial, and even a printed instead of a written name has been said to be sufficient. Vide 2 Bos. & Pull. 239.

As to execution by agent, see *supra*, Chap. XIX, Tit. I.

The Statute of 1892 permitted a substitutional or symbolic seal (e. g., a scroll) to be affixed to a deed of any private person. L. 1892, Chap. 677. The Real Property Law, § 208, dispensed with the necessity of sealing a deed. Leask v. Horton, 39 Misc. 144; Fitzpatrick v. Graham, 122 Fed. Rep. 401; 58 C. C. A. 619.

The common law required for a seal an impression upon wax or wafer or other tenacious substance, and such was the law of this state until 1892. Vide infra.

Bank of Rochester v. Grav. 2 Hill, 227. As to effect of a seal, see Baird v. Baird, 81 Hun, 300; also supra, p. 536.

A bit of paper secured with mucilage is sufficient (Gillespie v. Brooks, 2 Redf. 349), or an internal revenue stamp. Van Bokkelen v. Taylor, 62 N. Y. 105.

A scrawl held not a seal. Warren v. Lynch, 5 Johns. 239; 4 Cow. 508; 17 Barb. 309; Farmers & Manufacturers' Bank v. Haight, 3 Hill, 493; 17 N. Y. 521. One seal will answer for two or more persons, if intended for the seal of all. Van Alstyne v. Shuyck, 10 Barb. 383; Mackay v. Bloodgood, 9 Johns. 285; 4 Hill, 351; Atlantic Dock Co. v. Leavitt, 54 N. Y. 35; Christie v. Gage, 2 Supm. 344, affd., 71 N. Y. 189.

The private seal of a person, other than a corporation, to any instrument or writing, shall consist of a wafer, wax or other similar adhesive substance affixed thereto, or of paper or other similar

substance affixed thereto by mucilage or other adhesive substance, or of the word "seal" or of the letters "L. S." opposite the signature.

Statutory Construction Law, G. L., Chap. I, L. 1892, Chap. 677, § 13.

In the case of courts and public officers, and also of corporations (Laws of 1848, Chap. 197), an impression on paper, without the use of wafer or wax, is valid. L. 1892, Chap. 677, § 13. See formerly 2 R. S. 404; repealed Laws 1877, Chap. 417; Code Civ. Proc., § 29 and § 960; Farmers', etc., Bank v. Haight, 3 Hill, 493; Curtis v. Leavitt, 15 N. Y. at p. 225; Bank of Rochester v. Gray, 2 Hill, 227.

Paper sufficiently tenacious would satisfy the rule of law. Ross v. Bedell,

5 Duer. 462.

A stranger tearing off the seals will not vitiate the deed. Rees v. Overbaugh, 6 Cow. 746.

See Warren v. Lynch, 5 Johns. 239, and Jackson v. Wood, 12 id. 73, as to the origin, nature, and use of seals,

As to seal as evidence of consideration, see Chap. XX, Tit. III.

Seals of Corporations. See Chap. XXIV, "Corporations" and infra.

Seals of Courts.— A stamp on paper is sufficient. Laws 1815, p. 38; Laws of 1848, Chap. 197; 2 R. S. 276, repealed by Laws of 1880, Chap. 245; Code Civ. Proc., § 29; L. 1892, Chap. 677, § 13; Smith v. Tiffany, 16 Hun, 552.

Seals of Corporations and Courts Under Law of 1892.—A seal of a court, public officer or corporation may be impressed directly upon the instrument or writing to be sealed, or upon wafer, wax or other adhesive substance affixed thereto, or upon paper, or other similar substance affixed thereto by mucilage or other adhesive substance. An instrument or writing duly executed, in the corporate name of a corporation, which shall not have adopted a corporate seal, by the proper officers of the corporation under their private seals, shall be deemed to have been executed under the corporate seal. Laws of 1892, Chap. 677, § 13.

Seal Omitted by Mistake.—If the deed is passed, and the seal is casually omitted, the land is considered equitably in the grantee, and while the deed is not good as a conveyance, the grantor, his heirs, or a subsequent purchaser with notice may be compelled to convey. Wadsworth v. Wendell, 20 Wend. 659, revg. 5 Johns. Ch. 224; Grandin v. Hernandez, 29 Hun, 399. See also, as to necessity of seal, 18 Am. Law Review, 988, 1004.

Where the record showed no seal when recorded, it may be rebutted by proof of seal before. Todd v. Union Dime Savings Inst., 118 N. Y. 337,

revg. 20 Abb. N. C. 270.

Legislative Act.—A seal is unnecessary to a grant by legislative act. Wetmore v. Story, 22 Barb. 414, 485.

Evidence of Consideration.— A seal is presumptive evidence of consideration Case v. Boughton, 11 Wend. 106; McCurter v. Stevens, 13 id. 527, 22 Barb. 99; 10 id. 106; Livingston v. Tremper, 4 Johns. 416; 5 Duer, 294; North's Admrs. v. Pepper, 21 Wend. 636; Williams v. Kent, 15 id. 360; Mann v. Eckford's Exrs. 519; Johnson v. Miln, 14 id. 195; 2 R. S. 406, repealed by Laws 1880, Chap. 245; vide Code Civ. Proc., § 840; 10 Barb. 312; 6 id. 25; 5 How. Pr. 66; 25 Wend. 113; Hunt v. Jackson, 19 N. Y. 279, but not conclusive, except as to release since 2 R. S. 406, § 77. Gray v. Barton, 55 N. Y. 68; Torry v. Black, 58 id. 185; see Fowler's Real Property Law, 662, 663.

Estates Less than Freehold might be conveyed without a seal — e. g., growing trees. Warren v. Leland, 2 Barb. 613.

Adding a seal after execution, held, surplusage and an immaterial altera-

tion. Green v. Ellwell, 13 Wkly. Dig. 236.

Real Property Law - Necessity of Seal .- The words "and sealed" have been omitted from the Real Property Law and a seal no longer seems to be necessary to carry a fee.

Real Property Law, § 200. So held, Leask v. Horton, 39 Misc, 144.

Attestation.— The Revised Statutes provided that if not duly acknowledged previous to its delivery, every grant in fee, or of a freehold estate, shall be attested by at least one witness; or, if not so attested, it shall not take effect as against a purchaser or incumbrancer until so acknowledged.

1 R. S. 738, § 137.

The same provisions were re-enacted in the Real Property Law.

Real Property Law, § 208. See cases, supra, p. 576. Neither an heir nor

Real Property Law, § 208. See cases, supra, p. 576. Neither an heir nor a purchaser from an heir is a "purchaser" within this provision. Strough v. Wilder, 49 Hun, 405, affd., 119 N. Y. 530.

In the case of Roggen v. Avery, 63 Barb. 65, affd. in 65 N. Y. 592, it is held that an instrument under hand and seal, but without subscribing witness or acknowledgment, is insufficient to convey real estate, as against a purchaser holding through a devise by the former grantor. To the same effect, Goodycar v. Vosburgh, 57 Barb. 243. Nor is such an instrument good even as against a subsequent grantee with notice and without consideration from the same grantor. Chamberlain v. Spargur, 86 N. Y. 603.

The witness should subscribe at the time or be called in and requested to

The witness should subscribe at the time or be called in and requested to witness the deed by the parties immediately on execution. Jackson v. Phillips, 9 Cow. 94 at p. 113; Henry v. Bishop, 2 Wend. 575; Hollenbach v. Fleming, 6 Hill, 303; Voorhees v. Presbyterian Church, 17 Barb. 103. See the above cases as to the proof of execution by the witness, on a trial.

Subscribing witness must subscribe at the time of execution, not subsequently without request. Pritchard v. Palmer, 88 Hun, 412.

The fact that a person was present and saw another sign his name to instrument, if the person executing the instrument did not request him to become a subscribing witness thereto, and if he did not sign the instrument as a subscribing witness at that time, is not sufficient to qualify such person to prove the execution of such instrument as a subscribing witness. Earley v. St. Patrick's Soc., etc., 81 Hun, 369.

Revenue Stamps.— The affixing of United States revenue stamps is not essential to the validity of a deed. Dady v. O'Rourke, 61 App. Div. 529.

TITLE VIII. THE DELIVERY AND ACCEPTANCE.

It is also requisite that the deed be delivered to give it vitality. The deed takes effect so as to vest the estate or interest conveyed only from its delivery. (1 R. S. 738, § 138. Real Property Law, § 209.) The date is no part of the substance of a deed; the real date is the time of delivery. The delivery need not be by formal words or acts. Those showing an intention are sufficient. there must be an intention to deliver.

Jackson v. Bard, 4 Johns. 230; Jackson v. Schoonmaker, 2 id. 230; Jackson v. Leek, 12 Wend. 105; Carver v. Jackson, 4 Pet. 1; Goodrich v. Walker, 1 Johns. Cas. 250; Fisher v. Hall, 41 N. Y. 416; Roosevelt v. Carow, 6 Barb. 190; Bracket v. Barney, 28 N. Y. 333; United States v. Le Barron, 19 How. (U. S.) 73; Mitchell v. Bartlett, 51 N. Y. 447; Best v. Brown, 25 Hun, 223. The deed is generally presumed to have been delivered at the time of

its date. Harris v. Norton, 16 Barb. 264; vide supra, Tit. VII, p. 575; and People v. Snyder, 41 N. Y. 397.

And, as a general rule, the delivery is complete where the grantor has put it beyond his power to reclaim the deed. Brown v. Austen, 35 Barb.

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The presumption that it was executed at the time of the date, does not hold in respect to deeds in fee, unattested and unacknowledged since the Revised Statutes. Elsey v. Metcalf, 1 Den. 323; Harris v. Norton, 16 Barb. 264, supra; Genter v. Morrison, 31 id. 155. Nor where the contrary is proved. Elsey v. Metcalf, 1 Den. 323; Costigan v. Gould, 5 id. 290.

The presumption that a deed was delivered at its date was not affected by the statute (1 R. S. 738, § 137; Real Property Law, § 208), when the deed was proved and acknowledged. Robinson v. Wheeler, 25 N. Y. 252, criticised,

63 Hun, 490.

Where a revenue stamp is canceled of a certain date, that will control the presumption of the delivery as of the date. Van Rensselaer v. Vickery, 3 Lans. 57. Or where it was shown to have been, subsequent to its date, in the hands of grantor. Elsey v. Metcalf, 1 Den. 323. Or where the certificate of acknowledgement shows that it was acknowledged after the day of date. McIntyre v. Strong, 48 Super. 127.

Delivery to a third person and recording are equivalent to delivery to grantee, if the act is not repudiated. Russ v. Maxwell, 94 App. Div. 107.

Delivery to an agent is delivery to the party. Worrall v. Munn, 5 N. Y. 229; Taylor v. Smith, 61 App. Div. 623.

And, if unconditional, it will take effect immediately. Brown v. Austen, 35 Barb. 341; Ernst v. Reed, 49 id. 367.

If the delivery is void, all subsequent titles under the deed are void. Ford v. James, 4 Keyes, 300.

Parol evidence of conditions qualifying the delivery, if contrary to the terms of the instrument, is inadmissible. Worrall v. Munn, 5 N. Y. 229.

Possession is presumptive evidence of signing, sealing and delivery. Strough v. Wilder, 119 N. Y. 530; Chandler v. Temple, 4 Cush. 285; Rhine v. Robinson, 27 Pa. St. 30; Games v. Stiles, 14 Pet. 322. But may be rebutted.

Roberts v. Jackson, 1 Wend. 478.

The production of a deed by the grantee from his own custody, accompanied by proof of declarations by the granter that she intended the grantee to have the premises conveyed thereby, and by evidence that the deed was drawn by a scrivener pursuant to the grantor's directions, and that after its execution the grantee paid taxes, rented, repaired, and exercised control over the property, justifies a finding that the deed had been delivered. Strough v. Wilder, 119 N. Y. 530. See also Games v. Stiles, 14 Pet. 322; Ranken v. Donovan, 115 App. Div. 651.

A delivery to a stranger as agent to deliver, passes the title (49 Barb. 367; Church v. Gilman, 15 Wend. 656) if the grantee assent. Also, a registration of it by the grantor, if accepted by the grantee. Young v. Guilbeau, 3 Wall. 636; Parmelee v. Simpson, Id. 81.

Record of mortgage shows delivery, and delivery of bond will then be presumed. Geissman v. Wolf, 46 Hun, 289.

Where an agreement was made that two deeds to a husband not recorded should be destroyed, and a deed executed in their stead to his wife, who entered and made improvements and recorded — held to convey title, at least

entered and made improvements and recorded — held to convey title, at least in equity, to wife as against the husband, and husband by recording his deed could not make good title in himself. Ball v. Ball, 97 App. Div. 347.

Unconditional delivery to third party of mortgage for another and record by him makes it good, though mortgagee be ignorant of it. Munoz v. Wilson,

111 N. Y. 295.

Attestation clause is not proof of delivery. Weed v. Hewlett, 12 N. Y. Supp. 606, affd., 129 N. Y. 673.

Delivery without consent of grantor is void. Felix v. Patrick, 145 U.S.

A delivery to an attorney-at-law or agent who holds it for the consideration of his client, is not a delivery if the latter decline to accept. Carnes v. Platt, 7 Abb. N. S. 42; reversed on other grounds. Ford v. James, 2 Abb. Ct. App. Cas. 159, note.

A delivery on Sunday is held good. Shuman v. Shuman, 27 Pa. St. 90. Unless disclaimed, a delivery to a third person is a good delivery, if done for the grantee's use. Church v. Gilman, 15 Wend. 656. And the acceptance of the grantee will be presumed. Sayres v. Townsend, 15 Wend. 647; Shrader v. Banker, 65 Barb. 608.

Where a deed delivered in escrow, is to be delivered on the death of a Where a deed delivered in escrow, is to be delivered on the death of a grantor, the title by relation passes at the time the deed was left for delivery. Hathaway v. Payne, 34 N. Y. 92. Leaving for record is presumptive evidence of delivery (5 McLean, 457; Elsey v. Metcalf, 1 Den. 323; Fryer v. Rockefeller, 63 N. Y. 268; Knolls v. Barnhard, 71 id. 474), if left for grantee's use, but may be repelled. Lawrence v. Farley, 9 Abb. N. C. 371; Younge v. Guilbeau, 3 Wall. 636; Van Valen v. Schemerhorn, 22 How. Pr. 416; Rathbun v. Rathbun, 6 Barb. 98; Wilsey v. Dennis, 44 id. 354; Day v. Mooney, 6 Supm. 382. Even if the grantor recorded it himself. Id.; Ford v. Lames 4 Keves 300. Parmelee v. Simpson 5 Wall 81. Rest v. Brown 25 James, 4 Keyes, 300; Parmelee v. Simpson, 5 Wall. 81; Best v. Brown, 25 Hun, 223.

The return of a deed to the grantor and the destruction thereof, after it has been executed and delivered, will not reinvest the grantor with the title. Parshall v. Shirts, 54 Barb. 99; and *infra*, pp. 581, 582.

Delivery of a deed to a city is sufficient where city clerk has received and recorded same, without a resolution of common council accepting it. Beckrich v. City of N. Tonawanda, 171 N. Y. 292.

Redelivery.— A redelivery, after an alteration by grantor, is, in legal effect, also a re-execution. Malarin v. U. S., 1 Wall. 282; 22 How. Pr. 416.

A deed may be delivered or tendered to one of several grantees. Carman v. Pultz, 21 N. Y. 547.

Ratification.- A ratification may be made of grantor's unauthorized delivrey; but not so as to cut off an intervening incumbrancer for value. Parmelee v. Simpson, 5 Wall. 81; The Lady, etc. v. McNamara, 3 Barb. Ch. 375; Church v. Gilman, 15 Wend. 656; Souverbye v. Arden, 1 Johns. Ch. 240; Carnes v. Platt, 7 Abb. N. S. 42.

Decease of Grantor.— A delivery after the death of the grantor is no delivery. Jackson v. Leek, 12 Wend. 105; Stillwell v. Hubbard, 20 id. 44; Keirsted v. Avery, 4 Paige, 9. But see "Conditional Delivery," infra.

Where a deed signed by all the vendors was tendered on the trial of an action for specific performance and upon refusal was deposited with the clerk of the court, the death of one of the vendors before delivery to the grantee will not affect the validity of the deed. Webster v. Kings Co. Tr. Co., 145 N. Y. 275.

Deeds will be presumed to have been delivered on the day of acknowledgment. Loomis v. Pingree, 43 Me. 299.

The Revised Statutes provided that all rules of law in force when they were enacted, in respect to the delivery of deeds, should apply to grants thereafter to be executed. 1 R. S. 738, § 138. Also, that the delivery of a grant, where an expectant estate is created by grant, is to be deemed the time of the creation of the estate. 1 R. S. 726, § 41.

These provisions have been re-enacted in the Real Property Law.

Real Property Law, §§ 54 and 209.

If a deed be duly delivered, in the first instance, it will operate, though the grantee suffer it to remain in the custody of the grantor. Fisher v. Hall, 41 N. Y. 416; 19 Barb. 243; 16 id. 264; Scrugham v. Wood, 15 Wend. 545; Souverbye v. Arden, 1 Johns. Ch. 240.

See also as to when delivery and acceptance are to be implied from the fact of execution, etc. Doe v. Knight, 5 Barn. & Cress. 671; Scrugham v. Wood, 15 Wend. 545; 28 N. Y. 333; Fisher v. Hall, 41 id. 416; 25 Hun, 223; Wallace v. Berdell, 97 N. Y. 13; McGuire v. McGuire, 37 Misc. 259. Delivery may be inferred from subsequent circumstances. Gould v. Day,

4 Otto, 405.

A deed in escrow to be delivered on death of grantor may be superseded by grantor's will. Rochester Savgs. Bk. v. Bailey, 34 Misc. 247.

Fraud.- Delivery obtained by fraud will not vest title in the grantee. Ritter v. Worth, 58 N. Y. 627; Lawrence v. Conklin, 17 Hun, 228.

Innocent Purchaser .- Delivery of a deed held in escrow before the proper time, held valid as to a purchaser in good faith for a valuable consideration. Simpson v. Bank of Commerce, 43 Hun, 156.

Record as Evidence.—Recording by grantor held good delivery regardless of intent. Messelback v. Norman, 46 Hun, 414, affd., 122 N. Y. 578.

Record held only presumptive evidence of delivery. Russ v. Stratton, 11 Misc. 565; Townsend v. Rackham, 143 N. Y. 516.

Conditional Delivery.—The delivery may be either absolute, to the grantee himself, or to any other by his assent or direction; or to a third person for or on account of the grantee, to hold until some conditions be performed on his part, in which last case it is said to be delivered in "escrow." The delivery, also, may be contingent and provisional.

See Fowler's Real Property Law, 665, 666.

Where a deed absolute on its face is delivered to the grantee, its effect cannot be changed by parol. Arnold v. Patrick, 6 Paige, 310; 11 Barb. 349. Until the condition is performed and the deed delivered, the estate does not pass, but remains in the grantor. 1 Barb. 500; 20 id. 332; Jackson v. Rowland, 6 Wend. 666; Frost v. Beekman, 1 Johns. Ch. 288; Beekman v. Frost, 18 Johns. 544; Hunter v. Hunter, 17 Barb. 25, 82. The delivery in escrow must be to a stranger, and not to one of the parties or his agent. 11 Barb. 349; Worrall v. Munn, 5 N. Y. 229; 33 Barb. 9; Arnold v. Patrick, 6 Paige 310; Braman v. Bingham, 26 N. Y. 483.

A deed may be delivered in escrow, and such delivery may be made effective on the performance of the condition, even if the grantor has died. Hunter

v. Hunter, 17 Barb. 25.

A delivery in escrow to be delivered to grantee on grantor's death has been held to take effect from such death. Nottbeck v. Wilks, 4 Abb. 315. In the case of Hathaway v. Payne, 34 N. Y. 92, however, the title in such case is held to pass at the time the deed was left for delivery; and a distinction is drawn between deeds left in escrow, or on condition, or those To the same effect was Tooley v. Dibble, 2 Hill, 641. See also Goodell v. Pierce, 2 Hill, 659; Hunter v. Hunter, 17 Barb. 25. Van Tassel v. Burger, 119 App. Div. 509; Tompkins v. Thompson, 93 N. Y. Supp. 1070.

The presumption is that a deed was not delivered in escrow. Chouteau v.

Suydam, 21 N. Y. 179.

As to what may constitute a delivery not conditional. Wilcox v. First Meth. E. Ch. of Henderson, 104 App. Div. 576.

A delivery to grantee of a deed merely to enable him on death of grantor to gain title in case of emergency and where such emergency does not arise, held title will not vest and deeds may be canceled at suit of grantor as a cloud on title. Hamlin v. Hamlin, 51 Misc. 111.

It is a question for the jury what the intention of the parties was. Hol-

'brook v. Truesdell, 100 App. Div. 9.

A deed in escrow does not take effect until performance of the stipulated condition, although the instrument has gone into the grantee's possession. Smith v. Smith Royalty Bk., 32 Verm. 341; Hinman v. Booth, 21 Wend. 267; Pendleton v. Hughes, 65 Barb. 136, affd., 53 N. Y. 626.

Generally, a deed given in escrow would take effect and the title pass from its actual or second delivery, after performance of the condition, but the delivery would take effect by relation back to the first delivery, in cases of necessity, to prevent injury to the operation of the deed from what might have occurred intermediately, as in case of the marriage of a woman who was sole when the deed was first delivered; or where either of the parties die before condition performed. The delivery to a third person to be delivered to the grantee by him would take effect also from the time of delivery to such third person. Jackson v. Catlin, 2 Johns. 248, affd., 8 id. 120; Ruggles v. Lawson, 13 id. 285; Stanton v. Miller, 58 N. Y. 192.

See as to date of taking effect. Nat'l Bk. of Port Jervis v. Bonnell, 46 App. Div. 302; Ranken v. Donovan, Id. 225.

An intermediate judgment, however, would attach against the grantor in most cases. Jackson v. Rowland, 6 Wend. 666; Jackson v. Catlin, supra.

The distinction between a present delivery and an escrow reiterated, citing Hathaway v. Payne, 34 N. Y. 92; Cain v. Wright, 36 Hun, 74, affd., 114 N. Y. 307.

The depository in escrow is bound to deliver when the condition is performed, and the deed if put in escrow for a valuable consideration is not revocable except according to the terms of the deposit. Stanton v. Miller,

65 Barb. 58, revd. on other grounds in 58 N. Y. 192.

A deed to a third person to be handed over by him to grantee who was grantor's wife, if the grantor got drunk after its date, held not to be in escrow, as not made pursuant to any valid contract and not depending on any valid contract to be performed by the grantee; and where there was no other valid consideration and it was not delivered during grantor's life, its subsequent delivery is ineffectual. Rosen v. Lent. 44 Misc. 437.

An instrument was executed under seal and acknowledged, whereby the owner in fee of premises undertook, for a good consideration, to "give, bequeath and convey" the same, with reference to an accompanying paper for a full description, to a person named; the instrument was to take effect on the maker's death, and was delivered by him to a third party for delivery to the grantee named therein at the time stated, and was, on the maker's death, delivered to the grantee and recorded. Held, that the instrument was a deed and not a will, and conveyed to the grantee a good title in fee, which a party who had contracted to purchase the premises from the grantee was bound to accept. Campbell v. Morgan, 68 Hun, 490.

Unconditional delivery to third party and record by him held Munoz v. Wilson, 111 N. Y. 205.

Delivery Compelled .- Courts of equity will compel delivery by a depositorin proper cases. Id.

Acceptance and Ratification.—To make the delivery complete there must be an acceptance express or implied; and not merely a physical taking, but an intention to accept.

Jackson v. Phipps, 12 Johns. 418; Cunningham v. Freeborn, 11 Wend. 240; Crosby v. Hillyer, 24 id. 280; Stephens v. Buffalo & N. Y. R. R. Co., 20 Barb. 332; Brackett v. Barney, 28 N. Y. 333; 46 Barb. 109; 47 id. 505.

A subsequent acceptance, even on the same day, cannot divest the right of an intermediate lien, deed, or levy. 47 Barb. 505; Crosby v. Hillyer, 24 Wend. 280. Where a deed has been duly executed, delivered, and accepted, a subsequent surrender or destruction of it will not divest the estate conveyed by it. Nicholson v. Halsey, 1 Johns. Ch. 417; Raynor v. Wilson, 6 Hill, 469; 46 Barb. 109; 3 id. 404; 6 id. 373; Parshall v. Shirts, 54 id. 99; and see infra, "Alteration."

An acceptance in some cases may be implied, even where the grantor retains possession of the deed. McLean v. Button, 19 Barb. 450. See also

supra, "Delivery."

As a general rule, a ratification of a grantor's unauthorized delivery can be made by the grantee, but not when the effect would be to cut out an intervening mortgage for value. Parmlee v. Simpson, 5 Wall. 81; and supra, p. 581; Foster v. Beardsley Scythe Co., 47 Barb. 505.

As a general rule, there is a presumption in favor of an acceptance when a delivery has been proved. Cruise's Digest, Tit. XXXII, Chap. I; Cunningham v. Freeborn, 11 Wend. 240; Jackson v. Bodle, 20 Johns. 184; Jackson v. Phipps, 12 id. 418; and Spencer v. Carr, 45 N. Y. 406, in support of presumed acceptance by an infant of deed beneficial to him; also note, 15 Fed. Rep. 46.

Delivery and acceptance essential to validity—record is only prima facie evidence. Blass v. Terry, 87 Hun, 563; Hamlin v. Hamlin, 117 App. Div. 493; Mannix v. Riordan, 75 id. 135.

Delivery — refusal to accept and subsequent acceptance — intervening credi-

tors. Holmes v. Little, 86 Hun, 226.

The acceptance of a deed which has been acknowledged and recorded and passed beyond control of grantors is presumed, though grantee did not know of its execution until afterward. Edlich v. Gminder, 65 App. Div. 496.

TITLE IX. AVOIDANCE, ALTERATION, AND CANCELLATION.

A deed may be invalid for defect in the requisites above set forth. or it may be avoided by matter ex post facto, as —

r. By erasure, interlining, or other alteration, in any material part, unless a memorandum be made thereof at the time of the execution and attestation, or the alteration be made by authority of the parties.

The question of authority is one of fact for the jury. Smith v. Chadsey, 1 Supm. 7.

Striking out a covenant in an executed deed is held to avoid the deed. Stone v. Lord, 80 N. Y. 60.

But filling blanks in an executed instrument which do not in any way enlarge or extend the meaning, as inserting "his," "her," and the like in appropriate places, is in no legal sense a material alteration. Kinney v.

Schmitt, 12 Hun, 521. See also Hemmenway v. Mulock, 56 How. Pr. 38.

An alteration in a written instrument, made by one not a party thereto, without the knowledge or assent of a party, and in a matter not material, does not invalidate the instrument; the alteration is of no effect, and the original validity of the instrument remains. Gleason v. Hamilton, 138 N. Y. 353.

Alteration .- As a general rule, the material alteration of a deed made by a party claiming under it, or by any person under whom he claims, renders it void. Any alteration, however, by a stranger, without the privity of the party interested, does not render the deed void when its original contents can be ascertained; and the party seeking to recover must show that the alteration was not made by him, or by those under whom he claims; or that it was made before execution, unless the alteration is against the interest of the party producing the deed, when he is not bound to account for the alteration. Jackson v. Jacoby, 9 Cow. 125; Acker v. Ledyard, 8 Barb. 514; reversed on other grounds, 8 N. Y. 62; Garrett v. Maybee, 2 E. D. Smith, 1, 260; Maybee, 2 E. D. Smith, 1, 267, M affd., 16 N. Y. 560; Marcy v. Johnson, 5 Lans. 365.

In order to avoid a deed on the ground of alteration, it must be proved that the alteration was made by the party in interest (Van Brunt v. Van Brunt, 3 Edw. 14), or by some one under whom he claims. 36 Miss. 355. An immaterial alteration after title passed does not destroy the title or the deed. Malin v. Malin, 1 Wend. 625, 659; Herrick v. Malin, 22 Id. 388; People v. Muzzy, 1 Den. 239; 39 Barb. 319; see also 5 Lans. 365.

An alteration by a third person does not vitiate. Rees v. Overbaugh, 6 Cow. 746; Waring v. Smith, 2 Barb. Ch. 119; Every v. Merwin, 6 Cow. 360; Gleason v. Hamilton, 19 N. Y. Supp. 103, modified 138 N. Y. 353.

A deed may be altered after execution in material parts with consent of parties. Wooley v. Constant, 4 Johns. 54; Penny v. Corwithe, 18 id. 499.

Semble, an interlineation without anything to excite suspicion that it was not made before execution, will be presumed to have been so made. Herrick v. Malin, 22 Wend. 388; Waring v. Smith, 2 Barb. Ch. 119, 133. See these cases as to the proof relative to alterations.

The fraudulent destruction of a deed may operate to discharge the estate held under it, unless the estate may exist without the deed. Herrick v. Malin, 22 Wend. 338; Smith v. McGowan, 3 Barb. 404.

So also an alteration in a material part. Waring v. Smith, 2 Barb. Ch. 119; Garret v. Maybee, 2 E. D. Smith, 1, affd., 16 N. Y. 560.

The alteration of one of two duplicates does not vitiate the other. Lewis v. Payn, 8 Cow. 71; s. c. 4 Wend. 423.

An authority to fill in blanks or alter a deed ceases after it has been

delivered. Ex parte Decker, 6 Cow. 59.

The mere surrender, destruction or canceling of a deed by the grantee after delivery will not reinvest the grantor with the title, nor when done by agreement of parties. Schutt v. Large, 6 Barb. 373; Parker v. Kane, 4 Wis. 1; Jones v. Neale, 2 P. & H. (Va.) 339; Jackson v. Chase, 1 Johns. 84; Raynor v. Wilson, 6 Hill, 469; Nicholson v. Halsey, 1 Johns. Ch. 417; Lewis v. Payn, 8 Cow. 71; s. c. 4 Wend. 423; Smith v. McGowan, 3 Barb. 404; also 46 id. 100; 6 id. 373; 54 id. 99.

2. By Breaking off and Defacing the Seal.—A deed is not avoided by the tearing off of the seal by the grantor, or by his direction or by a stranger.

Rees v. Overbaugh, 6 Cow. 746; Every v. Merwin, 6 id. 360; 1 Gall. 69. Nor when done after delivery. Frost v. Peacock, 4 Edw. 678.

3. By Cancellation.—As a general rule, executed and recorded de ds under seal can be surrendered and canceled only by other deeds under seal, and the destruction or surrender of the instrument will not destroy title.

Jackson v. Chase, 2 Johns. 84; 3 Barb. 404; 6 id. 373; Raynor v. Wilson, 6 Hill, 469; Nicholson v. Halsey, 1 Johns. Ch. 417; 46 Barb. 109; 54 id. 99; 1 Black, 450; 4 McLean, 12; supra, p. 578 seq., and infra.

The above cases hold that although the title passed by the deed will not be changed by surrender or cancellation, the deed itself and the covenants

therein will be avoided.

Where a deed is canceled on the ground of mistake at the suit of the grantor, the grantee is relieved thereby from the covenant of assumption of a mortgage. Crowe v. Lewin, 95 N. Y. 423.

Destruction of a deed by the grantor, after delivery, held to have no effect, and the existence and contents of the deed may be proved by parol. Simmons v. Havens, 101 N. Y. 427.

TITLE X. DEEDS GIVEN UNDER ADVERSE POSSESSION, CHAMPERTY,

By our statutes, every grant of lands by parties out of possession at the time of delivery, and with an adverse possession against them, are absolutely void.

1 R. S. 739, § 147; Real Property Law, § 225; Webb v. Binden, 21 Wend. 98; Poor v. Horton, 15 Barb. 485; Vrooman v. Shepherd, 14 *id.* 441; Ten Eyck v. Craig, 2 Hun, 452, affd., 62 N. Y. 406; Hollister v. Dowe, 3 Wkly. Dig. 557.

Adverse possession cannot be founded upon such a deed. Elwood v. Northrup, 106 N. Y. 172.

Actual possession by the occupation of grantor is not necessary to give effect to his deed; for if the possession held by another be of a fiduciary character, or if its origin and continuance were such as not to amount to a

disseizin, it will not impede the operation of the deed.

Although deeds by parties out of possession are void as against the person holding possession, and his privies, they are good as to the rest of the world, and as between grantor and grantee. Hamilton v. Wright, 37 N. Y. 502; Van Hoesen v. Benham, 15 Wend. 164; 3 Barb. 589; 15 id. 485; 17 id. 665; Livingston v. Proseus, 2 Hill, 526, as the conveyance works an estoppel. Jackson v. Wheeler, 10 Johns. 164.

Ejectment will lie by the grantee in the name of the grantor. Code Civ.

Proc., § 1501.

As to mortgages when mortgagor is out of possession, vide "Title by Mort-

A deed from the true owner while a trespasser is in possession is good.

The prior possession, in order to avoid the conveyance, must be under claim of the entire specific title, which must cover the possession, and the title must be adverse to that of the grantor, in the deed sought to be avoided. 4 Duer, 454; Hallas v. Bell, 53 Barb. 247; Fish v. Fish, 39 id. 513; Stevens v. Hauser, 39 N. Y. 302; Crary v. Goodman, 22 id. 170; Howard v. Howard, 17 Barb. 663; Corning v. Troy Factory, 39 id. 311, affd., 40 N. Y. 191; Higginbotham v. Stoddard, 72 id. 94; Nash v. Kemp, 12 Hun, 592.

As to what title the possessor should have in order to avoid the deed, vide Jackson v. Elston, 12 Johns. 452; Jackson v. Foster, id. 488; Briggs v. Proser, 14 Wend. 227; Bradstreet v. Clarke, 12 id. 602, 674; Bailey v. Onondaga, etc., Ins. Co., 7 Hill, 476; Clapp v. Bromagham, 9 Cow. 530; Jackson v. Woodruff, 1 id. 276; Livingston v. Peru Iron Co., 9 Wend. 511; Jackson v. Hill, 5 id. 532; Jackson v. Mancius, 2 id. 357; Jackson v. Johnson, 5 Cow. 74; 5 Rob. 71; Christie v. Gage, 2 Supm. 344, affd., 71 N. Y. 189; Moody v. Moody, 16 Hun, 189.

The above rule as to a "specific title" would not apply to adverse possession under the statute of limitations. Crary v. Goodman, 22 N. Y. 170. See also Hallas v. Bell, 53 Barb. 247.

An Indian possession would not be considered an adverse one so as to avoid deeds by patentees. Jackson v. Hudson, 3 Johns. 375.

There is no adverse possession against a reversioner. Clarke v. Hughes, 13

Barb. 147.

A party may always buy in outstanding titles, to quiet his title. v. Given, 8 Johns. 137; Marble v. McMinn, 57 Barb. 421.

The time to which the grant is to relate is the time when the bargain for the sale was concluded. Jackson v. Bull, 1 Johns. Cas. 81.

Adverse possession cannot be set up to avoid a grant of the State. Jackson v. Jumaer, 2 Cow. 552; Candee v. Haywood, 34 Barb. 349, affd., 37 N. Y. 653: Baldwin v. Ryan, 3 Supm. 251. But it can as against a grant of water lots by the city of New York. Towle v. Remsen, 70 N. Y. 303.

Although a deed would not be good to a stranger where there is adverse possession, the party ousted may release to the party in possession. Williams v. Council, 4 Jones Law (N. C.), 206; Early v. Garland, 13 Gratt. (Va.) 1; 4 Kent, 446.

As to adverse possession set up by a tenant or one holding over, vide

Learned v. Tallmadge, 26 Barb. 443.

A conveyance made by a person out of possession does not impair his previous title. Chamberlain v. Taylor, 92 N. Y. 348.

Possession by a railroad company of a road-bed does not prevent the owner

of the fee from conveying it. Broiestedt v. S. S. R. R. Co., 55 N. Y. 220.

As to what constitutes adverse possession, see Chap. XXXIV.

Exempt Property. -- As to conveying exempt real property, see Code Civ. Proc., § 1404.

Champerty and Maintenance.— Champerty is defined as a bargain between a plaintiff or a defendant and another person, to divide the land or matter in dispute, if they prevail, the champertor to carry on the suit at his own expense. Maintenance is an assistance improperly given to either party, in a suit by a third person not concerned in it, for the purpose of stirring up litigation and strife. The prohibitions of law against them were not supposed to apply to parties having any legal or equitable interest in the matter in dispute, or standing in relationship to each other, such as husband and wife, ancestor and heir, etc.

Nor to disputed boundary lines. Allen v. Welch, 18 Hun, 226.

Every agreement relating thereto was also held void; and solicitors, counsel, attorneys and other officers could not contract for a part of the matter in litigation, as a compensation for services, nor accept anything from the client pending the suit, except lawful demands for services, etc.

Our statutes provided that taking a conveyance of any interest in lands in suit, from a party not in possession, is a misdemeanor; as also a misdemeanor to buy or sell pretended rights in lands, unless the grantor or those under whom he claims have had possession, or the reversion or remainder or the rents, etc., for a year. 2 R.S. 691; Penal Code, §§ 129, 130. See also Code Civil Proc., § 1679 and Real Property Law, § 225, in this connection.

The above was not to apply to releases or mortgages under Chap. I, Part II, Revised Statutes. Nor where the person in possession, does not hold adversely to the grantor. 2 R. S. 691; Penal Code, § 131; Pepper v. Haight, 20 Barb. 429; Webb v. Bindon, 21 Wend. 98.

Nor in case of a merely constructive possession. Brown v. Dawley, 79 N. Y. 390.

These statutes had no application to judicial sales. Tuttle v. Jackson, 6 Wend. 213; 2 Barb. 156; Varick v. Jackson, 2 Wend. 166; Jackson v. Varick, Cow. 238; Hoyt v. Thompson, 5 N. Y. 320; Smith v. Scholtz, 68 id. 41.

Unless there is an actual adverse possession at the time of the decree.

Carroll v. Dawson, 5 Cranch C. C. 514.

Nor to confirmatory deeds, nor to a deed of an assignee in bankruptcy made by order of court. Coleman v. Manhattan, etc., 94 N. Y. 229, affg. 26 Hun, 525. If the grantor was in possession, the conveyance would be good. Webb v. Bindon, 21 Wend. 98. It seems the statute against champerty has no application to a devise. Varick v. Jackson, 2 Wend. 166.

By the Revised Statutes the old laws against champerty and maintenance were abolished, except as therein provided. Sedgwick v. Stanton, 14 N. Y. 289. For other cases in this State, on this subject, vide 34 Barb. 56; Crary 289. For other cases in this state, on this subject, viate of Dail. 60, clary v. Goodman, 22 N. Y. 170. Under the Code, agreements made with attorneys relative to remuneration to be made out of land in suit are valid. 23 Barb. 420. See also Pepper v. Haight, 20 id. 429; Wallis v. Loubat, 2 Den. 607; Small v. Mott, 22 Wend. 403, revg. 20 id. 212; also Williams v. Jackson, 5 Johns. 489; Merritt v. Lambert, 10 Paige, 352; Berrien v. McLane, 1 Hoff. Ch. 421. And the law fully reviewed in Sedwick v. Stanton, 14 N. Y. 289. To invalidate a deed for champerty, the person in possession must claim under some specific adverse title. Smith v. Faulkner, 48 Hun, 186.

These statutes, however, did not apply where there was no knowledge of the pendency of the suit, nor where both parties had an interest in the litigation. Jackson v. Ketchum, 8 Johns. 479; Clowes v. Hawley, 12 id. 484; Wickham v. Conklin, 8 id. 220; Thallheimer v. Brinkerhoff, 3 Cow. 623.

The Revised Statutes modified the earlier statutes and common law on these subjects; and the Code has removed the restriction so far as attorneys these subjects; and the Code has removed the restriction so far as attorneys are concerned. Sedgwick v. Stanton, 14 N. Y. 289. And maintenance is no longer an offense, except as to buying and selling pretended titles, and falsely suing and maintaining suits. Small v. Mott, 20 Wend. 212; 22 id. 403. Code Civ. Proc., § 66, amended L. 1879, Chap. 542, L. 1899, Chap. 61; also Penal Code, §§ 136-142.

See Penal Code, §§ 129-131, as amended Laws of 1888, Chap. 282.

Conveyance and Mortgage of land by parties out of possession when void. 1 R. S. 739, §§ 147, 148, Real Property Law, § 225. Penal Code, § 131, amended L. 1888, Chap. 282, allowing mortgages when.

To constitute a violation of the statute of champerty a possession under some specific title, which in itself is adverse to the title of the plaintiff, must have-been shown. Crary v. Goodman, 22 N. Y. 170;—Sands v. Hughes, 53 id. 287, 296; Christie v. Gage, 71 id. 189, 192; Higginbotham v. Stoddard, 72 id. 94, 100; In matter of Department of Parks, 73 id. 560, 567; Pope v. Hanner, 74 id. 240, 245; Dawley v. Brown, 79 id. 390; Danziger v. Boyd, 120 id. 628; American B. N. Co. v. N. Y. E. R. R. Co., 129 id. 253, 263; Jones v. Hoyt, 85 Hun, 35.

To render a deed void under the Champerty Act the land granted thereby must be in the actual possession of the person claiming the same under a title adverse to that of the grantor. The language of such act must be strictly construed on account of its severity; under it possession for a single day by a person claiming under a title adverse to that of the grantor, whether such possession be known or unknown, avoids the conveyance. Corn-

well v. Clement, 87 Hun, 50.

Former Statutes.— Acts of 1788; 1801; 1 R. L. of 1802, 343; 1 R. L. of 1813, 172.

The statutes on the subject of champerty and maintenance in this State were founded on laws passed in the reigns of Ed. I and III, and Henry VIII.

TITLE XI. DIFFERENT FORMS OF CONVEYANCE.

It may be desirable that a brief memorandum of the old modes of conveyance should be given, and of the modifications of them now in use.

The different classes of conveyance as given by Blackstone are distinguished as -

- I. Conveyances at Common Law.
- 2. Such as had their force and efficacy by virtue of the Statute of Uses.
 - 3. Those operative by force of Statutory Enactments.

The first class are subdivided into Primary or Original, i. e., those by which an estate is created or first arises, and Derivative or Secondary, whereby the estate originally created is enlarged, restrained, transferred or extinguished.

Original Conveyances are specified as — 1. Feoffment. 2. Gift. 3. Grant. 4. Lease. 5. Exchange. 6. Partition.

Derivative Conveyances are subdivided into - 1. Release. 2. Confirmation. 3. Surrender. 4. Assignment. 5. Defeasance.

TITLE XII. FEOFFMENT.

A feoffment, with livery of seizin, was the ancient feudal conveyance, transferring a feud or fee. This mode of conveyance required a delivery of the corporeal possession of the land, actual or symbolical, called livery of seizin, without which the feoffee had a mere estate at will. The transfer was not at first, but was subsequently accompanied by a written deed, in order to specify the purposes, limitations and subject-matter of the grant. Feoffment, with livery of seizin in time became the usual mode of transfer of an estate of inheritance.

Livery of Seizin is still by the common law impliedly necessary on every grant of a freehold estate, whether of inheritance or for life. Schott v. Burton, 17 Barb. 173.

The livery, to be valid, required actual possession in the feoffor.

By the common law the feoffment operated upon the possession, and though the feoffor had nothing more than a naked or even tortious possession, the feoffment passed the fee by reason of the *livery*, and cleared away all other estates. It barred the feoffor also from all future right or possibility of right; and the feoffee continued vested with the freehold until the *disseizee*, by entry or action, regained his possession, the right to which might be barred by time.

The conveyance by feoffment with livery has become obsolete in England. The Revised Statutes in terms abolished it. 1 R. S. 738. And the Real Property Law re-enacted the provision. Real Property Law, § 206. See Fowler's Real Property Law, 20, 44, 648, 673.

TITLE XIII. GIFTS AND GRANTS.

The conveyance by gift (donatio) is properly applied to the creation of an estate tail. The operative words of the conveyance were "do" or "dedi." Gifts in tail also required livery of seizin.

Grants.—This was the conveyance by the common law, used in transferring interests in *incorporeal* hereditaments, as reversions. rents, commons, services, etc., which could not pass by livery. The operative words were "dedi" and "concessi." To render the grant effectual, the common law required the consent of the tenant of the land out of which the rent or other incorporeal interest proceeded, and this consent was called "attornment."

A "grant" passed only the estate that the grantor could lawfully convey. A feoffment, it has been seen, would pass an estate, and disseize the true owner, even if the feoffor's possession were tortious.

Vide supra, as to the effect of a grant in transferring an estate under the Revised Statutes, Tit. I; and infra, p. 592.

The Revised Statutes gave to deeds conveying an inheritance of freehold the denomination of GRANTS: and all the interest of a freehold estate of inheritance may now be transferred by grant. Deeds of "Bargain and Sale," and "Lease and Release," are now to be deemed grants.

These provisions have been continued in the Real Property Law. § 211.

TITLE XIV. LEASES.

A Lease is properly a conveyance (usually in consideration of rent) for a less time than the lessor has in the premises. The usual operative words in a lease are "demise, grant, and to farm let."

No livery of seizin was necessary except for freehold leases or for leases for life.

By Revised Statutes, leases for a year and under need not be in writing; but leases for a longer period, as also contracts for leasing for a longer period than a year, are void, unless the contract or some memorandum or note thereof, expressing the consideration, be in writing, and be subscribed by the party by whom the lease or sale is to be made, or his lawful agent.

The Real Property Law re-enacted these provisions.

2 R. S. 134; § 6; Real Property Law, § 207. See supra, as to leases, p. 176. Leases in fee or for life, like grants of freehold estates, must be sealed (before the Real Property Law) and witnessed or acknowledged. 1 R. S. 738. Otherwise no seal is necessary to a lease. Jackson v. Wood, 12 Johns. 73.

Leases are generally in duplicate, both parts of which are deemed originals. Lewis v. Payn, 8 Cow. 71.

See fully as to leases, and the rights and obligations of parties under them, supra, Chap. V, Tit. IV, and Chap. VIII.

Attornment.—The Revised Statutes provide as to attornment that "where any lands or tenements shall be occupied by a tenant, a conveyance thereof, or of the rents or profits, or of any other interest therein, by the landlord of such tenants, shall be valid without any attornment of such tenant to the grantee; but the payment of rent to such grantor, by his tenant, before notice of the grant, shall be binding upon such grantee; and such tenant shall not be liable to such grantee for any breach of the condition of the demise, until he shall have had notice of such grant." I R. S. 739. Vide Moffat v. Smith, 4 N. Y. 126, as to constructive notice.

By the Revised Statutes also, the attornment of a tenant to a stranger shall be absolutely void, and shall not in anywise affect the possession of his land-lord unless it be made with the consent of the landlord, or pursuant to a legal judgment, order or decree, or to a mortgagee after forfeiture of the mortgage. Vide Chalmers v. Wright, 5 Rob. 713. The similar provisions of the Real Property Law are contained in §§ 194, 213.

See as to attornments, supra, Chap. VIII, Tit. II.

TITLE XV. EXCHANGE AND PARTITION.

An exchange is a mutual grant of equal interests, the one in consideration of the other. The word "exchange" is necessary. Before the Revised Statutes the word "exchange" implied a warranty. The old conveyance by exchange is now not usual.

The estate should be equal in quantity of interest, but need not be equal in value. As a fee for a fee, etc., vide Wilcox v. Randall, 7 Barb. 628; Runyan v. Stewart, 12 Barb. 537, 542.

A parol exchange of lands cannot operate as a conveyance. Clark v. Graham, 6 Wheat. 577.

Partition is where two or more joint tenants or tenants in common agree to divide the lands so held among them in severalty. each taking a specified and distinct part.

Vide infra, Chap. XXX, "Title by Partition." It is also held that a parol partition followed by possession, is valid and severs the estate. Jackson v. Livingston, 7 Wend. 136, 141; Jackson v. Harder, 4 Johns. 202; Jackson v. Bradt, 2 Cai. 169; Jackson v. Vosburgh, 9 Johns. 270; Jackson v. Luquere, 5 Cow. 221; Ryerss v. Wheeler, 25 Wend. 434.

After twenty years no mistake or errors in the survey, etc., can be corrected. Jackson v. Hasbrouck, 3 Johns. 331.

TITLE XVI. RELEASES.

A release is classified under the above enumerated secondary or derivative conveyances. It is a discharge or conveyance of a right in land to another who already has an estate in possession. The operative words generally used are "remise, release, and forever quitclaim."

A release technically operates upon a present interest only, Woods v. Williams, 9 Johns. 123, and not on a right subsequently acquired (24 Barb. The subsection of the series o Den. 664. But see this case partially overruled, and cases on this point cited, and the provisions of the statutes as to the transfer of estates in expectancy. Supra, p. 231, changing the former law.

To make a release effectual the grantee must be in possession. Miller v.

Emans, 19 N. Y. 384; Lewis v. Howe, 64 App. Div. 572, 578.

Releases as classified by common law writers operate,

1. By way of enlarging an estate, as a remainderman releasing to a particular tenant in possession.

2. By way of passing an estate, as one tenant in common or joint tenant to another.

By way of passing a right, as where a disseizee released to the disseizer.
 By way of extinguishment.
 By way of entry and feoffment, as where a release is made by disseizee

to one of two joint disseizors, who enters and excludes the other disseizor.

No livery was necessary to a release, the releasee being in possession. A release has been held good in this State as a conveyance by bargain and sale, and sufficient to pass the fee though the releasee was not in possession.

Jackson v. Fish, 10 Johns. 456; Beddoe's Exr. v. Wadsworth, 21 Wend. 120; Lynch v. Livingston, 6 N. Y. 422. It is, therefore, under the statutes, good as a grant.

Vide also infra, "Lease and Release."

Quit claim deed carries all the estate of the grantor. Veit v. Dill, 78 Hun, 171; Wilhelm v. Wilken, 75 id. 552.

TITLE XVII. CONFIRMATION, SURRENDER, ASSIGNMENT AND DEFEASANCE.

A confirmation confirms a voidable estate or increases a particular estate. The words usually used are "given, granted, ratified, approved and confirmed."

A surrender yields up an estate for life or years to the reversioner or remainderman, or to one having the greater estate. The usual words are "surrendered, granted and yielded up."

To make a valid surrender, there should be privity of estate between the parties, and the surrenderer must be in possession. Jackson v. Sellick, 8 Johns. 262; Bradstreet v. Clarke, 12 Wend. 602; Jackson v. Johnson, 5 Cow. 74. A surrender may be by parol or act of the parties; as where a tenant gives the key of premises to the landlord, who accepts the same and resumes possession. Hegeman v. McArthur, 1 E. D. Smith, 147. The acceptance of a new lease implies a surrender of a prior one. Springstein v. Schermerhorn, 12 Johns. 357; Livingston v. Potts, 16 id. 28; as to a surrender by operation of law; and more fully, supra, Chap. VIII, Tit. X.

An assignment is usually applied to an estate for life or years. It differs from a lease in that by a lease an interest less than the lessor's is passed, and by an assignment the whole estate is transferred.

Vide supra, Chap. VIII, Tit. III, and as to the difference between an assignment and an under-lease, and the rights and obligations of assignees, etc.

Before the Statute of Frauds, chattels real might be assigned by parol, Jackson v. Wood, 12 Johns. 73.

A defeasance is a collateral deed made at the same time with the principal conveyance, and containing certain conditions defeating the latter when performed. Mortgages were originally so made.

Vide infra, Chap. XXIII, "Mortgages."

A writing to operate as a defeasance to a deed, must be of as high a nature, and therefore under seal. 4 Mass. 443; 14 Pick. 179; 22 id. 530.

TITLE XVIII. CONVEYANCES BY VIRTUE OF THE STATUTE OF USES.

These conveyances arose by virtue of the "Statute of Uses," before alluded to. (Vide supra, Chap. X.) This statute executed the use, i. e., annexed the possession to the use, and thereby made the cestui qui use the legal instead of equitable owner of the land. Such conveyances were in use in this State before the revision of 1830. The conveyances that had their operative effect through this statute were as follows:

I. A Covenant to Stand Seized to Uses .-- By this in consideration of blood or marriage, the covenantor stood seized to the use of a child, wife or kinsman. Here the statute transferred the possession to the use, for the benefit of the party who had acquired the use.

Affinity by a past marriage is not a sufficient consideration for this covenant. Corwin v. Corwin, 6 N. Y. 342. Such a covenant in this State would be good, doubtless, in equity, or might be upheld as a grant. Vide Hayes v. Kershow, 1 Sand. Ch. 258; also Lynch v. Livingston, 8 Barb. 463, affd., 6 N. Y. 422; Jackson v. Staats, 11 Johns. 373; Lossee v. Ellis, 13 Hun, 635. The consideration of blood may be shown aliunde. Goodell v. Pierce, 2 Hill, 169.

A marriage in futuro would be a good consideration. Roberts v. Roberts, 22 Wend. 140. A deed to a stranger in trust for relatives cannot operate as a covenant to stand seized. The blood or marriage relation must exist between the covenantor and covenantee. Schott v. Burton, 13 Barb. 173. A freehold to commence in futuro might be granted by a covenant to stand seized. Roberts v. Roberts, 22 Wend. 140.

Such a covenant held still good under the Revised Statutes. Eysaman v.

Eysaman, 24 Hun, 430; Fowler's Real Property Law, 355.

2. Bargain and Sale.—This is the species of conveyance now most prevalent in the United States, and has superseded the old form of transfer by lease and release. Under the statutes existing here it is equivalent to the deed of feoffment with livery.

It originally was a kind of real contract, whereby the bargainor for some pecuniary consideration bargains and sells, that is, contracts to convey the land to the bargainee, and became by such bargain a trustee for or seized to the use of the bargainee; and then the "Statute of Uses" completed the purchase and transfer, without livery of seizin. Thus the bargain first vested the use, and then the statute vested the possession. The use could be limited to no other person than the bargainee. (Jackson v. Cary, 16 Johns. 302.) This form of deed required an actual pecuniary or valuable consideration expressed.

Jackson v. Florence, 16 Johns. 47; Jackson v. Sebring, Id. 515; Jackson v. Cadwell, 1 Cow. 622; Rogers v. Eagle Fire Ins. Co., 9 Wend. 611; Corwin v. Corwin, 6 N. Y. 342; 9 Barb. 219; id. 487; Wood v. Chapin, 13 N. Y. 509; Schott v. Burton, 17 Barb. 173.

Schott v. Burton, 17 Barb. 173.

The consideration need not be money (30 Barb. 292, 296), but valuable. Jackson v. Florence, 16 Johns. 47; Jackson v. Delancey, 4 Cow. 427; Jackson v. Pike, 9 id. 69. The consideration may be proved if not in the deed. Jackson v. Fish, 10 Johns. 456; 30 Barb. 292; Wood v. Chapin, 13 N. Y. 509. The words remised, released and quitclaimed, where an intent to convey the estate of the grantor is recited, and a pecuniary consideration appears, have been held effectual as words of "bargain and sale," although in a deed to one not in possession. Vide Jackson v. Fish, 10 Johns. 456; Jackson v. Root, 18 id. 60, 78; Lynch v. Livingston, 6 N. Y. 422; Beddoe's Exr. v. Wadsworth, 21 Wend. 120; 18 Barb. 203; and infra, p. 593.

A pecuniary consideration to take effect in futuro is effectual. Jackson v. McKenny, 3 Wend. 233; Rogers v. Eagle Fire Ins. Co., 9 id. 611; Willson v.

Betts, 4 Den. 201.

So also the words "release and assign" (Jackson v. Fish, 10 Johns. 456), "make over and confirm" (Jackson v. Root, 18 Johns. 60), "make over and grant" (Jackson v. Alexander, 3 Johns. 484), have been held effectual as words of bargain and sale.

The use must be limited to the bargainee. Jackson v. Cary, 16 Johns. 302;

Jackson v. Meyers, 3 id. 388.

So also a deed not good as a lease and release, because the grantee was not in possession, nor as a covenant to stand seized, may be good as a bargain and sale, notwithstanding the granting words are "remise, release and quitclaim," if there is a pecuniary consideration expressed, and an intention is evident to convey the whole estate. Lynch v. Livingston, 8 Barb. 463, affd., 6 N. Y. 422.

The nominal consideration of one dollar not paid has been held not

sufficient. 9 Barb. 487.

Natural affection or affinity by past marriage is not sufficient. Corwin v. Corwin, 6 N. Y. 342, revg. 9 Barb. 342.

The words "for value received," have been held evidence of a pecuniary consideration, and as sufficient to raise the use. Jackson v. Alexander, 3 Johns. 484; Jackson v. Root, 18 id. 60.

Judge Nelson observes, in Rogers v. Eagle Fire Ins. Co., 9 Wend. 619, that the consideration sufficient to support a bargain and sale has become purely technical, without substance or value, and a nominal consideration has been held sufficient. In Wood v. Chapin, 13 N. Y. 509, the court holds, however, that without some consideration, even though nominal, the deed would be void, if executed before the Revised Statutes. Those statutes, as to grants of freehold estate, may have altered the rule.

By the Revised Statutes deeds of "Bargain and Sale," and of "Lease and Release," might continue to be used, and were to be deemed "Grants," and as such subject to all the provisions of the chapter concerning grants.

1 R. S. 739, § 142.

Similar provisions were embodied in Real Property Law.

Real Property Law, § 211.

A deed of bargain and sale to take effect in futuro is effectual. Jackson v. McKenny, 3 Wend. 233.

As to when one will convey after acquired title, United States v. Cala. and Oregon Land Co., 148 U.S. 31.

3. Lease and Release.—Under this form of conveyance a lease, or bargain and sale for a pecuniary consideration (generally a nominal one), was made for a year. This, in the case of a lease, vested the possession in the lessee; or in the case of a bargain and sale, vested in the lessee the use of the term for a year, and then the statute annexed the possession; and being then in possession, he could receive a release of the freehold and reversion from the lessor, by way of enlargement of the estate, without livery of seizin or consideration. Thus the lease and release operated as

one conveyance, and in effect amounted to a feoffment, without the ceremony of livery of seizin.

This was the usual mode of conveyance in England substituted for the feoffment. It was also the mode universally in practice in New York until about May 1, 1788, when all English statutes were by law abolished, except those specifically re-enacted. 2 Greenl. 116, § 37. It was then supplanted in a great measure by the deed of bargain and sale, although it was at times still lawfully used.

The lease was not usually recorded. The recital of it in the release was deemed conclusive evidence of its existence upon all persons claiming under the parties in privity of estate. Carver v. Jackson, 4 Pet. 1.

And in order to support the release, a previous lease may be presumed.

McBurney v. Cutler, 18 Barb. 203; Jackson v. Lamb, 7 Cow. 431.

By the Revised Statutes deeds of "lease and release" might continue to be used, and were to be deemed "grants," and as such subject to all the provisions of the statute relative to grants.

1 R. S. 739, § 142, vide supra.

The Real Property Law continued this provision.

Real Property Law, § 211.

Estates both in possession, remainder, and reversion, can be conveyed by lease and release. The consideration (although nominal) was inserted in the lease to raise the use; but the release need not have a consideration expressed, being a common law conveyance.

Short Forms of Conveyance.—As to these as now in force under the law of 1800, Chap. 475, now Real Property Law, §§ 223, 237, vide supra Tit. VI, p. 566.

TITLE XIX. FINES AND RECOVERIES.

These were solemn and public alienations by matters of record. and at times were employed in this State for the purpose of barring claims and assuring title.

Fines and recoveries were established by the statutes of this State. For the proceedings under them, vide "An Act concerning fines and recoveries of lands and tenements." 1 R. L. 358.

By the Revised Statutes, fines and recoveries were expressly abolished.

2 R. S. 343, § 24 (repealed L. 1880, Chap. 245, § 1, without however reviving the earlier law). See Const. 1846, Art. 1, § 15; Const. 1894, Art. 1,

CHAPTER XXI.

FRAUDULENT CONVEYANCES.

TITLE I .- FRAUD ON PURCHASERS.

II .- FRAUD ON CREDITORS.

III .- Fraudulent Conveyances .- MISCELLANEOUS.

It has been seen, in the preceding chapter, that a gift or voluntary conveyance would be effectual as between the parties, and is liable to be questioned only in certain cases, when the rights of creditors and subsequent purchasers are concerned; and it is a principle of law that a deed, however fraudulent as to third persons, is valid as to the parties to it, nor will courts of equity give relief to any party to the deed who is implicated in the fraud.

Van Wyck v. Seward, 18 Wend. 375; Roosevelt v. Carow, 6 Barb. 190; The Manhattan Co. v. Evertson, 6 Paige, 457; Matthews v. Duryea, 45 Barb. 69, affd., 4 Keyes, 525; Maloney v. Horan, 49 N. Y. 111; Mapes v. Snyder, 2 Supm. 318, affd., 59 N. Y. 450; Bicknell v. Lancaster, etc., Fire Ins. Co., 1 Supm. 215, affd., 58 N. Y. 677; Renfrew v. McDonald, 11 Hun, 254.

To make a deed voluntary, it must be without the least valuable consideration. Seward v. Jackson, 8 Cow. 406.

A voluntary conveyance may become valid upon matter ex post facto, or it may acquire validity so far as concerns the claims of others. Wood v. Jackson, 8 Wend. 9.

The English Statutes (of Elizabeth, 13th and 27th, and Charles II), confirmatory of the common law against fraudulent conveyances have been substantially re-enacted in this State, commencing with "An Act for the prevention of Fraud," passed 26th July, 1787.

1 Greenl. 381; 1 Rev. Laws, 75; see 2 R. S. 137, §§ 1, 2; id. 134, §§ 1, 2; Id. 134, 135, §§ 6, 7; Real Property Law, §§ 207, 226, 227.

TITLE I. FRAUD ON PURCHASERS.

The Revised Statutes provided that every conveyance of or charge upon land, etc., or rents and profits of land, made with intent to defraud prior or subsequent purchasers for valuable consideration, should be void as against them; but no such conveyance should be deemed fraudulent in favor of a subsequent purchaser who had actual or legal notice thereof at the time of his purchase,

unless the grantee or person to be benefited was privy to the intended fraud.

2 R. S. 134, §§ 1 and 2.

These provisions were re-enacted in the Real Property Law, with the addition of the word "incumbrancers," bringing them as well as purchasers within the express protection of the statute.

Real Prop. Law, \S 226. As to who are innocent purchasers, vide Chap. XXVI.

The deed is good as against the grantor and his heirs. Jackson v. Garnsey, 16 Johns. 189.

Also as against the grantee. Moseley v. Moseley, 15 N. Y. 334.

Conveyance taken in name of third party to defraud creditors is absolute in the third party and cannot be recovered by the debtor. Robertson v. Sayre, 134 N. Y. 97.

When as a matter of law, a purchaser is guilty of negligence in omitting to consult the records in the office of the county clerk. Blakeslee v. Sincepaugh, 71 Hun, 412.

And when statements act as an estoppel. Id.

False representations as a ground for damages. Griffing v. Diller, 21 N. Y. Supp. 407; Fairchild v. McMahon, 139 N. Y. 290.

The Revised Statutes further provided that every conveyance or charge on an estate or interest in land containing any provision for the revocation, determination, or alteration thereof at the will of the grantor, should be void as against subsequent purchasers from such grantor, for valuable consideration, of any estate or interest so liable to be revoked, etc., although the same be not expressly revoked, etc., by the grantor, by virtue of the power reserved or expressed in the prior conveyance or charge.

2 R. S. 134, § 3.

Also where a power to revoke a conveyance of any lands, rents or profits, and to reconvey the same, should be given to any person other than the grantor in such conveyance, and such person should thereafter convey the same lands, etc., to a purchaser for value, such subsequent conveyance should be as valid as if the power of revocation were recited therein, and the intent to revoke the former conveyance expressly declared.

2 R. S. 134, § 4.

Also if a conveyance to a purchaser under either of the last two sections be made before the person making the same should be entitled to execute his power of revocation, it should be as valid from the time the power vests in such person as if then made.

2 R. S. 134, § 5.

These provisions were embodied in the Real Property Law in substantially the same form, "the only material change being to bring incumbrancers within the protection of the statute.

Real Property Law, § 231.

Purchasers for Value Without Notice.— The title of a purchaser for value shall not be affected unless it appears that such purchaser had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor.

2 R. S. 137, § 5.

Real Property Law, § 230. Waterbury v. Sturtevant, 18 Wend. 353; Lands v. Hildreth, 14 Johns. 493;

Anderson v. Roberts, 18 id. 515.

The purchaser must have acquired the legal title, to be entitled to protection. Peabody v. Fenton, 3 Barb. Ch. 451. See also infra.

Actual Value.— The consideration or something of value, must have been actually parted with or secured. Jewitt v. Palmer, 7 Johns. Ch. 65; Starr v. Strong, 2 Sandf. Ch. 139; DeMott v. Starkey, 3 Barb. Ch. 403; Keyser v. Harbeck, 3 Duer, 373.

Taking the deed merely in payment of a former debt is not sufficient to protect. Root v. French, 13 Wend. 570.

Release of inchoate right of dower is held a valuable consideration for conveyance to wife. Smart v. Harin, 14 Hun, 276. But an agreement to separate is not. Morgan v. Potter, 17 Hun, 403. Nor is a transfer in trust to support grantor and wife for life. Robinson v. Stewart, 10 N. Y. 189; Barney v. Griffen, 2 id. 365; Todd v. Monell, 19 Hun, 362.

Benefit to Grantor.— A mere incidental benefit to grantor does not, of itself alone, invalidate conveyance. Curtis v. Leavitt, 15 N. Y. 9, 122; Shoemaker v. Hastings, 61 How. Pr. 79. But a trust for the benefit of the grantor himself is void. Parker v. Connor, 47 Super. 522, revd. on another point, 93 N. Y. 118. At least to the extent of his beneficial interest. Crouse v. Frothingham, 27 Hun, 123, revd., 97 N. Y. 105.

Parent and Child.—Previously rendered services, even by a minor son, are held a valid consideration. Canavan v. McAndrew, 14 Wkly. Dig. 282. So of indebtedness to a daughter; although the consideration expressed was "\$1, and love and affection," it appearing that the indebtedness existed. Smith v. Smith, 17 Wkly. Dig. 81.

See also Davis v. Howard, 73 Hun, 347.

Contract as Consideration. - An agreement to pay forged notes is held a valid consideration. Hatch v. Collins, 34 Hun, 314. An agreement of an attorney to render future service, is held a sufficient consideration to prevent the act being a controlling evidence of fraud. Remington Paper Co. v. O'Dougherty, 36 Hun, 79. So of an agreement by a son to support his parents. Vial v. Mathewson, 34 Hun, 70.

Mortgage by Grantee.— Where a husband conveyed to his wife in fraud of creditors, her mortgage, to secure his prior debts, was sustained as for value, though the mortgagee after the execution but before delivery, had notice that the conveyance to her was fraudulent. Murphy v. Briggs, 89 N. Y. 446.

Notice of Purchasers for Value.— Actual notice of the intended fraud, or of suspicious circumstances, is required. Stearns v. Gage, 79 N. Y. 102;

Herrlich v. Brennan, 11 Hun, 194; Weiss v. Brennan, 41 Super. 177; Farley v. Carpenter, 27 Hun, 359; Gottberg v. Conner, 44 Super. 554; Parker v. Conner, 93 N. Y. 118; Gilmour v. Colcord, 96 App. Div. 358.

As to omission to consult records not being negligence. Blakeslee v. Sincepaugh, 71 Hun, 412; Davis v. Howard, 73 id. 347.

A purchaser with notice, from one who purchased without notice of the fraud, may protect himself under the first purchaser. So also one who has taken without notice from one who had notice. Griffith v. Griffith, 9 Paige, 315; Noyes v. Burton, 29 Barb. 631; Jackson v. Walsh, 14 Johns. 407; Frazer v. Western, 1 Barb. Ch. 220, affd., How. App. Cas. 447, 479.

This last case reviews the obligations of grantees from those taking voluntary conveyances, and how far they are under obligation to inquire into the circumstances attending the original transfer. Vide infra, Chap. XXVI, "Record of Instruments," and the "Doctrine of Notice," Tit. V.

A record purchase money mortgage is good against subsequent creditors who relied on the ownership of the property unincumbered. An unrecorded or equitable mortgage would not be. Spring v. Short, 90 N. Y. 538.

An inadequate consideration is only important of itself, where the inadequacy is very great. Van Wyck v. Baker, 16 Hun, 168; vide cases supra, and Coddington v. Van DeVenter, 19 Wkly. Dig. 126; Smith v. Shaul, 21 id. 91.

Conveyance to Wife. - Transfer by an insolvent for a valuable consideration,

conveyance to which— Hansler by an insovent for a valuable consideration, even to his wife through a third person, has been held valid however. Crawford v. Everson, 2 Wkly. Dig. 168; Smith v. Smith, 17 id. 81.

Also a mortgage to secure her as to an old debt. Jewett v. Noteware, 30 Hun, 192. But if there be fraudulent intent the fact of good consideration will not save such a transaction. Billings v. Russell, 101 N. Y. 226.

See also p. 601 infra.

Post-nuptial settlements. Saxton v. Sebring, 96 App. Div. 570; Tanner v. Eckhardt, 107 id. 79.

Merger. If a conveyance be set aside as fraudulent, it will not operate to merge another estate. Malloney v. Horan, 49 N. Y. 111.

TITLE II. FRAUD AGAINST CREDITORS.

The Revised Statutes provided as follows:

Every conveyance or assignment, in writing or otherwise, of any estate or interest in lands, or in goods or things in action, or of any rents or profits issuing therefrom, and every charge upon lands, goods, or things in action, or upon the rents or profits thereof, made with the intent to hinder, delay or defraud creditors or other persons, of their lawful suits, damages, forfeitures, debts or demands, and every bond or other evidence of debt given, suit commenced, decree or judgment suffered, with the like intent, as against the persons so hindered, delayed or defrauded, shall be void.

2 R. S. 137, § 1.

This provision has been re-enacted in the Real Property Law and made to apply as well to a transfer of an "existing trust in real property."

Real Property Law, L. 1896, Chap. 547, § 227.

The decisions under this section are very numerous, and are based on the intent of the parties, as manifested from the facts, in each case. In the case

of a voluntary conveyance, as well as in any other, the question is as to the actual fraud, and is to be passed upon as a fact. Jackson v. Post, 15 Wend. 588; Seward v. Van Wyck, 8 Cow. 406; Jackson v. Peck, 4 Wend. 300; Jackson v. Zimmerman, 7 id. 437; Hinde's Lessees v. Walworth, 11 Wheat, 199; Young v. Heermans, 66 N. Y. 374; Baldwin v. Ryan, 3 Supm. 251; Brockway v. Fleming, 22 Wkly. Dig. 430; Carr v. Breese, 81 N. Y. 584; Fox v. Moyer, 54 id. 125.

Intent.—The intent shall be deemed a question of fact and not of law; and fraud shall not be predicated solely on the ground of want of consideration.

2 R. S. 137, § 4; Real Property Law, § 229.

Inadequacy of consideration held evidence of fraud. Maasch v. Grauer, 58 App. Div. 560.

Construed where there are creditors. White v. Benjamin, 3 Misc. 490, affd.,

8 Misc. 684.

It is not the intent of the person in whose favor a conveyance is made or a judgment confessed that is to control the determination whether it is fraudulent, but it is the intent of the debtor. Galle v. Tode, 74 Hun, 542.

A conclusion of law that the effect was to hinder and delay, in the absence of a finding of intent does not warrant entry of judgment setting aside con-

veyance. Nat'l State Bank v. Wheeler, 40 App. Div. 563.

What Creditors.—It has been generally held that the above section only applies where there are lawful debts of creditors existing at the time of the

This limitation was not sustained in the case of Case v. Phelps, 39 N. Y. 164, where it is held that a voluntary deed may be set aside by subsequent creditors, where made not in fraud, but to secure against possible loss on engaging in a new business. See also Dygert v. Remerschnider, 32 N. Y. 629; Savage v. Murphy, 34 id. 508; Partridge v. Stokes, 66 Barb. 586; Walheimer v. Truslow, 106 App. Div. 73.

A voluntary conveyance by a woman in contemplation of marriage, to save the land from possible future debts, is not fraudulent. Todd v. Nelson, 109

N. Y. 316.

A decision in the U.S. Supreme Court, in construing a similar statute, A decision in the U. S. Supreme Court, in construing a similar statute, holds that the deed would not be set aside in favor of subsequent creditors, unless a fraud was intended at the time of the conveyance. Mattingly v. Nye, 8 Wallace, 371; Loeschig v. Addison, 4 Abb. N. S. 210, affd., 51 N. Y. 160. The same rule is laid down by the Court of Appeals in Carr v. Breese, 81 id. 584, distinguishing Case v. Phelps, 39 N. Y. 164, and Savage v. Murphy, 34 N. Y. 508, supra. Also, Neuberger v. Keim, 134 N. Y. 35.

Only a judgment creditor can bring an action to set aside the conveyance. National Bank of Rondout v. Dreyfus, 14 Wkly. Dig. 160; National Bank v. Wetmore, 42 Hun, 359. And execution must have been issued and returned. McCaffrey v. Hickey, 66 Barb. 489. The issuing and return of an execution is not a condition precedent to the maintenance of a creditor's action, where it appears that the judgment was not indexed against the debtor, who has since died, as in such case the judgment is not a lien on his real estate and no execution can be issued thereon. Le Fevre v. Phillips, 81 Hun, 232. But must have been a lien. Hurwitz v. Hurwitz, 10 Misc. 353. To sustain an action brought by a judgment creditor in his own behalf simply, to set aside a conveyance of land made by his debtor on the record of land made by his debtor. a conveyance of land made by his debtor, on the ground that it was made in fraud of creditors, plaintiff must show that he has exhausted his remedy at law against the debtor by the issue and return of an execution unsatisfied in whole or in part. Prentiss v. Bowden, 145 N. Y. 342. The judgment must have been recovered before grantor's death. Lichtenberg v. Herdtfeldter, 103 N. Y. 302. See also L. 1889, Chap. 487. Nor can any but a judgment creditor attack a fraudulent judgment. Jacobstein v. Abram, 44 Hun, 272. After a valid general assignment only the assignee can attack fraudulent conveyance. Loss v. Wickinson, 110 N. Y. 195 (act of 1858). Unless he refuse, Hawly v. McDonnell, $113\ id.\ 526.$

A creditor may reach land which his debtor bought and caused to be conveyed to another, though his judgment never was a lien or has ceased, from lapse of time, to be so. Scoville v. Halladay, 16 Abb. N. C. 43.

The fraud must appear to have been mutual, i. e., between grantor and grantee. Carpenter v. Muren, 42 Barb. 300; Jaeger v. Kelly, 52 N. Y. 274;

grantee. Carpenter v. Murer Bush v. Roberts, 111 id. 278.

Unless no consideration at all appears. Newman v. Cordell, 43 Barb. 448; Wood v. Hunt, 38 id. 302; Mohawk Bank v. Atwater, 2 Paige, 54.

Inadequacy of price or want of consideration alone is not proof of fraud. 2 R. S. 137, § 4; Real Property Law, § 227; Jaeger v. Kelly, 52 N. Y. 274; Emmerich v. Heffernan, 53 Super. 98. See, however, Maasch v. Grauer, 58 App. Div. 560; Lawrence Bros. Inc. v. Heylman, 11 App. Div. 848.

An assignment for the benefit of creditors, made for the purpose of preventing parties who are bringing suits against the assignor from getting their pay in full upon judgment and execution, is not void. Davis v. Howard,

73 Hun. 347.

Post-nuptial settlements are void against antecedent creditors. Reade v. Livingston, 3 Johns. Ch. 481; Pell v. Tredwell, 5 Wend. 661. A conveyance, however, which operated as the inducement to a marriage, held good. Wood v. Jackson, 8 Wend. 9; Jackson v. Alexander, 3 Johns. 483. See also as to a contract to convey after marriage. 16 Barb. 136; Starkey v. Kelly, 50 N. Y. 676. This is not good if the woman had notice. Keep v. Keep, 7 Abb. N. C. 240.

In the case of Phillips v. Wooster, 36 N. Y. 412, it is held that voluntary conveyances to the wife, by the husband, without fraudulent intent, at a time when he was not indebted, cannot be questioned by subsequent creditors. Weld v. Reilly, 48 Super. 531. Also see Lowry v. Smith, 9 Hun, 514, distinguished Champlin v. Seeber, 56 How. Pr. 46; Neuberger v. Keim, 134 N. Y. 35. But they may become so. Talcott v. Levie, 20 N. Y. Supp. 440, affd., 3 Misc. 615.

So held also as to children. Holmes v. Clark, 48 Barb. 237. See also Wickes v. Clarke, 8 Paige, 161. There is no presumption of fraud because a deed is made from brother to sister. Spicer v. Spicer, 54 Super. 280.

Whether the particular transaction was intended as a fraud upon creditors is a question of fact. Dygert v. Remerschnider, 32 N. Y. 629, affg. 39 Barb. 417. But the mere fact that fraud was not intended will not always save the transaction. Coleman v. Burr, 93 N. Y. 17.

Where the husband, in good circumstances, pays the consideration for a deed to his wife in good faith, it is valid as against subsequent creditors. Curtis v. Fox, 47 N. Y. 299; Carr v. Breese, 81 id. 584; Phenix Bank v. Stafford, 89 id. 405, and in some cases as to existing ones. See Childs v. Connor, 38 Super. 471.

Sufficiency of Consideration .- A transfer by an insolvent husband to his wife, made in good faith, in consideration of an honest debt due to her, is valid as to his other creditors. Laixter v. Hoes, 11 Misc. 1.

The fact that a debtor, while putting off the payment of his debt, transfers and conveys to his wife property to the value of \$4,000 for a consideration of \$1,000 is sufficient to warrant the inference of a fraudulent intent on his part in disposing of his property, if, by so doing, he deprives himself of all power to pay his obligation. Sandman v. Seaman, 84 Hun, 337. See also Victor v. Goldberg, 6 Misc. 46; Morris v. Morris, 71 Hun, 45; Anderson v. Blood, 86 id. 244 Blood, 86 id. 244.

Future or existing indebtedness. Bank v. Wood, 86 Hun, 491; Bowen v. Brooklyn Trust Co., 21 N. Y. Supp. 324.

A void agreement (because not in writing) in consideration of marriage and a settlement based on it, is void as to creditors. Dygert v. Remerschnider, 32 N. Y. 629. See also cases cited above.

A voluntary conveyance in consideration of blood, etc., is only presumptively fraudulent against creditors, and may be rebutted by circumstances. Seward v. Jackson, 8 Cow. 406; Pell v. Tredwell, 5 Wend. 661; Wood v. Jackson, 8 id. 9; Van Wyck v. Seward, 18 id. 375; s. c., 6 Paige, 62. See also Jackson v. Peek, 4 Wend. 300; Sterry v. Arden, 1 Johns. Ch. 261; Van Wyck v. Seward, 5 Cow. 67; Cole v. Tyler, 65 N. Y. 73; Holden v. Burnham, 63 id. 74.

A conveyance without consideration by an insolvent, is controlling evidence

of fraud. Erickson v. Quinn, 47 N. Y. 410.

of fraud. Erickson v. Quinn, 47 N. Y. 410.

See also as to frauds against creditors, and the setting aside of conveyances, and who are "creditors." Sands v. Codwise, 4 Johns. 536; Anderson v. Roberts, 18 id. 515; Jackson v. Town, 4 Cow. 599; Boyd v. Anderson, 3 Johns. Ch. 371; Mead v. Gregg, 12 Barb. 653; Shadbolt v. Basset, 1 Lans. 121; Clements v. Moore, 6 Wald. 299; Wood v. Hunt, 38 Barb. 303; Rankin v. Arndt, 44 id. 251; Bayard v. Hoffman, 4 Johns. Ch. 452; Young v. Heermans, 66 N. Y. 374; Bowlsby v. Tompkins, 18 Hun, 219; Pendleton v. Hughes, 65 Barb. 136, affd., 53 N. Y. 626; Stimson v. Wrigley, 86 id. 332; Spring v. Short, 12 Wkly. Dig. 360; Laws 1877, Chap. 466; Royer Wheel Co. v. Fielding, 101 N. Y. 504; Spalding v. Norman, 51 id. 672; Corbin v. Gordon, 25 Hun, 59; Crane v. Roosa, 40 id. 455; Brown v. Townsend, 8 N. Y. Supp. 61. As to the judgment, see Orr v. Gilmore, 7 Lans. 345; Pendleton v. Hughes.

As to the judgment, see Orr v. Gilmore, 7 Lans. 345; Pendleton v. Hughes, 65 Barb. 136, affd., 53 N. Y. 626.

Statement.— A post nuptial settlement is presumably fraudulent as to creditors. Saxton v. Sebring, 96 App. Div. 570; Tanner v. Eckhardt, 107 App. Div. 79.

Conveyances Between Husband and Wife and Children. — Deed between husband and wife in equity will be sustained as against subsequent creditors unless intent is to defraud. Schuyler v. Scott, 134 U. S. 405.

Facts as to fraudulent intent in a conveyance from husband to wife.

Carver v. Barker, 73 Hun, 416.

In case of conveyance by father to son. Davis v. Howard, 73 Hun, 347.

A conveyance by husband to wife in accordance with an agreement with her father who intended to give the property conveyed to her, but made the deed to him without her knowledge, is not fraudulent. When a conveyance to wife is set aside and a sale ordered in supplementary proceedings, the sale must be subject to inchoate dower. The wife cannot be made to take a gross sum. Lowry v. Smith, 9 Hun, 514.

Conveyance to wife by husband, who retained sufficient property to satisfy all claims against him, held not fraudulent as to creditors at time of the con-

veyance. Guy v. Craighead, 40 App. Div. 260.

See, however, Ebbitt v. Dunham, 25 Misc. 232.

A conveyance to wife to secure her for moneys earned by her before marriage, sustained. Harbottle v. Farrell, 21 Wkly. Dig. 534.

A conveyance by a solvent debtor of a portion of his property to trustees to pay a portion of his creditors and providing for return of surplus, is not invalid, though if he were insolvent it would be. Knapp v. McGowan, 96 N. Y. 75.

It has been held that a mortgage to a bona fide creditor is good, though made with fraudulent intent. Billings v. Billings, 31 Hun, 65, criticising many cases.

But a sale to wife on foreclosure of a valid mortgage was set aside in

Simmons v. Johnson, 48 Hun, 131.

A deed is not valid if made to hinder creditors and the grantee participates. Union Nat. Bank of Albany v. Warner, 12 Hun, 306; Davis v. Leopold, 87 N. Y. 620. See also, however, Doyle v. Sharpe, 74 id. 154; Nugent v. Jacobs, 20 Wkly. Dig. 254. In such case the deed is absolutely void and the grantee loses the property entirely. Davis v. Leopold, 87 N. Y. 620.

But a deed to one creditor in consideration of the debt, not void even if to hinder other creditors, unless grantee participated in the fraudulent intent; mere knowledge is not sufficient. Dudley v. Danforth, 61 N. Y. 626; Hale v. Stewart, 7 Hun, 591; Parett v. Segall, 12 Wkly. Dig. 535; Stacy v. Deshaw, 7 Hun, 449. Compare Solomon v. Moral, 53 How. Pr. 342, distinguished in Roeber v. Bowe, 26 Hun. 554.

A debtor has a right in the absence of statutory restrictions to sell and transfer to one or more of his creditors the whole or any part of his property in payment of or to secure his debts, when the purpose is honest. Dodge v. Mckecknie, 156 N. V. 514.

Provision for a return of any surplus to the debtor does not impute an assent to a complicity in ulterior purposes of debtor. Sommers v. Collentin,

26 App. Div. 241.

Unrecorded Deed.—Held fraudulent as to those who relied on apparent ownership of the grantor and gave credit. Pendleton v. Hughes, 65 Barb. 136, 145, affd., it seems, 53 N. Y. 626; but compare Trenton Banking Co. v. Duncan, 86 N. Y. 221, which holds that the grantee must have notice. See, however, Blennerhassett v. Sherman, 15 Otto. 100, 117.

A voluntary conveyance made before entering upon business, to secure the property against contingencies of the business, has been held void as against subsequent creditors. Case v. Phelps, 39 N. Y. 164; Carpenter v. Roe, 10 id. 227; Fox v. Moyer, 54 id. 125; Hawley v. Sackett, 3 Hun, 605; Young v. Heermans, 66 N. Y. 374.

As to deed by absconding debtor, vide Avery v. Reynolds, 5 Alb. L. J. 287. A deed to sisters unrecorded for eight years, sustained as against creditors of grantor. Phila. & Reading Coal and Iron Co. v. Devoy, 25 Misc. 640.

Marriage Settlements .- An ante-nuptial settlement of lands, though made by the settler with the design of defrauding his creditors, will not be set aside in the absence of the clearest proof of his intended wife's participation in the fraud. Prewit v. Wilson, 103 U. S. 22.

As to marriage settlement, vide more fully, supra, Chap. III, Tit. III.

As to when post-nuptial settlements will be sustained in equity, so as to give a support for his wife, vide Wickes v. Clarke, 8 Paige, 161; Garlick v. Strong, 3 id. 452; Searing v. Searing, 9 id. 289; Partridge v. Havens, 10 id. 618; Bleecker v. Bingham, 3 id. 246; King v. Whitely, 10 id. 465.

The creditor may move to set aside the conveyance when he has a judgment

for his debt. Mohawk Bank v. Atwater, 2 Paige, 54.

Implied and Resulting Trusts .- As to when conveyances are treated as void as against creditors, in cases where a grant for a valuable consideration shall be made to one person, and the consideration is paid by another, vide supra, Chap. X, Tit. V; also Dunlap v. Hawkins, 59 N. Y. 342.

The provisions as to fraudulent conveyances do not preclude a party from establishing an implied or resulting trust recognized by the common law.

Foote v. Bryant, 47 N. Y. 545.

Where consideration was paid by debtor and conveyance made to third party who is free from the fraud, and he afterward has a claim in judgment against the debtor, held that creditors attacking the deed cannot disturb him without paying or offering to pay his judgment. Brown v. Chubb, 135 N. Y.

Plaintiff held entitled as administrator of an insolvent estate to a judgment against grantee of deceased insolvent for the benefit of a church, in case he had knowledge, or had not before action paid the money over. Truesdell v. Bourke, 29 App. Div. 95.

But see as to fraud in part tainting the whole. Baldwin v. Short, 125

Assignments for Benefit of Creditors .- As to these, vide infra, Chap. XXXI.

TITLE III. Fraudulent Conveyances: Miscellaneous.

'The following provisions with respect to fraudulent transfers are also noted for reference:

The Terms "Lands," "Conveyance," etc .- The term "lands" in the chapter of the Revised Statutes as to fraudulent conveyances, is to be construed as coextensive in meaning with "lands, tenements, and hereditaments;" and the

terms "estate and interest in lands" shall be construed to embrace every estate and interest, freehold and chattel, legal and equitable, present and future, vested and contingent, in lands as above defined. 2 R. S. 137, § 6. See Real Property Law, § 205.

The term "conveyance" is to be construed to embrace every instrument in

writing, except wills, whatever its form, and however known in law, by which any estate or interest in lands is created, aliened, assigned, or surrendered.

2 R. S. 137, § 7. See Real Property Law, § 205.

The chapter was not to effect prior instruments or proceedings. 2 R. S. 138,

Fraud Punishable .- By the Revised Statutes, parties to the making of conveyances to defraud purchasers, or to hinder or defraud creditors, or those privy thereto, or willingly putting the same in use, as if made in good faith, shall be guilty of a misdemeanor. 2 R. S. 690, § 3; vide 14 How. Pr. 11. See Penal Code, § 586.

Rights of Assignees, Receivers, Trustees and Creditors.— To bring suit to set aside fraudulent conveyances. Real Property Law, § 232 (L. 1858, Chap. 314; L. 1894, Chap. 370); Love v. Dierkes, 16 Abb. N. C. 47.

When they will not act, the creditor may. Hawley v. McDonnell, 113 N. Y.

As to general rule that general assignee alone can attack alleged fraudulent prior conveyances. McFraney v. Hall, 86 Hun, 415.

Fraudulent Intent.— The question of fraudulent intent is one of fact, and not of law. No conveyance or charge, etc., shall be adjudged fraudulent, as against creditors or purchasers, solely on the ground that it was not founded on a valuable consideration. 2 R. S. 139, § 4; Real Property Law, § 229.

See, as to fraudulent intent, and the burden of proof. Russell v. Lasher,

4 Barb, 232; Van Wyck v. Seward, 18 Wend, 375.

Fraudulent Trusts.— All trusts in land, created for the benefit of the grantor, are void as against creditors existing or subsequent. See Schenck v. Bames, 156 N. Y. 316; Townsend v. Bumpus, 29 App. Div. 122; see also 2 R. S. 135, § 1, as to trusts of personalty.

Grants or assignments or trusts, unless in writing subscribed by the party or his lawful agent, are made void. 2 R. S. 134, § 6; Real Property Law, § 207. Vide supra, 289; also 10 Barb. 346; Steere v. Steere, 5 Johns. Ch. 1.

Heirs, Assignees, Etc.- Instruments declared void as fraudulent conveyances are void as against heirs, successors, personal representatives, or assignees of the creditors, purchasers or incumbrancers. Real Property Law, § 228; 2 R.S. 137, § 3 (without provision for incumbrancers).

As to devisees, see below.

Fraudulent Title.— An action will lie for a fraudulent representation as to title. Whitney v. Allaire, 1 N. Y. 505; Barber v. Morgan, 51 Barb. 116.

Bona Fide Purchaser.— Such a purchaser is one who has bought without notice of another claim and has parted with or paid value. Fraud follows the land into the possession of any other persons. Spicer v. Waters, 65 Barb.

A deed acknowledging payment of purchase money, is prima facie evidence of a purchase in good faith and for value, but the evidence may be overcome

by proof. Taylor v. Hoey, 36 Super. 402.

Subsequent improvements are held to be forfeited where the grantee had notice of intent to defraud. Shand v. Handley, 71 N. Y. 319. But he will be allowed necessary taxes, interest and repairs. Loss v. Wilkinson, 113 N. Y. 485.

But in cases of constructive notice only, moneys paid to reduce existing incumbrances have been allowed. Davis v. Leopold, 87 N. Y. 620; Love v. Dierkes, 16 Abb. N. C. 47.

Though all creditors may join in the action all are not necessary parties. White's Bank v. Farthing, 101 N. Y. 344. But the grantor is a necessary

party. Hubbell v. Merchants' Bank, 42 Hun, 200.

Devisees may bring an action before probate to set aside as fraudulently procured a conveyance of property devised. The validity of the will may be determined then. The surrogate has no power to act. Norris v. Norris, 32 Hun, 175.

Fraud on Grantor.—When deed so obtained may be canceled. Smith v. Smith, 134 N. Y. 62; Talbot v. Cruger, 72 Hun, 30. See Cramsey v. Sterling, 111 App. Div. 568; Hunter v. McCammon, 119 App. Div. 326.

Fraud on Grantee .- Held an objectionable clause written in surreptitiously may be adopted by grantee's action showing acquiescence. Townsend v. Bumpus, 29 App. Div. 122.

Dower of Wife in Property Fraudulently Conveyed .- As to deed made to deprive future wife of dower. Oakley v. Oakley, 69 Hun, 121. Vide also "Dower." Chap. VII.

Delivery .- As to refusal and effect of subsequent acceptance of fraudulent deed. Holmes v. Little, 86 Hun, 226.

CHAPTER XXII.

CONVEYANCES, MISCELLANEOUS.

The following miscellaneous provisions as to conveyances are of importance to note:

Transfers to Receivers.—When a receiver of property is appointed by a court or judge in a judicial proceeding, he does not, by force of his appointment as receiver, become possessed of *real* property. A deed is necessary, or other conveyance of title. Moak v. Coates, 33 Barb. 498; Chautauqua Bank v. Risley, 19 N. Y. 370; Keeney v. Home Ins. Co., 71 N. Y. 396.

But see "Receivers under Supplementary Proceedings," infra, Chap.

XXXIX.

Conveyances for Money Lost at Play, Lotteries, etc.—All things in action, judgments, mortgages, conveyances, or other securities, where any of the consideration is for money or value lost at play, or betting, or loans for the same, shall be void, except as to real estate, when they shall enure for the sole benefit of such person as would be entitled to such real estate if the grantor or person incumbering the same had died immediately upon the execution of such instrument, and shall be deemed to be taken and held to and for the use of the person who would be so entitled. All grants, covenants and conveyances for preventing such real estate from coming to or devolving upon the person hereby intended to enjoy the same as aforesaid, or in any way incumbering or charging the same, so as to prevent such person from enjoying the same fully and entirely, shall be fraudulent and void. 1 R. S. 663, §§ 16, 17 (1 R. L. 153, § 1); vide 19 Barb. 127; Ruckman v. Bryan, 3 Den. 340, 342; Ruckman v. Pitcher, 1 N. Y. 392.

For Lotteries or Games.— Every bargain, grant, conveyance, etc., or transfer of real estate, made pursuant to any lottery or game not authorized by law, or to assist or aid the same, is declared *void*. 1 R. S. 668, § 38 (Laws of 1819, 259).

Absconding, Concealed, and Nonresident Debtors.—All sales, assignments, transfers, mortgages, and conveyances made by them after first publication of attachment and judgments confessed, were absolutely void as against creditors. 2 R. S. 8, § 32. This has all been repealed. Vide infra, Chap. XXXI.

Conveyances by Guardians ad Litem, by Order of the Court.—Such deeds must be executed in the name of the infant, per the guardian. Hyatt v. Seely, 11 N. Y. 52.

Special Partnership Property.— Transfers of the effects, etc., of such a partnership, when insolvent or in contemplation of insolvency, with a view to give a preference to creditors, are made void. Also, judgments, liens, etc. 1 R. S. 766, 767; 9 Abb. 132; 16 id. 71; Hathorne v. Hodges, 28 N. Y. 486; 36 Barb. 262; Mills v. Hooker, 6 Paige, 577.

Usury Laws.— Conveyances, etc., taken in violation of the usury laws are void. 1 R. S. 772, § 5, as amd. L. 1837, Chap. 430, § 1. Also see "Usury" in Chap. XXIII.

Reformation of a deed intended to be for an entirety for benefit of husband and wife. Brown v. Brown, 79 Hun, 44.

Reform of deed cannot be had by the injured party if he accept a portion of the land conveyed through devise from the wrongful grantee. Haack v. Weickens, 42 Hun, 486, revd. on other grounds, 118 N. Y. 67.

CHAPTER XXIII.

MORTGAGES.

TITLE I .- DEFINITION AND NATURE OF A MORTGAGE.

II .- THE DEFEASANCE.

III .- THE BOND OR NOTE.

IV .- THE POWER OF SALE.

V .- THE ESTATE OF THE PARTIES.

VI .- THE EQUITY OF REDEMPTION.

VII.— ASSIGNMENT OF MORTGAGES.

VIII .- DISCHARGE, PAYMENT, AND EXTINGUISHMENT.

IX.— USURY.

X .- MORTGAGES; MISCELLANEOUS PROVISIONS.

DEFINITION AND NATURE OF A MORTGAGE.

A mortgage is defined as the conveyance of an estate by way of pledge for the security of a debt; to become void on payment of the debt, as provided.

All estates and interests in property may become the subject of a mortgage, whether present, future, or contingent.

Short form of instrument provided for by Real Property Law, § 223, re-enacting L. 1890, Chap. 475.

Vide supra, Chap. IX, Tit. II, fully, as to the transfer of expectant estates. Whatever is annexed to the freehold, and would pass between vendor and vendee, passes with the mortgage. Miller v. Bumb, 6 Cow. 665; King v. Wilcomb, 7 Barb. 263. "Appendages" covers anything commonly used on the property though not a fixture. Miller v. Hart, 32 Hun, 639.

An undivided interest is mortgagable. Bradford v. Downs, 24 App. Div. 97; Jackson v. Pierce, 10 Johns. 414.

Partnership Lands.— One partner may mortgage partnership property to secure the firm debts. Willet v. Stringer, 17 Abb. 152; Tarbel v. Bradley, 7 Abb. N. C. 273, affd. (in effect), 86 N. Y. 280; Hardin v. Dolge, 46 App. Div. 416. A mortgage of the partner's individual share is not a mortgage of partnership property. Mabbett v. White, 12 N. Y. 442, 454; Graser v. Stellwagen, 25 N. Y. 315. As to mortgages by limited partnerships, see 1 R. S. 766, § 20; id. 767, § 21. L. 1897, Chap. 420, § 40.

As to mortgages by surviving partner, see Bell v. Hepworth, 134 N. Y. 442.

Consideration, Parties, Description, Covenants, etc.—See Chap. XX, " Deeds."

Corporations .- See Chap. XXIV.

Mortgage on a Lease .- The mortgagee, under the present views of the courts, is not liable on covenants in the lease, if he have not taken possession. Vide supra, Chap. VIII, Tit. III; Walton v. Cronly, 14 Wend. 63; Astor v. Miller, 2 Paige, 68, revd., 5 Wend. 603; Levy v. L. I. Brewery, 26 Misc. 410.

A mortgage on a lease will attach to the renewal thereof.

Jenkins, 3 Sandf. Ch. 130.

By the Revised Statutes a mortgagee of a lease might redeem within six months after judgment in ejectment against the tenant. 2 R. S. 506; repealed by L. 1880, Chap. 245. This right is now given by Code Civ. Proc.,

§ Ī508.

Fixtures put on the property after foreclosure are not covered. Henry v. Von Brandenstein, 12 Daly, 480. Necessary appliances for raising a perennial crop are covered. Bishop v. Bishop, 11 N. Y. 123.

For form of mortgage on leases of real property authorized by statute, see Real Property Law, § 237 (added by L. 1898, Chap. 338).

Growing and Future Crops.- May be sold or mortgaged, and a lessee of lands can give to his landlord, to secure the amount of rent due to him, a mortgage on crops not yet planted; in such case, the title to the crops, when grown, vests at once in the landlord and not in the lessee.

Ordinarily, however, the legal title to property not in existence, actually or potentially, cannot be transferred by way of a mortgage, and at law a mortgage upon property not yet acquired is only a license until a new act intervenes. Pleetham v. Reddick, 82 Hun, 390.

Validity.— A seal as evidence of consideration. Baird v. Baird, 81 Hun, 300. A mortgage has no validity until a sum of money has been actually advanced on it. Schafer v. Reilly, 50 N. Y. 61. But a mortgage given to secure an existing indebtedness is valid. Knapp v. McGowan, 96 N. Y. 75. So if given to secure a bond already secured by another mortgage. Havens v. Willes, 100 N. Y. 482.

A mortgage by a wife to obtain time for her husband to pay debt, is

valid. Pennsylvania Coal Co. v. Blake, 85 N. Y. 226.

An agreement to pay full legal interest in consideration of an extension of a mortgage reserving a less rate is valid. Ritter v. Phillips, 53 N. Y. 586.

A mortgage executed by a corporation after its insolvency, but in pursusance of an agreement to secure advances made before there was any expectation of insolvency, is not made "in contemplation of insolvency," and is valid. Paulding v. Steel Co., 94 N. Y. 334; Brown v. Brooklyn Trust Co., 21 N. Y. Supp. 324.

A mortgage may be enforced though the deed be set aside. Reilly v. Reilly,

63 N. Y. 169.

A mortgage made without consideration or delivery becomes valid on assignment for value by the mortgagee at the request of the mortgagor. Spicer v. First Nat. Bk., 55 App. Div. 172.

Mortgage by Trustee.— A mortgage by a trustee in which remainderman and cestui que trust join, does not bind the estate of the trustee in the property. Rathburn v. Hooney, 58 N. Y. 463. Where bond and mortgage are signed by one as trustee, there is no individual liability. Crate v. Benzinger, 13 App. Div. 617.

As to statutes conferring power to mortgage on trustees, see supra, Chap. X.

Widow.- A widow whose dower is unassigned may mortgage the land to which her right attaches. Mut. Life Ins. Co. v. Shipman, 108 N. Y. 19,

s. c., 119 N. Y. 324.

Where a will devises all property to wife, "to have and to hold for her comfort and support all of the above-named property if she needs the same during her natural lifetime," and gives a legacy "if there is enough of my property left at the death of my wife," the widow takes a life estate with power to convert to her use so much of the estate as she may need, and has a right to mortgage for that purpose. Swarthout v. Ranier, 143 N. Y. 499.

After-Acquired Title by the mortgagor enures to the benefit of the mortgagee. Tefft v. Munson, 57 N. Y. 97; Smith v. Rowe, 33 Hun, 422. See in this connection, Donovan v. Twist, 85 App. Div. 130. So held of a renewal of lease to testamentary trustees of mortgagor of leasehold, though the former lease contained no covenant of renewal. Wunderlich v. Reis, 31 Hun, 1.

Party in possession of land under a parol contract for a deed has an interest which he can mortgage. Crane v. Turner, 7 Hun, 357, affd., 67 N. Y. 437; Johnson v. Strong, 65 Hun, 470; Washington Trust Co. v. Morse Iron Works, 106 App. Div. 195. See infra, Chap. XXVI, Tit. III, as to notice, from its being recorded before deed.

A Vested Remainder may be mortgaged. Birch v. Jansen, 9 Wkly. Dig. 255, affd., it seems, 86 N. Y. 630; Rathburn v. Hooney, 58 N. Y. 463.

Cemetery Lots.— As to mortgage of cemetery lots, vide L. 1850, Chap. 152. and Thompson v. Hickey, 8 Abb. N. C. 159.

Railroad Mortgages.— A railroad mortgage describing the projected route is binding though the route be changed. Elwell v. Grand St., etc., R. R.

A railroad company confers by a mortgage the same rights and interests on its mortgagees as does an individual. Vatable v. N. Y., L. E., etc., Co., 96 N. Y. 49.

The rolling-stock of a railroad is personalty not realty. Hoyle v. Plattsburgh, etc., R. R. Co., 54 N. Y. 314, limited, 58 Hun, 215.

Exempt Property.— As to mortgaging exempt real property. See Code Civ. Proc.. § 1404.

Future Advances.— The rule, as now declared by the courts, is, that a mortgage or judgment may be taken and held as security for future advances and responsibilities, to the extent of it, when this is a constituent part of the original agreement; and the future advances would be covered by it in preference to the claim of a junior intervening incumbrancer, with sufficient notice, by record or otherwise, of the agreement. Actual notice to the mortagee, however, of the intervening incumbrance, would give it priority over advances made by him after the time of notice.

Monnell v. Smith, 5 Cow. 441; Lansing v. Woodworth, 1 Sandf. Ch. 43: Barry v. Merch. Ex. Co., Id. 280; Livingston v. McInley, 16 Johns. 165; Brinckerhoff v. Marvin, 5 Johns. Ch. 320; James v. Johnson, 6 id. 417, revd.. 2 Cow. 246; United States v. Hoe, 3 Cranch. 73; Shinas v. Craig, 7 id. 34: Truscott v. King, 6 N. Y. 147; Laurence v. Tucker, 23 How. (U. S.) 14: Milliman v. Neher, 20 Barb. 37; Knapp v. McGown, 96 N. Y. 75; Ackerman v. Hunsicker, 85 id. 43; Farr v. Nichols, 132 id. 327.

But a parol agreement treating a mortgage as security for further advances would be void. Stoddart v. Hart, 23 N. Y. 556; Taylor v. Post, 30 Hun, 446. The purpose of the security may be shown by parol. Truscott v. King, 6 N. Y. 147, supra; Bank of Utica v. Finch, 3 Barb. Ch. 293, 302; Hall v. Crouse, 13 Hun, 557.

A subsequent advance cannot be tacked to a prior security to the security. Monnell v. Smith, 5 Cow. 441; Lansing v. Woodworth, 1 Sandf. Ch. 43:

A subsequent advance cannot be tacked to a prior security, to the prejudice of a bona fide junior incumbrancer. Craig v. Tappen, 2 Sandf. Ch. 78; Truscott v. King, 6 N. Y. 147; Ex parte Hooper, 19 Ves. 477; Ketcham v. Wood, 22 Hun, 64; Reynolds v. Webster, 71 Hun, 378; Ackerman v. Hunsicker, 85 N. Y. 43; distinguishing Craig v. Tappen, 2 Sandf. Ch. 78.

And a purchase money mortgage covering also future advances held superior to prior liens of the mortgaging vendee. Tallman v. Farley, 1 Barb. 280;

Hyman v. Hauff, 138 N. Y. 48.

The aggreement relative to future advances should be recorded to be notice. Truscott v. King, 6 N. Y. 147, supra; St. Andrew's Ch. v. Tompkins,

7 Johns. Ch. 14; Hall v. Crouse, 13 Hun, 557.

Making the bond for further advances will not affect the mortgage. Stoddart v. Hart, 23 N. Y. 556, supra. A mortgage for future advances unrecorded will take preference over a subsequent judgment, unless there has been a fraudulent intent. Thomas v. Kelsey, 30 Barb. 268. See also as to railroad mortgages, Stevens v. Watson, 45 How. Pr. 104, and infra.

As to what form of words will be held to cover future advances, see Bell v. Smith, 1 N. Y. St. Rep. 93; Simons v. First Nat. Bk. of Union Springs, 93 N. Y. 269.

A mortgage by an individual to cover debts and advances will not extend

to debts of his firm. First Nat. Bk. of Batavia v. Tarbox, 38 Hun, 57.

A mortgage to secure future advances or indorsements is valid; is within the Recording Act; is notice to subsequent purchasers and puts them upon inquiry as to the amount of advances or indorsements already made; and it is only by notice to the mortgage, or other holder of the mortgage, that still further advances or indorsements which shall be equally a lien on the mortgaged premises can be prevented. Willoughby v. Fredonia Nat. Bk., 68 Hun, 275.

Tacking Mortgages.— It was a principal established by the English courts, that if a junior mortgagee acquired a first mortgage. he could tack his junior mortgage to the first mortgage, and gain preference thereby for a third mortgage, over an intervening mortgage or judgment. The principal was based upon the view that the mortgagee was owner of a conditional fee, which is no longer the view of the courts of this State. The doctrine of tacking, therefore, no longer prevails in this State, and liens are enforced according to the order of time in which they respectively attach.

An agreement by the holder of first mortgage that his mortgage should be junior to a fourth mortgage, does not give the fourth mortgage priority over the second and third, the first being canceled. Taylor v. Wing, 84

Estoppel.- May validate. Vellum v. Demerle, 20 N. Y. Supp. 516, s. c., 65 Hun, 543.

After-acquired interest.—As a general rule, a mortgage of all right and interest does not pass an after-acquired interest.

Watson v. Campbell, 28 Barb. 421. As to after-acquired title, vide supra,

p. 607.

If such was the intention of the parties, an after-acquired interest might pass in equity. Otis v. Sill, 8 Barb. 103; Seymour v. Can., etc., R. R., 25 id. 284; Benjamin v. Elmira, etc., R. R., 49 id. 441. See Central Trust Co. v. West India Imp. Co., 169 N. Y. 314.

Railroad Property.- A mortgage of railroad property and future acquisitions and changes would be good, and attach to the franchise or after-acquired lands and interests as designated, but subject to all liens on the afteracquired property. Seymour v. Canandaigua, etc., R. R., 25 Barb. 284; also Benjamin v. Elmira, etc., R. R. Co., 49 id. 441, supra; Minnesota Co. v. St. Paul Co., 6 Wall. 742; U. S. v. N. O. R. R., 12 id. 362; also Laws of 1850, Chap. 140; Railroad Law, L. 1890, Chap. 565, \$ 4, subd. 70; Stevens v. Watson, 4 Abb. App. Cas. 302; Shaw v. Bill, 9 Otto, 10.

Such mortgages may be executed at a meeting held out of the State of incorporation. Galveston R. R. v. Cowdrey, 11 Wall. 459. See this case as

to foreclosure of such mortgages.

The Condition.— That which distinguishes a mortgage from other securities is the condition that if the debt be paid at a day specified, the conveyance is to be void; otherwise it becomes absolute at law, though subject, in equity, to the right of redemption. Whenever also property is transferred no matter in what form or by what conveyance as a security for a debt, the transferee takes merely as mortgagee and has no other rights or remedies than the law accords the mortgagees.

Differs from a Pledge.— On a pledge, there is always a deposit of the security, in which the pledgee has only a special property, and it can be redeemed at any time before sale.

In a mortgage, technically, the whole title passes, subject to the defeasance. Langdon v. Buell, 9 Wend. 80; Burdick v. McVanner, 2 Den. 170; see infra.

Differs from a Conditional Sale .- A mortgage also differs from a conditional sale, i. e., a sale with an agreement to repurchase within a given time, in which case, after the expiration of the time, the right to reclaim is gone. For the distinction between the two, vide Brewster v. Baker, 20 Barb. 364; 2 id. 28; Holmes v. Grant, 8 Paige, 243; Baker v. Thrasher, 4 Den. 493; Saxton v. Hitchcock, 47 Barb. 220. See also below.

If the debt remain, the transfer is a mortgage. See also Robinson v. Cropsey, 2 Edw. 138; Holmes v. Grant, 8 Paige, 243; Cooper v. Whitney, 3 Hill, 95; Brockway v. Wells, 1 Paige, 617; Slee v. Manhattan Co., *Id.* 48; Elliot v. Pell, *Id.* 263; Eckford v. De Kay, 8 *id.* 89, affd., 26 Wend. 31; and see "Defeasance," Tit. II.

The Amount Secured .- It has been held that the amount secured must be specified, and that otherwise the mortgage would be void as to creditors, etc. It is held, however, that if the mortgage be duly recorded, it will not be void as to purchasers or creditors for uncertainty, when, being conditioned to pay liabilities already incurred, it does not specify the amount. Youngs v. Wilson, 27 N. Y. 351.

Certain Deeds to be Deemed Mortgages .- The Revised Statutes provided as follows: Every deed conveying real estate, which, by any other instrument in writing shall appear to have been intended only as a security in the nature of a mortgage, though it be an absolute conveyance in terms, shall be considered as a mortgage: and the person for whose benefit such deed shall be made shall not derive any advantage from the recording thereof, unless every writing operating as a defeasance of the same, or explanatory of its being designed to have the effect only of a mortgage or conditional deed, be also recorded therewith and at the same time.

1 R. S. 756, § 3.

This section is taken from the act concerning mortgages, 1 R. L. 372, and Laws of 1822, p. 262.

The words "at the same time" were supplied by the Revision of 1830.

The Real Property Law contains the same provision re-enacted without material change.

Real Property Law, § 269.

For a construction of this statute, vide Stoddard v. Rotten. 5 Bosw.

378, where it was held that even if the defeasance is not recorded, bona fide

purchasers from the grantee are protected.

The deed should be recorded as a mortgage, and if recorded as a deed only, the mortgagee is not protected against subsequent bona fide mortgagees or purchasers. The defeasance may be subsequently made and recorded with the principal instrument. White v. Morse, 1 Paige, 554; Brown v. Dean, 3 Wend. 208; Grimstone v. Carter, 3 Paige, 421; Day v. Dunham, 2 Johns. Ch. 188; James v. Johnson, 2 Cow. 248. Compare Bowery Sygs. Bank v. Belt, 20 N. Y. Supp. 746.

If made subsequently it should be in writing, and formally executed.

Notice may be otherwise than by record, but it must be full and clear, otherwise subsequent bona fide purchasers, etc., are protected. Jackson v. Van Valkenburgh, 8 Cow. 260; Fort v. Burch, 6 Barb. 60; Cooper v. Whitney, 3 Hill, 95. See also 5 Barb. 652; Brown v. Dean, 3 Wend. 208; Clark v. Henry, 2 Cow. 324; Hawley v. Bennett, 5 Paige, 104, 111; White v. Moore, 1 id. 551; 6 Johns. Ch. 417; Pattison v. Powers, 4 Paige, 549, 551.

A deed executed at the same time with an agreement by the vendee to sell and account for part of the proceeds, etc., is no mortgage. Macaulay

v. Porter, 71 N. Y. 173; Wilson v. Parshall, 129 id. 223.

So held where the agreement recited that the deed was security for thirty thousand dollars, and required an accounting for any surplus over that sum upon a sale. Kraemer v. Adelsberger, 55 Super. 245, revd., 122 N. Y. 467.

Nor is a deed containing a covenant by the grantee to resell within a certain time at an advanced price. Randall v. Sanders, 87 N. Y. 578; or

the same price, Bowery Savings Bank v. Belt, 20 N. Y. Supp. 746.

It seems an equitable mortgage may be created on good consideration by parol agreement to execute a mortgage. Burdick v. Jackson, 7 Hun, 488; Roberge v. Winne, 71 Hun, 172.

A deed given at request of the beneficial owner of property, who at the same time receives from the grantee an instrument declaring the conveyance to be as security for advances, is a mortgage. Dodd v. Neilson, 90 N. Y. 243.

A deed accompanied by an agreement to reconvey upon payment of certain sums, but specifying that the conveyance was absolute and not conditional and that the agreement should cease on a certain day, is a mortgage. Simon v. Schmidt, 41 Hun, 318; Macauley v. Smith, 132 N. Y. 524. See also Shields v. Russell, 20 N. Y. Supp. 909, modified, 142 N. Y. 290; and compare Bowery Savings Bank v. Belt, 20 N. Y. Supp. 746.

A deed will be declared a mortgage only upon satisfactory evidence.

Thornley v. Thornley, 3 Misc. 597. As to degree of proof required to show it to be a mortgage, vide Barton v. Lynch, 69 Hun, 1.

Conditional sales and rights of vendee as to selling the land, discussed. Huber v. Grauer, 87 Hun, 100; Sumner v. Skinner, 80 Hun, 20.

A deed conveying land for a debt, and an agreement executed at the same time giving the grantor the privilege of repurchasing within a fixed time at a fixed price, do not constitute a mortgage, though both instruments be recorded together as such. Morrison v. Brand, 5 Daly, 40, affd., 56 N. Y. 657; 8 N. Y. Supp. 711.

The test of the transaction is whether the conveyance was intended by the parties to be security for the debt, or payment of it; in the former case the deed will be held a mortgage; in the latter case not. 34 Hun, 167, revd., 107 N. Y. 83; citing Smith v. Beattie, 31 N. Y. 542.

In doubtful cases the transaction will be construed to be a mortgage rather than a conditional sale, because in the former case redemption can be made after default. Matthews v. Sheehan, 69 N. Y. 585; Westervelt v. Ackley, 2 Hun, 258, affd., 62 N. Y. 505; Thompson v. Hickey, 8 Abb. N. C. 159. See also infra, p. 613.

Burden of evidence is on party seeking to make it a mortgage. Fullerton

v. McCurdy, 55 N. Y. 637.

A deed by wife to secure loan to husband, under what circumstances held to be a mortgage. Shields v. Russell, 142 N. Y. 290.

As to other cases where absolute deed was held to be a mortgage, see Blazy

v. McLean, 77 Hun, 607; Draper v. Draper, 71 id. 349; Moore v. Nye, 21 N. Y. Supp. 94, affd., 142 N. Y. 677; Graves Elevator Co. v. Seitz, 54 Misc. 552; Kerrigan v. Fielding, 47 App. Div. 246.

Title. Such deed does not divest owner of his title. Graves El. Co. v. Seitz, 54 Misc. 552; Kerrigan v. Fielding, 47 App. Div. 246.

Estate of the Parties in Conditional Conveyances .- The rule that the mortgagee has only a lien and not an estate does not apply where the debtor conveys the fee, although the deed was intended as security only. grantor has an equity of redemption and can compel a reconveyance upon performance of the conditions. On his default the grantee cannot bring ejectment, and his only remedy is by forcelosure. If he acquire possession peaceably he may retain it, but if by force or fraud the grantor may eject him and that without payment. Bond v. Collins, 18 Wkly. Dig. 90.

Parole Evidence.—In equity and, since the Code, also at law. parol or other extrinsic evidence may be given to show that a deed, though absolute on its face, was intended as a mortgage. The rule was otherwise at law before the Code.

Webb v. Rice, 6 Hill, 219; Hodges v. Tenn. Ins. Co., 8 N. Y. 416; Despard v. Walbridge, 15 id. 374; Murray v. Walker, 31 id. 399; Dobson v. Pierce, 12 id. 156; Crary v. Goodman, Id. 266; Odell v. Montross, 68 id. 499; Farmers & Merchants' Bank v. Smith, 61 App. Div. 315; Spencer v. Richmond, 46 id. 481; Danaher v. Hodgkins, 25 id. 6.

For discussion of the principle permitting this evidence, see Thomas v.

Scutt, 127 N. Y. 133.

Not so, however, if no defeasance was intended or agreed upon at the time. Taylor v. Baldwin, 10 Barb. 582; Cook v. Eaton, 16 id. 439; Horn v. Keteltas, 46 N. Y. 605; Barrett v. Carter, 3 Lans. 68; Keller v. Paine, 34 Hun, 167, revd., 107 N. Y. 83, and below.

As to evidence to be furnished, see Miller v. McGuckin, 15 Abb. N. C.

204; Payne v. Wilson, 74 N. Y. 348.

Oral evidence for this purpose must be clear and distinct. Erwin v. Curtis, 43 Hun, 292, affd., 112 N. Y. 660.

As to compelling reconveyance, etc., see Miller v. McGuckin, above. Also Hubbell v. Von Schoening, 49 N. Y. 326; Merchants' Bk. v. Thomson, 55 id. 7; see also Chap. XXVIII, Title "Through Foreclosure."

Tender must be made of the whole amount secured. Westfall v. Westfall,

16 Hun, 541.

Vendor's Lien.-An equitable mortgage also arises out of the vendor's lien on the estate sold for the purchase money; unless it be waived, or a different security be contemplated.

Garson v. Green, 1 Johns. Ch. 308; Clark v. Hall, 7 Paige, 382; Watson v. Le Row, 6 Barb. 481, 484; Swartout v. Burr, Id. 495; Champion v. Brown, 6 Johns. Ch. 398, 402; Dusenbury v. Hulbert, 59 N. Y. 541.

The lien would be upheld only against subsequent purchasers with notice, or who have paid no new value. 3 Barb. 267; Burlingame v. Robbins, 21 id. 327; Bayley v. Greenleaf, 7 Wheat. 46. See, as to notice, Cordova v. Hood, 17 Wall.; Hazeltine v. Moore, 21 Hun, 355.

Taking certain securities may waive the lien, but not bonds, notes, or other mere evidences of the debt. Garson v. Green, 1 Johns. Ch. 308; Shirley v. Sugar Refinery, 2 Edw. 506; Clark v. Hall, 7 Paige, 382; but collateral security, or the bond, etc., of a third person, will waive the lien, unless taken in part payment. Fish v. Howland, 1 Paige, 20; Champion v. Brown, 6 Johns. Ch. 398; McKillip v. McKillip, 8 Barb. 552; 21 id. 327. Or a covenant to do some act in lieu of paying money. McKillip v. McKillip, 8 Barb. 552. See also Vail v. Foster, 4 N. Y. 312. The lien cannot be extended to third parties, but only to vendor and vendee,

The hen cannot be extended to third parties, but only to vendor and vendee, and their privies in law and estate. McKillip v. McKillip, 8 Barb. 552.

Except where they are acquainted with the transaction and presumably have acquiesced in it. Boies v. Brenham, 127 N. Y. 620.

A vendor's lien is not such a mortgage within the statute, as charges land descended or devised to the heir or devisee. Wright v. Holbrook, 32 N. Y. 587; and see, as to vendor's lien, cases cited, supra, p. 502, Chap. XIX.

A building contract between vendor and purchaser, held an equitable mortgage for materials, etc., advanced. Payne v. Wilson, 74 N. Y. 348; Kendall v. Niebuhr, 45 Super. 542, affd., 46 Super. 544, and that affd., 87

Where a mortgage on part of the land is assumed by the vendee and is stated in the deed to form part of the purchase price, the vendor's lien will not attach to the part covered by the mortgage. Lea v. Fabbri, 45 Super. 361.

Vendee's Lien.— See as to nature of vendee's lien. Occidental Realty Co. v. Palmer, 117 App. Div. 505. It may be foreclosed. Id.

It has been recently said however that no such lien exists. Krainin v. Coffey, 119 App. Div. 516. See, however, firmly establishing vendee's lien. Elterman v. Hyman, 192 N. Y. 113; Davis v. Rosenweig Realty Co., Id. 128.

Equitable and Constructive Mortgages.—Agreements may also be held as equitable mortgages — for instances of which see the following:

Jackson v. Dunlap, 1 Johns. Cas. 141; In the Matter of Howe, 1 Paige, 125; Stoddard v. Hart, 23 N. Y.556; Stoddard v. Whiting, 46 id. 627; Chase v. Peck, 21 id. 581; Shaler v. Signer, 37 Barb. 329; Cooper v. Whitney, 3 Hill, 95; Hemans v. Lucy, 1 Supm. 523; Schneider v. Mall, 84 App. Div. 1.

An equitable mortgage may also be raised and upheld in equity by reason of a debtor depositing his "title deeds" with his creditor as security, although against the Statute of Frauds, under the principle that such deposit is evidence of an agreement to mortgage which may be enforced in equity. Rockwell v. Hobby, 2 Sand. Ch. 9; Jackson v. Parkhurst, 4 Wend. 36; Shillsher v. Robinson, 7 Otto, 68. Shillaber v. Robinson, 7 Otto, 68.

Where there are registry laws, however, such a deposit would not operate

against bona fide purchasers or incumbrancers.

Such lien cannot be set up at law as a legal estate. Jackson v. Dunlap, 1 Johns. Cas. 114; Jackson v. Phipps, 12 Johns. 418; Jackson v. Parkhurst, 4 Wend. 369.

Equitable mortgages will take precedence of judgments. Chase v. Peck,

21 N. Y. 581.

They no not require seals. Stoddard v. Whiting, 46 N. Y. 627.

A contract to give a mortgage held not an equitable mortgage, and the recording of it not notice. Matthews v. Demainville, 100 App. Div. 311.

TITLE II. THE DEFEASANCE.

There is usually inserted in the mortgage deed the defeasance or condition upon which the land is conveyed, defeating the principal deed on performance of the condition.

The defeasance may also be in a separate instrument, but should be recorded at the same time with the deed, to protect against subsequent purchasers and mortgagees.

Even if a conveyance be absolute on its face, if made with a defeasance which renders it a mere security, it is a mortgage. Clark v. Henry, 2 Cow. 324; Henry v. Davis, 7 Johns. Ch. 40; Peterson v. Clark, 15 Johns. 205; Dunham v. Dey, id. 555; Brown v. Dean, 3 Wend. 208; Dey v. Dunham, 2

Johns. Ch. 182; and if intended as a mortgage, it will be a mortgage whether there is a written defeasance or not as between the parties. Brown v. Dewey, 2 Barb. 28; Villa v. Rodriguez, 12 Wall. 323; Saxton v. Hitchcock, 47 Barb. 220; Farmers and Merchants' Bank v. Smith, 61 App. Div. 315. And will pass no title. Barry v. Hamburg-Bremen, etc., Co. 110 N. Y. 1.

Bona fide holders will be protected, who have no notice that it is a mortgage. Newton v. McKean, 41 Barb. 285; Decker v. Leonard, 6 Lans. 265.

It is often a perplexed question whether a conveyance was intended to be absolute or as a security with right of redemption, etc. The character of the conveyance is generally determined by the clear intention of the parties. James v. Morey, 2 Cow. 246; Hughes v. Edwards, 9 Wheat. 489; Holmes v. Grant, 8 Paige, 243; Cooper v. Whitney, 3 Hill, 95; Brown v. Dewey, 1 Sand. Ch. 56; Baker v. Thrasher, 4 Den. 493; and estates absolute at law may be held mortgages in equity. Elliott v. Wood, 53 Barb. 28t, affd., 45 N. Y. 71; Binsse v. Paige, 1 Keyes, 87; Carr v. Carr, 52 N. Y. 251.

As to difference between a mortgage and an agreement to resell, vide Brown v. Dewey, 2 Barb. 28; 8 N. Y. Supp. 711; and supra, Tit. I.

The defeasance need not be to the grantor to make a deed a mortgage in equity. Pardee v. Treat, 82 N. Y. 385.

The defeasance clause, even if not filled in, is enough to make it a mortgage. Burnett v. Wright, 135 N. Y. 543.

TITLE III. THE BOND OR NOTE.

A bond or note creating a personal liability for the debt secured usually accompanies and is referred to in the mortgage deed. There is also usually inserted a covenant to pay the debt.

The Revised Statutes provided where there was no accompanying bond or separate instrument, nor any covenant to pay the debt, the mortagee's remedy was confined to the land mortgaged, and the mortgage was not to be construed as a covenant to pay the money, and there was no personal liability.

1 R. S. 738, § 139.

The Real Property Law re-enacted this provision.

Real Property Law, § 214. Smith v. Rice, N. Y. Daily Reg., March 8, 1884; Spencer v. Spencer, 95 N. Y. 353; Mack v. Austin, 95 id. 513; Gaylord v. Knapp, 15 Hun, 87.

The covenant or agreement, however, to pay, need not be in express words. Hone v. Fisher, 2 Barb. Ch. 559; Elder v. Rouse, 15 Wend. 218, and it may be to do any act. Stewart v. Hutchins, 13 Wend. 488, affd., 6.Hill, 143; Coleman v. Van Rensselaer, 44 How. Pr. 368. This provision does not apply to a mortgage executed in another State and covering land there. Thayer v. Marsh, 11 Hun, 501, affd., 75 N. Y. 340.

As to the presumption of the payment of the debt, vide infra, Tit. VIII. As to what words in mortgage will not create a covenant to pay, see Coleman v. Van Rensselaer, 44 How. Pr. 368; Smith v. Rice, 12 Daly, 307.

A mortgage is sufficient to secure the debt without a bond, so far as the land will suffice. Matthews v. Sheehan, 69 N. Y. 585. The bond may be void and yet the mortgage stand. Kidd v. Conway, 65 Barb. 158.

Obligations of a Vendee.— If he purchases subject to the lien of a mortgage, and specially assume its payment, and not otherwise, he becomes personally liable for the debt to the holder of the mortgage, and also indemnifies the grantor against it, and becomes liable to a decree for any deficiency on the foreclosure. The land is the principal fund to pay the debt.

See Tit. V; also p. 571 supra.

Ferris v. Crawford, 2 Den. 595; Cornell v. Prescott, 2 Barb. 16; Russell v. Pistor, 7 N. Y. 171; Trotter v. Hughes, 12 id. 74; Stebbins v. Hall, 29 Barb. 524; Halsey v. Reed, 9 Paige, 446; Flagg v. Thurber, 14 Barb. 196; Flagg v. Munger, 9 N. Y. 483; Jumel v. Jumel, 7 Paige, 591; Binsse v. Paige, 1 Ct. Ap. Cas. 138; Comstock v. Drohan, 71 N. Y. 9; Marsh v. Pike, 10 Paige, 595. See Hartley v. Harrison, 24 N. Y. 170; where the mortgage was usurious.

A grantee who does not assume the mortgage and has to pay arrears of interest has no remedy against his grantor. Lynch v. Rinaldo, 58 How. Pr.

Where the grantee does not assume the mortgage (in this case he did not even know of it) he may buy it to protect the property and enforce it against his grantor, the mortgagor. Wadsworth v. Lyon, 93 N. Y. 201.

Where a clause in a deed purporting to create an assumption of a mortgage by the grantees, is inserted without their knowledge and is not subsequently in some manner approved by them, the grantees are not charged with any liability thereby. Blass v. Terry, 87 Hun, 563, affd., 156 N. Y. 122.

Words of Assumption. The mere acceptance of the deed "subject to the mortgage, etc.," does not, in default of other words showing a personal mortgage, etc.," does not, in default of other words showing a personal obligation contemplated, make the grantee personally liable for a deficiency on foreclosure. Stebbins v. Hall, 29 Barb. 524; Belmont v. Coleman, 22 N. Y. 438; Binsse v. Paige, I Keyes, 87; Dingledein v. Third Av. R. Co., 37 N. Y. 575; Collins v. Roome, I Abb. N. C. 98. It would be otherwise if the deed recite that the grantee is to pay the mortgage. Trotter v. Hughes, 12 N. Y. 74; Bowen v. Beek, 94 id. 86; Wadsworth v. Lyon, 93 id. 201; Knickerbocker Life Ins. Co. v. Nelson, 78 id. 137; Wales v. Sherwood, 42 How. Pr. 413.

Or that the conveyance is made subject to the assumption of the mortgage

as part of the consideration. Douglass v. Cross, 56 How. Pr. 330.

The mere presence of words of assumption, without something showing that grantee actually accepted with knowledge of it or under such circumstances that he was bound to know its legal effect, held not to establish personal chiefficiants read about the present that the statement of the statement obligation to pay debt of a third party. Blass v. Terry, 156 N. Y. 122.

Deficiency.—But there would be no liability for deficiency if the grantor was not personally liable for the debt. *Id.*; Carter v. Holahan, 92 N. Y. 498; Vrooman v. Turner, 69 id. 280; Fairchild v. Lynch, 44 Super. 1. See also as to liability for deficiency, Flagg v. Munger, 9 N. Y. 483; Ricard v. Sanderson, 41 id. 179. See Thorp v. The Keokuk Co., 48 id. 253, overruling King v. Whitley, 10 Paige, 465, and explaining Trotter v. Hughes, 12 N. Y. 74; Belmont v. Coman, 22 N. Y. 438; Luddington v. Low, 53 Super. 374, citing many cases; Knohloch v. Zschwetzke, 53 Super. 391; Mead v. Parker, 29 Hun, 62; Tuthill v. Wilson, 90 N. Y. 423; Fleischauer v. Gugenheimer, 15 Wkly. Dig. 164.

Rights of Grantor.— Where the grantee assumes a mortgage he becomes the principal debtor. The grantor is only a surety and may recover of the grantee any deficiency which he is compelled to pay on foreclosure. The grantor is not compelled to pay without foreclosure, for he has a right to have the land applied, so far as it will go, in satisfaction of the mortgage. He may also recover of the grantee the costs of the foreclosure, though the latter were not a party. Comstock v. Drohan, 71 N. Y. 9. He can have no relief until after sale in foreclosure and deficiency. Slauson v. Watkins, 86 N. Y. 597. He cannot compel the mortgagee to foreclose. Marshall v. Davies, 78 N. Y. 414. He may pay the amount, take an assignment and enforce the security himself. Id. security himself. Id.

A covenant of assumption in a deed intended for security is not binding as

between the parties after quitclaim by grantee to one of grantors. In such a

deed the covenant is to be construed merely as one for future advances. Cole v. Cole, 110 N. Y. 630. Vide infra, as to the effect of request to foreclose.

The grantor, in case of assumption, being only a surety, any variation in the terms of the mortgage impairing his equitable rights will release him. Calvo v. Davies, 73 N. Y. 211; Paine v. Jones, 76 id. 274; Spencer v. Spencer, 95 id. 353; Fish v. Hayward, 28 Hun, 456; Jester v. Sterling, 25 id. 344. But it has been held that this does not apply where the holder of the mortgage was ignorant of the terms of the assumption. Star Fire Ins. Co. v. Waddington, 18 Wkly. Dig. 307.

Where there is no assumption, but the conveyance is subject to the mortgage, the grantor becomes a quasi surety to the extent of the value of the land, and is entitled to the equities arising from that relation so as to be discharged by variation of the mortgage. Murray v. Marshall, 94 N. Y. 611,

disapproved, 73 Hun, 236.

See also as to the right of the mortgagor, as against the lands, where he has been obliged, after transfer, to pay the mortgage debt. Marsh v. Pike, 10-Paige, 595.

Remedy of mortgagee against subsequent grantee who assumes is determined by lex fori. Union Mut. L. Ins. Co. v. Hanford, 143 U. S. 187.

Where the grantor paid the mortgage debt and procured the mortgage to be discharged of record, without first requiring the mortgagee to resort to the land, held he could not maintain an action against the grantee to recover the amount, even though the grantee had assumed and agreed to pay the mortgage, the land being the primary fund for payment of the mortgage, and the relation of the parties being that of indemnitor and surety. Keller v. Lee, 66 App. Div. 184.

Release by Grantor .- Mere forbearance of the mortgagee to the grantee. it seems, will not release the mortgagor. Mutual L. 1. Co. v. Davies, 44 Super. 172.

Failure of the mortgagee to foreclose on request of mortgagor, where the mortgage is due and the property has been sold to a grantee, who has assumed the mortgage, will release the mortgagor. Russell v. Weinberg, 4 Abb. N. C. 134; Loomis v. Balheimer, 5 id. 263; Mutual L. I. Co. v. Davies, supra. But see Marshall v. Davies, 78 N. Y. 414.

Extension of time to the mortgagor's grantee by the mortgagee will release the mortgagor where he conveyed the property "subject" to the mortgage, though it was not assumed. Murray v. Marshall, 94 N. Y. 611, overruling Penfield v. Goodrich, 10 Hun, 41.

An agreement between the mortgagee of the grantor and a junior mortgagee, preferring the latter's mortgage, releases the grantor. Bank for Savings, etc., v. Frank, 45 Super. 404. See also Laird v. Wittkowski, 67 App. Div. 476.

Release of Grantee .- Neither a release by the grantor nor a reconveyance to him can relieve a grantee who has assumed a mortgage from his liability to the mortgagee. Whiting v. Gearty, 14 Hun, 498; Douglass v. Wells, 18 id. 88; Ranney v. McMullen, 5 Abb. N. C. 246. These cases overrule Stevens v. Casbocker, 8 Hun, 116, and Devlin v. Murphy, 5 Abb. N. C. 242, holding the contrary.

At any rate perfect good faith is requisite. Fleishauer v. Doellner, 58

How. Pr. 190.

Failure of title, when the grantee took under a warranty deed, is held to release him from a covenant of assumption. Dunning v. Leavitt, 85 N. Y. 30.

Verbal Assumption.—A verbal agreement to assume is valid. Taintor v. Hemmingway, 18 Hun, 458, affd., 83 N. Y. 610.

Consideration.— Where, on a joint venture in land, one took title and mortgaged and afterward conveyed shares to his associates who assumed the mortgages in certain proportions, the consideration was held sufficient to support the covenant. Hand v. Kennedy, 83 N. Y. 149.

A grantee who does not assume the mortgage is under no liability to his grantor unless the amount of the mortgage forms part of the consideration and was to be paid by the purchaser, if he retained its amount. Truslow, 84 N. Y. 660.

to pay, the mortgagor is not discharged from liability. Carter v. Holahan, 92 N. Y. 498.

A mortgage given to secure a prior assumption of a mortgage, when void for want of consideration. Coffin v. Lockhart, 71 Barb. 162.

Married Women. - Even before the recent acts a married women could assume a mortgage, as grantee, and an assumption by her grantee is therefore valid. Cashman v. Henry, 75 N. Y. 103, revg. 44 Super. 93.

Acceptance of the Covenant by Grantee.—A covenant of assumption inserted in the deed without the grantee's knowledge will not bind him. Dey Ermand v. Chamberlain, 88 N. Y. 658; Munson v. Dyett, 56 How. Pr. 333; Best v. Brown, 25 Hun, 223.

Where the deed was made and recorded without grantee's knowledge an

immediate reconveyance by him was held no acceptance of the covenant.

A grantee consenting to the insertion of his name in a deed executed in blank, which contained a covenant of assumption, is liable upon the covenant. Campbell v. Smith, 71 N. Y. 26.

Deed Intended as a Mortgage. A grantee in a deed which equity will construe as a mortgage is not liable on a covenant of assumption therein, the grantor still remaining the principal debtor. Pardee v. Treat, 82 N. Y. 385; Root v. Wright, 84 id. 72.

Grantee of One Not Liable. A grantee is not liable on his covenant of assumption unless his grantor were so liable, and hence, where a grantee who had not assumed a mortgage upon the property conveyed to one who took with a covenant of assumption, the latter was held not liable on his covenant. Carter v. Holahan, 92 N. Y. 498, at 504,

Grantee After an Assumption.— Where a grantee of part of the mortgaged premises assumes the mortgage, subsequent grantees of other portions may enforce the covenant. It runs with the land. Wilcox v. Campbell, 35 Hun, 254, affd., 106 N. Y. 325,

Estoppel of Grantee.— A grantee who assumes a mortgage, or takes subject to it, is estopped to deny its validity while he remains in possession. Parkinson v. Sherman, 74 N. Y. 88; Haile v. Nichols, 16 Hun, 37; Hartley v. Harrison, 24 N. Y. 170; Freeman v. Auld, 44 id. 50; Styles v. Price, 64 How. Pr. 227; McConihee v. Fales, 107 N. Y. 404.

Nor can he deny the validity of the conveyance to himself where he has had quiet possession and has himself conveyed. Gifford v. McClockey, 38 Hun,

The Court of Appeals in Bennett v. Bates, 94 N. Y. 354, in an elaborate opinion, has discussed the question of the disabilities of a grantee who assumes a mortgage on the property conveyed, or takes subject to it, and holds that no question of estoppel is involved.

Any defense arising out of his purchase is available to a grantee. ning v. Leavitt, 85 N. Y. 30. Dun-

One who accepts the benefits of a transaction is estopped from claiming that he is not bound by the burdens imposed. Kinyon v. Kinyon, 6 Misc. 584, 72 Hun, 452.

Fraud and Mistake.— A covenant of assumption should not be held void on foreclosure for fraud or mistake, except upon the clearest proof. Albany, etc.,

Bank v. Martin, 56 How. Pr. 500.

If a covenant of assumption be inserted in a deed without the grantee's knowledge, he may have the deed reformed. Kilmer v. Smith, 77 N. Y. 226; see Dey Ermand v. Chamberlain, 88 id. 658.

Assignment of Mortgage to Grantor.—Where a grantee has assumed a mortgage the grantor may acquire and enforce it. Fairchild v. Lynch. 99 N. Y. 359; Marshall v. Davies, 78 id. 414.

Second Mortgage by Grantee of a Part .-- Where a grantee of a part of the mortgaged premises assumed the mortgage and gave a second mortgage on the part conveyed to him, it was held that the second mortgagee was postponed to the first, and could not compel a recourse to the rest of the property before foreclosure on the portion mortgaged to him. Bowne v. Lynd, 91 N. Y. 92.

Agreement by Mortgagee to Pay Prior Mortgage. - A stipulation by a mortgagee to pay a prior mortgage does not impose on him a liability to the prior mortgagee. Garnsey v. Rogers, 47 N. Y. 233.

Effect of Default in Payment of Interest or Installment .- If the parties so stipulate, the whole amount will become due and may be collected on non-payment of an installment or of interest, as provided. Malcolm v. Allen, 49 N. Y. 448.

And it is no excuse that the mortgagor was unable to find the mortgagee.

Dwight v. Webster, 10 Abb. 128.

But it is, if he could not find an assignee, under certain circumstances. Noyes v. Clark, 7 Paige, 179. Vide also infra, Chap. XXVIII. "Foreclosure."

TITLE IV. THE POWER OF SALE.

A power of sale is generally inserted in the mortgage, which would enable the mortgagee to sell without a suit on default. This, however, would not foreclose the right to redeem, unless so provided by statute.

Power to pass by Assignment.—By 1 R. S. 737, § 153, where a power to sell lands shall be given to the grantee in any mortgage or other conveyance intended to secure the payment of money, the *power* shall be deemed a part of the security, and shall vest in and may be executed by any person who by assignment or otherwise shall become entitled to the money. See Real Property Law, § 219.

A power to sell in a mortgage is not divisible, and an assignment by a mortgagee of a part of his interest in the mortgage debt and estate, would not carry a corresponding part of the power. Wilson v. Troup, 2 Cow. 195,

affg. 7 Johns. Ch. 25.

Such a power survives the mortgagor, and is irrevocable, being coupled with an interest. Bergen v. Bennett, 1 Cai. Cas. 1; Knapp v. Alvord, 10 Paige, 205.

See further as to such a power, supra, Chap. XII, Tit. IV.

Payment of a mortgage extinguishes the power of sale in it, and a subsequent foreclosure would be void. Cameron v. Irwin, 5 Hill, 572, partially overruling Jackson v. Henry, 10 Johns. 185; Jackson v. Slater, 5 Wend. 295.

But not if the first foreclosure was invalid. Stackpole v. Robbins, 48 N. Y.

A power to mortgage includes a power to authorize a sale on default of payment, but not to make covenants in any deed given. Wilson v. Troup, 7 Johns. Ch. 25, affd., 2 Cow. 195; vide also supra, Chap. XII, Tit. VI.

As to a mortgage by tenant for life having power to make leases, or by a married woman by virtue of a beneficial power, vide supra, Chap. XII, Tit. IV; and as to the extinguishment of such powers, Chap. XII, Tit. VIII.

TITLE V. THE ESTATE OF THE PARTIES.

By the common law, a mortgage created an estate upon condition, or a base or determinable fee, with a right of reverter attached to it, on performance of the condition strictly at the time; which right was neither alienable nor devisable, but was confined to the mortgagor and his heirs.

If the mortgagor was in default, the estate became absolute in the mortgagee, without the right of redemption.

There were many refinements of the common law principles, relative to mortgages, based upon the equitable interference of courts. to avoid the operation of the strict common law rules, which it is unnecessary here to review.

Although by force of the mortgage the legal estate at common law technically vested in the mortgagee, subject to defeasance on condition performed, and until defeasance the mortgagee had the right of entry and possession, and the mortgagor, if in possession, was considered there by permission and assent of the mortgagee, in equity, the mortgage was considered a mere security for the debt. and only a chattel interest, and until a decree of foreclosure and sale the mortgagor continued the real owner of the fee.

The courts of law of this State have gradually adopted the views of the subject long adopted by courts of equity, and a mortgage is now considered merely a chattel interest or chose in action by way of security for debt. The mortgagor in possession is considered to retain the real or legal as well as the equitable ownership of the freehold, and his title is not affected by default in payment nor by surrender of possession nor the taking of possession by the mortgagee.

A mortgageee has no longer an estate in the lands, but only a lien. Barson v. Mulligan, 191 N. Y. 306, 315; Fowler's Real Property Law, 694, 841.

A mortgagee in possession is held as holding a pledge in possession, and may retain possession until the debt is paid, but the title is always in the mortgagor. Kortright v. Cady, 21 N. Y. 343; Jackson v. Willard, 4 Johns. 41; Hitchcock v. Harrington, 6 id. 290; Coles v. Coles, 15 id. 319; Wilson v. Troup, 2 Cow. 195; Astor v. Hoyt, 5 Wend. 603; Astor v. Miller, 2 Paige, 68; 3 Barb. 347; Morris v. Mowatt, 2 Paige, 586; Cooper v. Whitney, 3 Hill, 95, 2 Barb. Ch. 119, 135; Stoddard v. Hart, 23 N. Y. 556; Bell v. Mayor, etc., of New York, 10 Paige, 49; Mills v. Van Voorhies, 20 N. Y. 412; Trimm v. Marsh, 54 id. 599; Trustees v. Wheeler, 61 id. 88.

A mortgagee in possession stands in no fiduciary relation to the mortgagor

A mortgagee in possession stands in no fiduciary relation to the mortgagor and may acquire any other mortgage, or the title of the mortgagor or a superior title, and enforce it. Ten Eyek v. Craig, 62 N. Y. 406; Cornell v. Woodruff, 77 id. 203.

But he may so agree as to put himself in the position of trustee, and in that case he cannot acquire interests or title adverse to the mortgagor. Genet v. Davenport, 56 N. Y. 676; Miller v. McGuckin, 15 Abb. N. C. 204.

A mortgagee out of possession need not protect the land at a sale under a

superior claim, but must trust to the bond. Marshall v. Davies, 78 N. Y. 414; Fleishhauer v. Doellner, 9 Abb. N. C. 372.

A subsequent parol agreement that a deed absolute in form but in reality a mortgage, should be treated as an absolute conveyance is insufficient for that purpose. The grantor can be divested of title only by foreclosure or conveyance. Reich v. Dyer, 91 App. Div. 240, affd., 180 N. Y. 107.

Right to Possession and Rents .- The mortgagee has no right before forrich to Possession and Kents.—The mortgagee has no light before for feiture, unless by agreement, to the possession or rents, and has his remedy only in equity, where aid would be afforded if the rents became indispensable to his indemnity. Syracuse City Bank v. Tallman, 31 Barb. 201; Astor v. Turner, 11 Paige, 436; Bank of Ogdensburgh v. Arnold, 5 id. 38; Bigler v. Waller, 14 Wall. 297; Zeiter v. Bowman, 6 Barb. 133; Walsh v. Rutgers Fife Ins. Co., 13 Abb. 33.

The mortgagor is entitled to the possession, and the rents and profits up to the time the purchaser under the decree of sale becomes entitled to the possession. Clason v. Corley, 5 Sandf. 447; Bank of Ogdensburgh v. Arnold, 5 Paige, 38; Astor v. Turner, 11 id. 436; Syracuse City Bank v. Tallman, 31 Barb. 201; Neudecker v. Kohlberg, 81 N. Y. 296; Derby v. Brandt, 99 App. Div. 257; Krakower v. Lavelle, 37 Misc. 423; Bradley & Currier Co. v. Hoffman, 70 App. Div. 77.

Plaintiff entitled to rents only in case of deficiency. Harris v. Taylor, 22 App. Div. 109; Sickles v. Canary, 8 id. 308.

An assignment held superior to receiver's right to rents. Harris v. Taylor,

35 App. Div. 462.

If the mortgagee is in possession he cannot commit waste and must keep the premises in repair. He will be accountable for the actual receipt of the rents and profits, and for those lost by his negligence, after deducting disbursements for taxes, necessary repairs, collection by an agent, if necessary, etc. The right of a mortgagee to protect his interest in the property by the payment of taxes is not affected by the merger of the bond and mortgage in a judgment of foreclosure and sale. Mutual Life Ins. Co. v. Newell, 78 Hun, 293. He stands in the relation of trustee, and any renewal of a lease enures to the benefit of the estate; he can make no gain out of the estate. Van Buren v. Olmstead, 5 Paige, 9; Ensign v. Colburn, 11 id. 503; 4 Kent, 167; Bell v. Mayor, etc., of New York, 10 Paige, 49; Holridge v. Gillespie, 2 Johns. Ch. 30; Kelly v. Bruce, 17 Wkly. Dig. 39; Castleman v. Simson, 16 id. 455; Chapman v. Porter, 69 N. Y. 276.

He can retain possession if lawfully obtained until the debt is paid. Madison Ave. Bap. Ch. v. Bap. Ch. in Oliver St., 73 N. Y. 82, 94. Also see Trimm v. Marsh, 54 N. Y. 599.

But it seems he can end the possession at any time and foreclose. Union

Dime Sav. Bank v. Quinn, 18 Wkly. Dig. 304, affg. 63 How. Pr. 211.

The mortgagor might maintain trespass against the mortgagee or a person acting under his license. Runyan v. Mersereau, 11 Johns. 534; Hitchcock v.

Harrington, 6 id. 290; Coles v. Coles. 15 id. 513.

The mortgagee also may bring "waste" against the mortgagor or a purchaser. Van Pelt v. McGraw, 4 N. Y. 110; 3 Barb. 347; Herman v. Stewart,

5 Wkly, Dig. 408.

A mortgagee of leasehold premises, if he take possession, takes it, cum onere, i. e., subject to all covenants. Astor v. Hoyt, 2 Paige, 68, as partially reversed, 5 Wend. 603.

Actual payment of prior incumbrances by a mortgagee entitles him, in equity, to hold the land until reimbursed. Cameron v. Irwin, 5 Hill, 272.

As to possession under conditional conveyances, see supra, p. 612.

Estate of mortgagee in possession defined; Sutherland v. Brooklyn, 87 Hun,

82, 85; Becker v. McCrea, 48 Misc. 341.

A mortgagee in possession cannot be ousted or deprived of his rights as such against his will or without his knowledge, by the mere intrusion of the owner of the equity of redemption. Townshend v. Thomson, 139 N. Y. 152.

Fraud.— Where a mortgage was procured by fraud, innocent mortgagees will be protected. Austen v. Richardson, 67 App. Div. 166.

Mortgagee relying upon record title, taking from one to whom it had been transferred by fraudulent grantee, protected. 165 N. Y. 557.

Ejectment.—It is provided (Code Civ. Proc., § 1498, following 2 R. S. 312, § 57, which was repealed by L. 1880, Chap. 245) that a mortgagee, or his assignee or other representative, cannot maintain an action of ejectment to recover the mortgaged premises. Vide 27 Barb. 54; 9 id. 284; Stewart v. Hutchins, 13 Wend. 485, 486; Jackson v. Meyers, 11 id. 533, 538; Murray v. Walker, 31 N. Y. 399; 42 Barb, 401.

A mortgagor may have ejectment against a grantee of the mortgagee. Jackson v. Bronson, 19 Johns. 325; also Wilson v. Troup, 2 Cow. 195.

As against the mortgagee in possession if the lien be removed. Trimm v. Marsh, 54 N. Y. 599.

But he cannot have it against the mortgagee lawfully in possession. His remedy is by an action for an accounting. Hubbell v. Moulson, 53 N. Y. 225.

TITLE VI. THE EQUITY OF REDEMPTION.

The mortgagor is allowed by the law, as it now exists, to redeem the estate by the performance of the condition, even after forfeiture of the condition by nonpayment at the day.

Farmers Fire Ins., etc., Co. v. Edwards, 26 Wend, 541; and Kortright v. Cady, 21 N. Y. 343.

This right to redeem is technically called the "Equity of Redembtion."

This equity of redemption is the real and beneficial estate, tantamount to the fee at law; and it is descendible by inheritance, devisable, alienable and subject to dower, and sale on execution, precisely as if it were an absolute estate of inheritance at law in the mortgagor.

The estate of the mortgagee, on the contrary, is not, at least before entry and foreclosure, subject to sale on execution, even after forfeiture of condition. Jackson v. Willard, 4 Johns. 41.

Sale of Equity of Redemption.—Although an equity of redemption is vendible as real property on an execution at law, by the Revised Statutes (2 R. S. 368, § 31), the equity of redemption could not be sold on execution under a judgment at law for the mortgage debt, and this restriction is continued by Code Civ. Proc., § 1432. Vide Delaplaine v. Hitchcock, 6 Hill, 14, 16; Palmer v. Foote, 7 Paige, 437; Trimm v. Marsh, 3 Lans. 509, affd., 54 N. Y. 599.

The provision of the Revised Statutes was repealed by Laws of 1882,

Once a mortgage always a mortgage (Mooney v. Byrne, 163 N. Y. 86, 93; Conover v. Palmer, 123 App. Div. 817) and consequently all collusion and dealings for the deprivation of the mortgagor of the equity of redemption are looked upon unfavorably by the courts, and will not stand in equity, if impeached as oppressive, within a reasonable time. Odell v. Montross, 68 N. Y. 499.

A fair contract for its purchase, however, may be made between the parties, and the mortgagee may become the purchaser at a sale under a decree. The equity of redemption is, however, an inseparable incident to the mortgage, and cannot be restrained or clogged by agreement. Clark v. Henry, 2 Cow. 324; Henry v. Davis, 7 Johns. Ch. 40; 39 Me. 110; see also Jencks v. Alexander, 11 Paige, 618; Hall v. Ditson, 5 Abb. N. C. 198; Macauley v. Smith, 132 N. Y. 524; Mooney v. Byrne, 163 id. 86; Hughes v. Harlam, 166 id. 407 id. 427.

As to legal status of the mortgagor who sells the equity of redemption: Gottschalk v. Jungmann, 78 App. Div. 171.

Who may Redeem .- The equity of redemption exists not only in the mortgagor himself, but in his heirs and personal representatives, and in every other person who has an interest in or a legal or equitable lien upon the land, as grantee, reversioner, remainderman, tenant by curtesy or dower, incumbrancer, etc.

Redemption must be made by the heirs of the mortgagor, in case of his

decease. Sutherland v. Barber, 47 Barb. 144.

Equity will aid to redeem only one who holds the estate of the mortgagor. or a subsisting interest under him. Chamberlain v. Chamberlain, 44 Super.

Right of wife of mortgagor not cut off by foreclosure to redeem during life

of husband. Campbell v. Ellwanger, 81 Hun, 259.

Further as to who may redeem, vide infra, "Foreclosure of Mortgages,"

Chap. XXVIII.

Redemption, When and How Made .- He who redeems must pay the mortgage debt and interest due, and he will then stand in the place of the party whose interest in the estate he discharges.

The power of enforcing the right of redemption is an equitable power

residing in courts clothed with such powers.

As to redemption by a junior mortgagee, against a prior one, vide Pardee v. Van Auken, 3 Barb. 534.

Redemption by assignee of a lease. Averill v. Taylor, 8 N. Y. 44.

Mortgages on Leases of Five Years Unexpired and Upward .- When lessees of such terms are ejected, under summary proceedings, mortgagees, judgment creditors, etc., may redeem within a year. Code Civ. Proc., §§ 2256, 2257, superseding Laws of 1842, Chap. 240, which repealed Act of April 25, 1840, and was itself repealed by Laws 1880, Chap. 245.

State Mortgages. - Redemption under mortgages to the State, vide Laws of 1836, Chap. 457; State Finance Law, L. 1897, Chap. 413, § 90.

Equity of Redemption Barred by Time.— The right of redemption may be barred by length of time. In this State, twenty years' adverse possession gives an absolute title. (See Tit. "Adverse Possession," Chap. XXXIV.) Until this time has run action to redeem may be brought.

Code Civ. Proc., § 379.

Character of the twenty years' adverse possession necessary to defeat an action for redemption. Mamhoffer v. Mittnacht, 12 Misc. 585.

Before the Code of Civil Procedure an action to redeem must have been brought within ten years after the mortgagee's entry. Peabody v. Roberts,

47 Barb. 91; Miner v. Beekman, 50 N. Y. 337; Hubbell v. Sibley, *Id.* 468. The lapse of twenty years would not bar the mortgagee's right to foreclosure, if any payment had been made within twenty years, or there had been acts recognizing the mortgage; and any purchaser of the land would take at his peril, and at the risk of such payment having been made, although the mortgage was presumptively discharged by lapse of time. Vide N. Y. Life Ins. Co. v. Covert, 6 Abb. N. S. 154; Calkins v. Calkins, 3 Barb. 305: Calkins v. Isbell, 20 N. Y. 147; Borst v. Boyd, 3 Sandf. Ch. 501.

Prior to the Code of Procedure a person entitled to redeem had to bring his action within twenty years; under section 97 of that Code, the action had to be commenced within ten years, but under section 379 of the Code of Civil Procedure, the time to redeem was again extended to twenty years.

The wife of a mortgagor claims under him within the meaning of Code Civ. Proc. § 379, and her right to bring action to redeem is barred by the Statute of Limitations at the expiration of twenty years. Campbell v. Ellwanger, 81 Hun, 259.

TITLE VII. THE ASSIGNMENT OF MORTGAGES.

A mortgage is assignable as a chose in action or a chattel interest. It is not a "conveyance" within the Statute of Frauds, and would pass by delivery or by parol assignment. The debt is considered the principal, and the land an incident; and in general even a bona fide assignee takes subject to all equities of the original obligor or debtor. though not subject to latent equities in favor of third persons against his assignor.

Murray v. Lylburn, 2 Johns. Ch. 441; Livingston v. Dean, 2 id. 479; James v. Morey, 2 Cow. 246; Pendleton v. Fay, 2 Paige, 202; Evertson v. Evertson, 5 id. 644; L'Amoureux v. Vandenburgh, 7 id. 316; Evans v. Ellis, 5 Den. 640; Ellis v. Messervie, 11 Paige, 467; Runyan v. Mersereau, 11 Johns. 534; Ingraham v. Disborough, 47 N. Y. 421; Hartley v. Tatham, 2 Abb. App. Cas. 333; Prouty v. Eaton, 41 Barb. 410; Hovey v. Hill, 3 Lans. 168; also Bush v. Lathrop, 22 N. Y. 535; 39 How. Pr. 329; Schaefer v. Reilly, 50 N. Y. 61; Crane v. Turner, 67 id. 437; Westbrook v. Gleason, 79 id. 23; Davis v. Falihee, 25 Hun, 570; Viele v. Judson, 82 N. Y. 32; Green v. Fry, 93 id. 353; Rapps v. Gottlieb, 67 Hun, 115, affd., 142 N. Y. 164.

But see Simpson v. Del Hoyo, 94 N. Y. 189, holding a bona fide assignee of a mortgage not affected by the fraudulent title of the mortgagor, though his assignor, who was the mortgagee, had full notice, the rights of the defrauded owner being cut off as soon as the mortgage reached the hands of a Murray v. Lylburn, 2 Johns. Ch. 441; Livingston v. Dean, 2 id. 479; James

frauded owner being cut off as soon as the mortgage reached the hands of a

bona fide purchaser.

The rule applies only to equities attending the original transactions and not those subsequently arising. Bank for Svgs., etc. v. Frank, 45 Super. 404; Coles v. Appleby, 87 N. Y. 114; Smyth v. Knickerbocker L. I. Co., 84 N. Y.

One who gives money to her attorney to pay for assignment is not a bona fide assignee, unless he pay it over at the time of assignment. Kursheedt v. McCune, 20 Abb. N. C. 265.

As to assignment of mortgages by Banking Department without acknowledgement, see the Banking Law, G. L. Chap. XXXVII, L. 1892, Chap. 689,

Assignment good by parol or by delivery. Fryer v. Rockefeller, 63 N. Y. 268, 276.

Assignee of a mortgagee has no greater rights than belonged to the original mortgagee. Rapps v. Gottlieb, 142 N. Y. 164. He takes subject to all latent equities in favor of mortgager and third parties, notwithstanding assignor makes affidavit that mortgage is valid security for the whole amount secured thereby and the assignee pages full value. Scheurer v. Brown, 67 N. Y. 567; Verity v. Sternberger, 62 App. Div. 112. See Merchants' Bank v. Weill, 163 N. Y. 486.

An assignment of a mortgage belonging to the estate by the administrator, to himself individually, through a third person, is not void, but voidable only at the election of the next of kin, and the mortgagor and his successors cannot controvert his title. Read v. Knell, 143 N. Y. 484.

Acts of Mortgagee after Assignment.—Discharge by a mortgagee after assignment is ineffectual. Heilbrun v. Hammond, 13 Hun, 474; Viele v. Judson, 82 N. Y. 32. But see Trustees, etc. v. Wheeler, 61 N. Y. 88, holding a release in such case, to one without notice, to be good. In this case the

assignment was not recorded until after the releases.

Where a mortgagee, after assignment, took a conveyance of the land in satisfaction, and afterward conveyed to an innocent purchaser, the mortgage was held to be a subsisting lien, though the assignment was not recorded.

Miller v. Lindsey, 19 Hun, 207; Purdy v. Huntington, 42 N. Y. 334.

Where a mortgagee after assignment satisfied the mortgage of record, a subsequent bona fide mortgagee was protected, the assignment not being recorded. Van Keurens v. Corkins, 66 N. Y. 77; Bacon v. Van Schoonhoven, 87 N. Y. 446.

Vide also infra, Chap. XXVI, as to record.

Where payments upon a mortgage have been wrongfully received by the mortgagee after parting with the mortgage, the mortgagor is entitled to an order directing the payment of the moneys to the holder of the mortgage, to be applied thereon. People v. Madison Square Bk., 75 Hun, 114, affd., 142 N. Y. 644.

Covenant in a trust mortgage for the benefit of all holders of the bonds passes with the bonds and cannot be waived by acts of the first holders of the bonds as against their successors; and the bondholders can bring suit for its enforcement where the trustee refuses to do so. Belden v. Burke, 72 Hun, 51.

Assignee of Assignee.- The assignee of the assignee of a mortgage takes only the title of his assignor. Sweet v. Van Wyck, 3 Barb. Ch. 451; White v. Knapp, 8 Paige, 173; Bush v. Lathrop, 22 N. Y. 535.

Collateral Rights.—An assignment of the bond and mortgage and the money due, etc., carries all collaterals. Belden v. Meeker, 2 Lans. 470, affd., 47 N. Y. 307; Craig v. Parkes, 40 id. 181; Reichert v. Stillwell, 57 App. Div. 480.

Limit of Recovery .- Rollins v. Barnes, 11 App. Div. 150.

Assumption and Insolvency.— Proof may be made against the insolvent estate of the grantee who assumes, for the whole amount notwithstanding foreclosure. Matter of Simpson, 36 N. Y. 562.

Assignment to Mortgagor.— The legal effect of an assignment of a mortgage from the mortgage to the mortgagor is to extinguish it, so as to let in subsequent liens. Moore v. Hamilton, 48 Barb. 120; Purdy v. Huntington, 42 N. Y. 334; Smith v. Roberts, 91 N. Y. 470, limited 53 Hun, 73; but this may be controlled. Coles v. Appleby, 87 N. Y. 114; also Purdy v. Huntington, 42 N. Y. 334; Miller v. Lindsey, 19 Hun, 207.

See also "Merger," infra, Tit. VIII, p. 631.

Effect of Lis Pendens .- An assignee is an "incumbrancer," and is bound by a "lis pendens" notice, Hovey v. Hill, 3 Lans. 168. But see Lamont v. Cheshire, 65 N. Y. 30, distinguishing this case.

So is a mortgagee of the grantee, whose mortgage was recorded after a lis pendens was filed in a suit by a receiver in supplementary proceedings of the grantor's property. Ayrault v. Murphy, 54 N. Y. 203.

Assignment without Bond .- The assignment of the debt transfers at least an equitable title to the mortgage. The mortgage interest, however, as distinct from the debt created by the bond, has no determinate value and is not a fit subject of assignment. The assignment, without the accompanying bond, whether by writing or parol, and as collateral or otherwise, is a nullity, and the assignee acquires no interest. Cooper v. Newland, 17 Abb. 342; Merritt v. Bartholick, 47 Barb. 253, affd., 36 N. Y. 44; Pattison v. Hull, 9 Cow. 747; Jackson v. Blodget, 5 id. 202; Payne v. Wilson, 74 N. Y. 348; Green v. Warnick, 64 id. 220; Carpenter v. O'Dougherty, 67 Barb. 397.

And if he take the mortgage without production of the bond he is chargeable with notice of defect in his assignor's title. Kellogg v. Smith, 26 N. Y.

18. See also Syracuse Svgs. Bk. v. Merrick, 182 N. Y. 387.

Estoppel of Assignor.— The assignor is estopped to deny in any way the validity of the bond or mortgage. Smith v. Simpson, 8 Wkly. Dig. 4; Matthews v. Warner, 145 U. S. 475.

Implied Warranty.— A warranty of validity is implied in an assignment, on which action will lie if injury be sustained from any invalidity. Ross v. Terry, 63 N. Y. 613; Corwin v. Wesley, 34 Super. 109.

A warranty of the mortgage is a warranty of the bond. Ross v. Terry.

Estoppel of a Mortgagor or Assignor of a Mortgage. A mortgagor is liable even of an invalid mortgage, if he do any act or make any representation from which an assignee may properly infer validity. Day v. Perkins, 2 Sandf. Ch. 359; Carpenter v. O'Dougherty, 67 Barb. 397; Eitel v. Bracken, 38 Super. 7; First Nat. Bk., etc. v. Stiles, 22 Hun, 339.
But not if the acts were procured by fraud. Wilcox v. Howell, 44 N. Y.

398, affg. 44 Barb. 396.

And the doctrine must be cautiously applied. Thompson v. Simpson, 128 N. Y. 270.

There must be no laches. Banking Co. v. Duncan, 86 N. Y. 230.

See Collier v. Miller, 137 N. Y. 332 as to estoppel of comortgagee having

priority by agreement as to assignee of subordinate mortgage.

A mortgager is estopped to set up usury against one who took an assignment of the mortgage relying on his affidavit of validity. Hirsch v. Trainer, 3 Abb. N. C. 274; Weyh v. Bolan, 85 N. Y. 394; Dinkelspiel v. Franklin, 7 Hun, 339; Paine v. Burnham, 62 N. Y. 69; Real Est. Trust Co. v. Roder, 53 How. Pr. 231.

So of a mortgagor who induced an assignee, in good faith and without notice, to take the mortgage and paid him for an extension. Barnett v. Zacharias, 24 Hun, 304.

Reliance on a certificate of validity as a protection in law will not create an estoppel. There must be a change of position due to reliance on the truth of the facts stated. Shapley v. Abbott, 42 N. Y. 443; Nichols v. Nussbaum, 10 Hun, 214. See also infra, Tit. IX, "Usury."

The principle that the assignee takes subject to all equities, applies only

to equities attending the original transactions and not those subsequently arising. Bank for Savings, etc. v. Frank, 45 Super. 404; Coles v. Appleby, 87 N. Y. 114; Smyth v. Knickerbocker L. I. Co., 84 id. 589.

He is not bound by an unrecorded agreement by the mortgagee to release

part of the premises for a certain sum. St. John v. Spalding, 1 Supm. 483.

Who May Assign.— As to assignment by trustees, vide supra, p. 298.

One of several joint mortgagees or executors may assign. Bogert v. Hertell, 4 Hill, 492; s. c., 9 Paige, 52; Everit v. Strong, 5 Hill, 163; Hertell v. Van Buren, 3 Edw. Ch. 20.

An infant cannot assign a bond and mortgage. Peabody v. Fenton, 3 Barb.

Right to Compel Assignment. - Simonson v. Lanck, 105 App. Div. 82; Blydenburgh v. Seabury, 104 id. 141; Howard v. Robbins, 170 N. Y. 498; Cleveland v. Rothwell, 54 App. Div. 14.

TITLE VIII. PAYMENT, EXTINGUISHMENT AND DISCHARGE OF MORTGAGES.

Provision was made by law of December 12, 1753, and February 26, 1788, re-enacted by law of March 19, 1813, for the discharge of mortgages on record by clerks of counties on presentation of a certificate similar to the one below mentioned, the certificate to be signed in presence of two witnesses and acknowledged or proved as then required by law.

The Revised Statutes provided as follows:

"Any mortgage that has been registered or recorded, or that may hereafter be recorded, shall be discharged upon the record thereof. by the officer in whose custody it shall be, whenever there shall be presented to him, a certificate signed by the mortgagee, his personal representatives or assigns, acknowledged, or proved, and certified. as hereinbefore prescribed, to entitle conveyances to be recorded. specifying that such mortgage has been paid, or otherwise satisfied and discharged."

1 R. S. 761, § 28.

"Every such certificate, and the proof or acknowledgment thereof, shall be recorded at full length; and a reference shall be made to the book and page, containing such record, in the minute of the discharge of such mortgage, made by the officer upon the record thereof."

1 R. S. 761, § 29; 1 R. L. 373, § 4. Before the Revised Statutes,, there was no provision that the certificate of discharge should be recorded.

Certified copies of certificates may be recorded. Laws of 1843, Chap. 210; amended 1887, Chap. 539; 1893, Chap. 182.

The Real Property Law re-enacted these provisions without material change.

Real Property Law, § 270.

As at present amended (L. 1903, chap. 490; 1907, chap. 347) the law reads:

"A mortgage registered or recorded must be discharged upon the record thereof, by the recording officer, when there is presented to him the certificate signed by the mortgagee, his personal representative or assignee and acknowledged or proved and certified in like manner as to entitle a conveyance to be recorded, specifying that the mortgage has been paid, or otherwise satisfied and discharged. The certificate of discharge and the certificates of its acknowledgment or proof must be recorded and filed; and a reference must be made to the book and page containing such record in the minute of the discharge of such mortgage, made by the officer, upon the record thereof. After such discharge has been recorded the recording officer shall make and deliver to the person in whose interest such discharge of mortgage is executed and recorded, his certificate setting forth the names of the mortgagor and mortgagee, the liber and page at which, the time when such mortgage was recorded, and the date on which said mortgage was satisfied and discharged."

Laws 1907, Chap. 347.

In counties within cities of the first class the original mortgage or a certified copy of an order must be presented. L. 1903, chap. 490, and L. 1907, chap. 289 (Real Property Law, § 270a).

And certain provisions regarding the method of cancellation must be followed. *Id*.

See also provisions applicable when land lies in more than one such county. L. 1907, chap. 621 (Real Property Law, § 270b).

It may be discharged by order of Supreme Court or a county court (within their respective jurisdictions) in certain cases, in case of death of mortgagees, or of dissolution of a corporation or association. Real Property Law, § 270c-g. (See Laws of 1862, Chap. 365; amended by Laws of 1868, Chap. 798; amended Laws of 1873, Chap. 551; Laws of 1882, Chaps. 100 and 278; Laws of 1884, Chap. 326.)

Where conflicting assignments are on record the register or county clerk cannot be compelled by mandamus to cancel the mortgage. People v. Miller,

43 Hun, 463.

Under these acts payment in fact must be alleged and proved. A legal presumption is not enough. Matter of Townsend, 6 Supm. 227; s. c., 4 Hun, 31.

Payment Before Due.—A debtor has no more right to pay the principal of a debt before it is due than he has to refuse to pay it when it becomes due, and the rights of a creditor are correlative. Missouri, Kansas and Texas Railway Co. v. Union Trust Co. of New York, 87 Hun, 377.

Quære, as to whether if interest in full to expiration were also tendered

the decision would be followed.

Mortgage to Trustees.— Presumption as to validity of act discharging the mortgage. Bendheim v. Morrow, 73 Hun, 90.

Mortgage to Secure a Trust.—A mortgage may be given to secure a trust or annuity, and not be dischargeable by the mortgagee even with consent of the mortgagor until complete fulfillment. McPherson v. Rollins, 21 Wkly. Dig. 254, affd., 107 N. Y. 316. See also Chap. X.

Discharge After Judgment.—Discharge of a mortgage which has become merged in a judgment does not discharge the debt. Purdy v. Purdy, 9 Wkly. Dig. 425.

Waiver of performance of the condition of the mortgage extinguishes it. Morrison v. Morrison, 4 Hun, 410.

Extinguishment by Gift.— Thomas v. Fuller, 68 Hun, 361; Gibbons v. Campbell, 21 N. Y. Supp. 186; Morgan v. Freeborn, 68 Hun, 296.

Collateral Mortgage.— Where a mortgage is given to secure payments to become due on a contract, the cancellation of the contract discharges the mortgage. Wanzer v. Cary, 76 N. Y. 526.

Forged or Unauthorized Satisfaction Piece.—A mortgagee may be barred by laches from having reinstated a mortgage which was discharged of record on a forged satisfaction piece. Costello v. Meade, 55 How. Pr. 353.

An unauthorized satisfaction of a mortgage will not protect a bona fide purchaser of the property from foreclosure. McPherson v. Rollins, 21 Wkly.

Dig. 254.

Satisfaction by a mortgagee in fiduciary relation vacated when made by him, while owner of the land individually. Kirsch v. Tozier, 143 N. Y. 390.

Joint Mortgagees, Executors, etc.—One of the several joint mortgagees, or one joint executor or partner, may discharge a mortgage. The People v. Keyser, 28 N. Y. 226, revg. 39 Barb. 587; 2 Barb. Ch. 151; 17 Abb. Pr. 214;

23 How. Pr. 223; Pierson v. Hooker, 3 Johns. 68; 37 Barb. 466, revg. 32 id. 612; Stuyvesant v. Hall, 2 Barb. Ch. 151; Bogert v. Hertell, 4 Hill, 492.

This is the rule, whether the mortgagees hold jointly as individuals or as executors; and the executors of a deceased joint mortgagee or assignee do not have to join. People v. Keyser, 28 N. Y. 226, supra, explaining Peck v. Mallams, 10 N. Y. 509, and the People v. Miner, 32 Barb. 612. See also Babcock v. Beman, 11 N. Y. 200; Chouteau v. Suydam, 21 id. 179; Carman v. Pultz, 21 id. 547, 550. As to trustee, vide supra, Chap. X, Tit. VII.

Return of the Mortgage.— When the debt is satisfied the mortgagor held entitled to have the mortgage and bond delivered up to him, and canceled. Matter of Coster, 2 Johns. Ch. 503.

See L. 1907, Chap. 289, providing for presentation and filing of original

mortgage in counties in cities of the first class.

Possession of bond and mortgage by mortgagee is evidence they are valid and unpaid. Fitz-Mahoney v. Caulfield, 25 App. Div. 119.

Mortgages to the State.—As to the discharge of such mortgages, vide 1 R. S. 175, 176. State Finance Law, L. 1897, Chap. 413, § 31.

Mortgages to Loan Commissioners may be discharged also by the comptroller. State Finance Law, L. 1897, Chap. 413, § 84 (Laws of 1868, Chap. 693).

After Assignment.— After assignment recorded, the mortgage cannot be discharged by the mortgagee; and see, as to protection of bona fide purchasers. Belden v. Meeker, 47 N. Y. 308; Ely v. Scofield, 35 Barb. 330; Van Keuren v. Corkins, 66 N. Y. 77; Trustees v. Wheeler, 61 id. 88. Vide also supra, p. 623.

On Decease of Mortgagee, his executors or administrators are the ones to acknowledge satisfaction. Ely v. Scofield, 35 Barb. 330.

A satisfaction piece executed by the next of kin who has not been appointed is validated by his subsequent appointment as administrator. Smith v. Robinson, 30 Hun, 269.

Payment to and discharge by agent after death of mortgagee, held ineffect-

ual. Weber v. Bridgeman, 113 N. Y. 600.

Delivery of a satisfaction piece after death is ineffectual. Early v. St. Patrick's Church, etc., 81 Hun, 369. See also Morgan v. Freeborn, 68 Hun, 296.

Foreign executor may satisfy. People v. Fitzgerald, 21 N. Y. Supp. 911; but where there is a domestic administrator, a foreign one cannot satisfy. Stone v. Scripture, 4 Lans. 186. See Sherman v. Matthieu, 106 App. Div. 368.

Testamentary Cancellation. - Dibble v. Richardson, 171 N. Y. 131.

By Guardians of Infants.— Subsequent mortgagees or purchasers are bound to inquire by what authority a guardian discharges a mortgage, and that every requisite has been performed. Swartout v. Curtis, 5 N. Y. 301.

By a Public Officer.— Parties must see that he had proper authority, and acted under the order of a court, where that is necessary. Walworth v. F. L. & T. Co., 1 N. Y. 433.

But a county treasurer may release a mortgage taken by him officially, and even if he do so without consideration his act is good as against subsequent bona fide mortgages or purchasers. Baldwin v. Crary, 30 Hun, 422.

Mistakes.— A discharge by mistake is held not to make an existing second mortgage a prior lien, to the injury of the holder of the first mortgage. Weaver v. Edwards, 39 Hun, 233, affd., 121 N. Y. 653.

Production of Bond.— In paying on a bond and mortgage, the bond should be seen, or it is at the peril of the mortgagor that he makes the payment, lest the bond should have been assigned to some other person. Crane v. Greenewald, 120 N. Y. 274; Clark v. Igelstrom, 51 How Pr. 407. Compare Van Keuren v. Corkins, 66 N. Y. 77.

But the production of the bond and mortgage are not necessary on the paying off the debt if the person receiving the money has a clear record title to the bond and mortgage. Bacon v. Van Schoonhoven, 19 Hun, 158, affd., 87 N. Y. 446.

Releasing Mortgaged Premises. - Vide How. Ins. Co. v. Halsey, 8 N. Y. 271; Patty v. Pease, 8 Paige, 277; Kendall v. Woodruff, 87 N. Y. 1.

Upon release of mortgage, dower revives against grantee of the land. Ever-

son v. McMullen, 113 N. Y. 293.

Release of partnership mortgage as to one surviving partner cancels the mortgage. Murray v. Fox, 104 N. Y. 382.

When procured by fraud, it does not discharge a surety of mortgagor.

Hamlin v. Klein, 8 App. Div. 413.

Release of part of the Premises .- This does not release the balance, and even if not under seal, it may be enforced in equity. Headley v. Goundry,

A mortgagee cannot by releasing one or more parcels of the mortgaged land throw more than a pro rata share of the mortgage debt upon the other

But is seems that notice of such rights must be brought home to him. He is not bound to examine the records subsequent to his mortgage. Chesebrough v. Millard, I Johns. Ch. 414; Howard Ins. Co. v. Halsey, 8 N. Y. 271. See also Chap. XXVI, Tit. III.

Release by mortgagee of part of the premises after assigning his mortgage, held valid as to one acting in good faith and without notice of the assignment. Trustees of Union College v. Wheeler, 61 N. Y. 88. But see supra,

A partial release of the debt or part of the land held not within the recording act, and not to affect a subsequent assignee for value without notice. Judson v. Dada, 79 N. Y. 373.

Error of clerk in recording release does not affect the releasor. Simonson v. Falihee, 25 Hun, 570.

Discharge by Payment or Tender.—By the Revised Statutes. after the expiration of twenty years from the time a right of action accrued upon any sealed instrument for the payment of money, such right was to be presumed to be extinguished by payment; but such presumption might be repelled by proof of payment of some part, or by proof of a written acknowledgement of such right of action within that period.

2 R. S. 301, § 48.

This was repealed by Chap. 245 of the Laws of 1880. See now Code Civ. Proc., § 381 (amd. L. 1877, Chap. 416) establishing the simple limitation of the time for beginning actions upon sealed instruments of twenty years.

This would not apply if payments had been made within twenty years before commencement of foreclosure. N. Y. L. & T. Co. v. Covert, 6 Abb. N. S. 154. The purchaser is bound to inquire as to facts. 3 Abb. App. Cas.

After twenty years, where no interest has been paid, and there has been no foreclosure or entry, the mortgage will be considered as paid. Jackson

v. Wood, 12 Johns. 242.

As to burden and sufficiency of proof showing payment of interest within twenty years. U. S. Trust Co. v. Stanton, 76 Hun, 32; burden on mortgagee, Id.

Also after fifteen years' possession. McMurray v. McMurray, 17 N. Y.

Supp. 657.

A payment upon a recorded mortgage, made by the heirs of two joint

and several mortgagors, while in the possession of the part of the mortgaged premises inherited by them from the mortgagors, keeps it alive as to the rest of the mortgaged land held by one acquiring title thereto by grant from one of the mortgagors, and from the heirs of another, although such grants were with warranty and for a valuable consideration, and no reference to the mortgage was contained in the deeds conveying the premises. Murdock v. Robinson, 71 Hun, 320.

A mortgage that has once been paid cannot be revived to the prejudice of subsequent incumbrances, etc. Mead v. York, 6 N. Y. 449; Truscott v. King, 6 id. 147; Stoddard v. Hart, 23 id. 556; Bogert v. Bliss, 13 Misc. 72.

Payment extinguishes the power of sale, Cameron v. Irwin, 5 Hill, 272; and prima facie extinguishes the mortgage (Remington Paper Co. v. O'Dougherty, 81 N. Y. 474), though it may be kept alive by agreement. Kellogg v. Ames, 41 N. Y. 218, revg. 41 Barb. 211; Hubbell v. Blakeslee, 71 N. Y. 63.

Receipt of rents by a nortgagee in possession does not pay or extinguish the mortgage until by an accounting in equity they are so applied. Hubbell

v. Moulson, 53 N. Y. 225.

Ancient Mortgages Presumed Paid .- An uncanceled mortgage sixty years old is no lien. Belmont v. O'Brien, 12 N. Y. 394.

When Presumed Paid .- Martin v. Stoddard, 127 N. Y. 61, 64; Katz v. Kaiser, 10 App. Div. 137, 139; Forsyth v. Leslie, 74 id. 517.

Payment by a Stranger.—Whether payment by a stranger discharges, quaere. If so, the mortgagor is equitably bound to indemnify the stranger. Wellington v. Kelly, 84 N. Y. 543.

Payment on a mortgage by one who has no obligation as to it will not prevent running of the Statute of Limitations. Murdock v. Waterman, 145 Ñ, Y. 55.

To Whom to be Made .- Payment to be valid must be made according to the mortgage. Payment to the nominal mortgagee when the mortgage names other payees, is ineffectual. Waterman v. Webster, 33 Hun, 611, affd., 108 N. Y. 157. Payment made to an agent who negotiated the mortgage and collected interest is valid. Central Trust Co. v. Folsom, 167 N. Y. 285.

Payment of a mortgage to secure a trust to the mortgage is ineffectual.

McPherson v. Rollins, 107 N. Y. 316.

As to programs to mortgage of the contral trust to the mortgage.

As to payments to mortgagee after assignment, vide supra, Title VII.

Payment to one who negotiated the loan, but who was not shown to have possession of the securities, is not protected. Frank v. Tuozzo, 26 App. Div. 447. See also Central Trust Co. v. Folsom, 26 App. Div. 40.

Revivor.—A person who has noticed payment cannot by verbal arrangement between himself and mortgagor, give the extinct mortgage vitality again as security for a new loan so as to give it priority over a subsequent conveyance or mortgage. Bogert v. Bliss, 148 N. Y. 194.

Tender and Refusal .-- At any time before foreclosure decree tender and refusal is equivalent to payment in respect of discharging the lien from the land mortgaged. Jackson v. Craft, 18 Johns. 110; Edwards v. Farmers, etc., Co., 21 Wend. 466; Jackson v. Myers, 11 id. 533; Farmers, etc., Co. v. Edwards, 26 id. 541; Stoddard v. Hart, 23 N. Y. 556; Kortright v. Cady, 21 id. 343, revg. 23 Barb. 490. See also 26 How. Pr. 158; Hartley v. Tatham, 2 Abb. App. Cas. 333; Graham v. Linden, 50 N. Y. 547.

Also after sale and before deed. Citizens' Svgs. Bk. v. Foster, 6 N. Y. Supp.

420.

Tender, however, does not extinguish the debt, but removes the lien. is not necessary to show a continued willingness to pay, nor to bring the money into court. Jackson v. Craft, 18 Johns. 110; Hunter v. Le Conte, 6 Cow. 728; Arnot v. Post, 6 Hill, 65; 2 Den. 344; Merritt v. Lambert, 7 Paige, 344; Edwards v. Farmers', etc., Co. 21 Wend. 467; Stoddard v. Butler, 20 id. 506 at 541; Kortright v. Cady, 21 N. Y. 343, revg. 23 Barb. 490; Tuthill v. Morris, 81 N. Y. 94; Trimm v. Marsh, 54 id. 599; Exchange Fire Ins. Co. v. Norris, 74 Hun, 527.

What to be Tendered.— The tender must be of the whole amount secured by the mortgage to the holder of the mortgage, even if others are interested. Graham v. Linden, 50 N. Y. 547. And must be made in what by law and decision is then legal tender. Harris v. Jex, 55 N. Y. 421. Where there is a tax clause authorizing the mortgagee to pay the same "with any expense attending," tender must include any payments by the mortgagee to an expert employed to examine and determine validity of taxes. Equitable L. A. Soc. v. Glahn, 107 N. Y. 637.

Keeping Tender Good .- Although the tender need not be kept good to extinguish the lien of the mortgage, yet it must be in order to have affirmative relief of its extinguishment. Tuthill v. Morris, 81 N. Y. 94.

Nor will it when made by junior mortgagee prevent running of interest

unless kept good. Nelson v. Loder, 132 N. Y. 288.

Mortgagee in Possession.—Tender or payment to a mortgagee in possession at any time after the mortgage is due and before foreclosure, destroys the lien of the mortgage, and the mortgagor may recover the land in ejectment. Trimm v. Marsh, 54 N. Y. 599.

As to the right of a mortgagee in possession, see Becker v. McCrea, 48 Misc. 341; Barson v. Mulligan, 66 App. Div. 486.

Redemption by the Owner of the Equity. Finn v. Sally, 1 App. Div. 411.

To Whom Made.—A debtor need not follow his creditor into a foreign State to make tender. Tender to the person authorized to receive the interest, etc., is sufficient. Housie v. Volkening, 49 How. Pr. 169. See Scher-

merhorn v. Farley, 11 N. Y. Supp. 466; s. c., 58 Hun, 66.

Tender may be made to the last person known to the mortgagor to have been entitled to the bond and mortgage. He is only bound by actual notice of assignment.

Hetzel v. Barber, 6 Hun, 534, partly revd., 69 N. Y. 1, but not

noticing this point.

It must be to one authorized to receive the money. Tender to a servant is not good. Jewett v. Earle, 53 Super. 349.

Tender by a Subsequent Incumbrancer has the same effect against the mortgage as if made by the mortgagor. Dings v. Parshall, 7 Hun, 522.

But the tender must be clear as to whether an extinguishment or assignment is sought. Frost v. Yonkers Savings Bk., 70 N. Y. 553.

How Made.— To discharge the lien of a mortgage by tender, the tender must be fairly made and deliberately refused by the mortgagee or his duly authorized representative, after a sufficient opportunity to ascertain the amount due, or a sum ample to pay the whole amount due must be absolutely and unconditionally tendered and refused. Tuthill v. Morris, 81 N. Y. 94; Jewett v. Earle, 53 Super. 349. To demand a satisfaction as a condition of payment does not invalidate the tender. Id; Halpin v. Phenix Ins. Co., 118 N. Y. 165.

Any act which releases or discharges the bond discharges the mortgage, as it is a mere incident to the debt. Weeks v. Weeks, 16 Abb. N. C. 143 (citing Remington Paper Co. v. O'Dougherty, 81 N. Y. 492; Wanzer v. Cary, 76 N. Y. 526; Carpenter v. Soule, 88 N. Y. 251), affd., 52 Super. 512.

Mortgagee wrongfully refusing to execute satisfaction piece liable in damages. Mosher v. Campbell, 30 Hun, 230.

Decree and Sale .- A foreclosure decree extinguishes the mortgage lien, although it is not docketed.

After a decree and sale, neither the mortgage nor the decree is a lien. The People v. McKnight, 1 Barb. 379.

Merger.— The mortgage also may be removed, or discharged by merger and extinguishment.

If the mortgagor or his grantee who has assumed payment becomes the owner of the bond and mortgage, the lien is not necessarily gone but may

be revived. Kellogg v. Ames, 41 N. Y. 259. Whether merger results is a question of intention. See *supra*, p. 624.

As a general rule, where the owner of the mortgage becomes owner of the fee, the mortgage is merged in the greater estate. This rule is modified by the intention of the parties, or in equity where the circumstances are such that it would be beneficial to one party and not injurious to others, to continue the mortgage, as also in the case of infancy. Remington Paper Co. v. O'Dougherty, 81 N. Y. 474.

Where a purchaser of mortgaged lands who is under no obligation to pay the mortgage does pay it, it does not merge as against his grantor, and if the latter's widow claim dower she must allow a due proportion of the mortgage debt. Everson v. McMullen, 113 N. Y. 283, revg. 45 Hun, 578.

Mortgage assigned to owner of the equity kept alive to protect equitable

rights. Sturges v. Hart, 84 Hun, 409.

As an illustration of the rule and the above exceptions, vide James v. Johnson, 2 Cow. 246, revg. 6 Johns. Ch. 417; Skeel v. Spraker, 8 Paige, 182; Gardener v. Astor, 3 Johns. Ch. 53; Starr v. Ellis, 6 id. 393; Forbes v. Moffat, 18 Ves. 384; Hill v. Pixley, 63 Barb. 200; Compton v. Oxden, 2 Ves. Jr. 261; James v. Morey, 2 Cow. 246; 6 Johns. Ch. 417; Van Nest v. Latson, 19 Barb. 604; see also Chap. XXVI.

No merger takes place in equity where there is an intermediate mortgage. Millspaugh v. McBride, 7 Paige, 509.

Nor upon conveyance to the mortgagee after assignment. Purdy v. Hunt-

ington, 42 N. Y. 334.

Where a purchaser of lands give a purchase money mortgage to his grantor prior to receiving the deed from him, there is no merger. Justice and

A merger can never arise against the intention of the parties forbid. Judd v. Seekins, 62 N. Y. 266.

A merger can never arise against the intention of the parties in the transaction out of which it arose. Day v. Mooney, 6 Supm. 382, citing Clift v. White, 12 N. Y. 519; Morris v. Whitcher, 20 id. 41; Millspaugh v. McBride,

7 Paige, 509; Skeel v. Spraker, 8 id. 182.

Where land was sold on execution and after lapse of time to redeem conveyed to a junior mortgagee, it was held that the mortgage was merged and the lien extinguished by being sunk in the legal estate. Hill v. Pixley, 63 Barb. 200.

When a grantor with warranty subsequently acquires an existing mortgage, it becomes extinguished. Mickles v. Dillaye, 15 Hun, 296. Vide supra, Chap. VIII, Tit. IX.

TITLE IX. USURY.

By the Revised Statutes the taking or reserving upon any loan or forbearance of any money, of a greater value than seven per cent. upon the sum advanced is declared to be usury, and any instrument made in accordance with an agreement for more is declared void.

Revised Statutes, Part II, Chap. IV, Tit. III; 1 R. L. 64; Laws of 1837, Chap. 430; Penal Code, § 378.

By L. 1879, Chap. 538 (in effect Jan. 1, 1880), the rate of interest was reduced to six per cent. See Bennett v. Bates, 94 N. Y. 354.

Place as Affecting Usury.—The usury laws are limited in their application to the State and have no extraterritorial effect, so that an obligation entered into here in pursuance of an agreement made in another State, which is valid there, is not void for usury merely because it contravenes the usury laws of New York. But if the obligation be made and payable here without any intention that it should be sold or discounted elsewhere, a sale in another State or country will invalidate it, if made at a rate usurious here though not usurious there.

Western Transp. Co. v. Kilderhouse, 87 N. Y. 430; Wayne Co. Savgs. Bk. v. Low, 81 id. 566; Clayes v. Hooker, 4 Hun, 231; Dickinson v. Edwards, 77 N. Y. 573. Contra, Weil v. Lange, 6 Daly, 549.

In accordance with these principles it is held that a mortgage made and payable here, though upon property in another State, is subject to the usury laws of New York.

Buckingham v. Corning, 64 How. Pr. 503, affd. (without noticing this point) in 91 N. Y. 525. For discussion of State and National laws, see Perkins v. Smith, 116 N. Y.

Agreement Essential.— It is essential, to constitute usary, that there should be an agreement between the borrower and the lender that the latter should receive or retain some sum or advantage beyond the lawful interest.

Guggenheimer v. Geiszler, 81 N. Y. 293; Morton v. Thurber, 85 id. 550; Bill v. Fisch, 1 N. Y. St. Rep. 473.

But the agreement may be inferred from regular payments of interest on the obligation at an usurious rate. Smith v. Hathorn, 88 N. Y. 211.

An honest mistake in receiving interest will not make usury. The excess will be credited on foreclosure. Bevier v. Covell, 87 N. Y. 50.

The Reservation of Money is not Essential.—It is not necessary that money should be received or retained by the lender in order to constitute usury. If the borrower be compelled, as a condition of the loan, to purchase lands or other property at an exorbitant price, or to accept goods or choses in action at an unfair valuation as part of the amount advanced, it is usury. If the borrower, as a condition of the loan, purchase goods or choses in action, the transaction will be presumed to be usurious and the lender must show that the price was just, though the mere fact of the purchase and loan, if the former were not a condition of the latter, will raise no such presumption.

Quackenbos v. Sayer, 62 N. Y. 344; Knickerbocker Life Ins. Co. v. Nelson. 78 id. 137; Marvin v. Medbury, 13 Wkly. Dig. 544.

So any advantage to the lender, or even a chance of advantage, beyond lawful interest, will be usurious if the intent be shown.

Heidenheimer v. Mayer, 42 Super. 507, apparently affirmed in 74 N. Y. 607; Brown v. Brinckerhoff, 3 Alb. L. J. 16; Arnold v. Angell, 62 N. Y. 508. But see a dictum in Richardson v. Hughitt, 76 N. Y. 55.

Protection of Lender from Incidental Loss is not Usury .--Agreements which merely save the lender from incidental loss in making the loan or relieve him from charges which would lessen the return to him are not usurious (unless they be used as a mere cover for usury) though the lender thereby pay more than what would be lawful interest on the money.

So held of the payment of a bonus to the lender to pay for his time and expense in making journeys to sell securities and discount a note in order to raise money for the loan. Van Tassell v. Wood, 76 N. Y. 614. So of an agreement by the lender to pay insurance. John Hancock, etc., Ins. Co. v. Nichols, 55 How. Pr. 393. Contra, Nat. Life Ins. Co. v. Harvey (U. S. C. C. Iowa), 12 Fed. Rep. 227. Vide also Knickerbocker Life Ins. Co. v. Nelson, 7 Abb. N. C. 170.

So of an agreement to pay, in the alternative, usurious interest or taxes. Home Ins. Co. v. Dunham. 33 Hun, 415.

So of a bond given in settlement of an action by defendant which was for the plaintiff's costs, disbursements and counsel fees, in addition to his claim. Haughwout v. Garrison, 69 N. Y. 339.

So of the payment of interest before the money was actually advanced, the lender meanwhile withholding the money from investment pending the perfecting of the security. Bevier v. Covell, 87 N. Y. 50.

So of the payment of an attorney's fees. Hamil v. Roth, Brooklyn Daily Rec., Feb. 26, 1883.

But to make the loan payable at another place and allow a charge for exchange, when there is no exchange between the two places, is usury even though the charge, of itself, be reasonable. Perkins v. Smith, 41 Hun, 47.

Obligation to Pay Essential.—There can be no usury without an absolute obligation to pay, and hence a mortgage without bond which contains no covenant to pay can never be usurious.

First Nat. Bank v. Griswold, 21 Wkly. Dig. 516.

Subsequent Usury.—If an obligation be valid in its inception, it will not be invalidated by subsequent usurious dealings in connection with it, and a subsequent purchase of it at a discount, even though made in pursuance of a previous agreement, cannot affect it. And in any event a party who has represented a mortgage to be valid, and his privies, are estopped to set up usury if an assignee take, relying on his statement.

Brooks v. Avery, 4 N. Y. 225; Campbell v. Hall, 16 id. 575; Wood v. Seely, 32 id. 105; Payne v. Burnham, 62 id. 69; Sickles v. Flanagan, 79 id. 224; Weyh v. Bolan, 85 id. 394; Smith v. Cross, 90 id. 549; Siewert v. Campbell, 91 id. 199; Dunham v. Cudlipp, 94 id. 129; Union Dime Savings Inst. v. Wilmot, 94 id. 221; White v. Turner, 1 Hun, 623; O'Brien v. Ferguson, 37 id. 368.

Accommodation Mortgage. A mortgage given without consideration, however, has its inception only when it is assigned, and if the assignment be made for an usurious discount the mortgage will be void.

Tiedman v. Ackerman, 16 Hun, 307, affd. without opinion 84 N. Y. 677; Verity v. Sternberger, 62 App. Div. 112.

As to estoppel of the mortgagor and his privies, however, vide cases supra;

and infra. p. 637.

Usurious Extension. An extension of a mortgage given in consideration of the payment of a bonus above lawful interest is void; but upon foreclosure the holder of the equity has a right to have the amount so paid applied upon the mortgage.

Earle v. Hammond, 2 Abb. N. C. 368; Church v. Maloy, 70 N. Y. 63. The latter case was distinguished in Nat. Bk. of Gloversville v. Place, 15 Hun, 564, holding that where such extension is pleaded in an action on a note the holder cannot avoid it by setting up usury. See also Ganz v. Lancaster, 169

Bonus to Agent.— The exaction by an agent of the lender of a bonus or compensation for his services, or the making of an usurious loan by the agent, if these things are done without the knowledge or consent of the principal will not invalidate the transaction. And even if the lender be aware of the agent's charge for his own services his rights will not be affected, if he do not receive any portion of it.

Estevez v. Purdy, 66 N. Y. 446; Guardian Mut. L. I. Co. v. Kashaw, *Id.* 544; Moore v. Bogart, 19 Hun, 227; Van Wyck v. Watters, 81 N. Y. 352; Arnot v. Whitcomb, 22 Wkly. Dig. 195. But see Alger v. Gardner, 54 N. Y. 360, distinguished in Estevez v. Purdy, *supra*.

The same rules apply in favor of a *cestui que trust* whose trustee has

exacted a bonus for a loan. Fellows v. Longyor, 91 N. Y. 324.

The mere fact that the lender received or shared the sum exacted as a bonus by his agent will not be enough to prove usury, if he took it innocently and without knowledge that it was so exacted or paid. But in such cases, upon proof of the facts, the amount must be credited to the borrower upon his obligation.

Phillips v. McKellar, 92 N. Y. 34; Wheaton v. Voorhis, 53 How. Pr. 319.

The evidence must be clear and satisfactory that the bonus or usurious exaction was for the benefit of the agent and without the lender's authority. Unless the facts show some agreement for a payment to the agent himself, apart from the principal, there will be usury.

Alger v. Gardner, 54 N. Y. 360; Wintermute v. Patchin, Id. 647; Pratt v. Elkins, 80 id. 198; Wyeth v. Braniff, 84 id. 627.

Interest in Advance.— It is not usury to provide for the payment of interest semi-annually in advance, if there be no wrong intent, for the agreement may be construed to call for a proper discount.

Bloomer v. McInerny, 30 Hun, 201.

Compound Interest.— Compound interest is not favored although not strictly usurious, and hence an agreement to pay it or for annual rests founded upon a sufficient consideration (e. g., an extension) is not void. But an agreement to pay it which is retrospective and only founded upon the moral obligation of the debtor to pay will be void. In any case the agreement must be distinct and clear, though it need not be in writing.

Stewart v. Petre, 55 N. Y. 621; Young v. Hill, 67 id. 162, distinguishing this case, Phelps v. Beardsley, 16 Wkly. Dig. 21. See also, 16 Alb. L. J. 252.

Subrogation.— If one who has any right to subrogation on paying off prior liens, makes an usurious loan, a part of which is used to pay off prior incumbrances, though the security which he takes may be void, he will nevertheless be subrogated to the amount of the liens paid off. But where his sole right to subrogation is derived from the usurious agreement, he has no remedy for any amount.

Baldwin v. Moffatt, 94 N. Y. 82; Perkins v. Hall, 105 id. 539. Where, however, the usurious lender took an assignment to himself of the prior mortgage he was held to be subrogated as to it. Allison v. Schmitz, 31 Hun, 106.

Loans by Banks.— By Laws of 1870, Chap. 163, amended by Laws of 1880, Chap. 567, banking associations organized under the act of 1838, might reserve and take on any loan full interest in advance. Any exaction beyond this carried forfeiture of the entire interest, but not of principal, and double the excess might be recovered in an action brought within two years. This act was repealed by Laws of 1882, Chap. 402, but its provisions were reenacted as to banks generally in the general banking act, L. 1882, Chap. 409, § 68, and later in the Banking Law, G. L. Chap. XXXVII, L. 1892, Chap. 689, § 55, amd. L. 1900, Chap. 310.

Farmers and Mechanics' Bk. v. Dearing, I Otto. 29, overruling Farmers' Bank v. Hale, 59 N. Y. 53; Bank of Monroe v. Finlay, 6 Hun, 584.

Curing Usury.— Usury may be cured by a renunciation by both parties of the original agreement and their making a new and not usurious contract.

Sheldon v. Haxtun, 91 N. Y. 124.

Repayment of an usurious bonus will not validate the transaction as to judgments entered in the meantime. Van Tassel v. Wood, 12 Hun, 388, revd. on other grounds in 76 N. Y. 614.

Usury as a Defense.— Usury is available as a defense to the borrower and those claiming under a party injuriously affected by it, but if the original party could not set it up, his privies are affected by the same disability.

Madison University v. White, 25 Hun, 490; Dime Savings Bk. v. Wilmot, 94 N. Y. 221; Myers v. Wheeler, 24 App. Div. 327.

Accordingly it is held that a purchaser at foreclosure of a second mortgage may defend against the first mortgage on the ground of usury. More v. Devoe, 22 Hun, 208.

Corporations.—A corporation is not permitted to set up usury as a defense. L. 1850, Chap. 172, §1.

Hawley v. Kountze, 6 App. Div. 217.

Usury as a Cause of Action.— The right of action given to the borrower by I R. S. 772, § 8, to relieve himself of the usurious obligation by bringing suit himself without offering to repay the sum actually loaned, is purely personal and is not available to any one else.

Post v. Bank of Utica, 7 Hill, 391; Rexford v. Widger, 2 N. Y. 131; Allerton v. Belden, 49 id. 375; Buckingham v. Corning, 91 id. 525.

Formerly the rule was otherwise. Cole v. Savage, 10 Paige, 583, which was overruled by the above cases. A general assignee cannot maintain the action. Wright v. Clapp, 28 Hun, 7.

Usury as an Offense.—Taking usury is a misdemeanor. Penal Code, § 378.

TITLE X. MISCELLANEOUS PROVISIONS.

The following general provisions it may be desirable to refer to, in connection with mortgages.

Lands Devised or Descended Subject to a Mortgage.— As to who is to pay the same, vide supra, pp. 397, 416.

Also as to possession by heirs as a muniment of title. Brown v. Perris, 11 N. Y. Supp. 97; s. c., 56 Hun, 601.

Notice to Mortgagees, by purchasers under tax and assessment sales. In order to establish titles on lands sold for taxes, as against mortgagees, certain notices have to be served, as to the details of which, vide Laws of May 14, 1840, Chap. 387; May 4, 1844, Chap. 266; 1855, Chap. 427; April 17, 1862, Chap. 285; 1870, Chap. 280; 1893, Chap. 711, § 18; Tax Law, L. 1896, Chap. 908, § 138, as amd. by L. 1897, Chap. 373; and infra, Chap. XLVI.

Tax Law, § 138, applies also to sale made by the county treasurer for State and county taxes, although in words applying only to sale made by State Comptroller. Gabel v. Williams, 39 Misc. 489.

Dower in Mortgaged Lands.—Where a person seized of an estate of inherit. ance in lands shall have executed a mortgage of such estate before marriage, his widow shall nevertheless be entitled to dower therein, as against every person, except the mortgagee, and those claiming under him. I R. S. 740. § 4; Real Property Law, § 172. Wife may be estopped. Purdy v. Coar, 109 N. Y. 448.

Where Lands are Mortgaged for Purchase Money .- Where lands are so mortgaged the widow shall not be entitled to dower therein, as against the mortgagee, or those claiming under him, although she shall not have united in such mortgage, but she shall be entitled to her dower as against all other persons. 1 R. S. 740, § 5; Real Property Law, § 173.

This is the case even where the mortgage is given to a third person who advances the money. Kittle v. Van Dyck, 1 Sandf. Ch. 76. See fully as to these provisions, supra, Chap. VII, Tit. I.

Mortgages to and by Aliens.— Vide supra, Chap. III, Tit. IV. Their consideration money mortgages are valid, and only the equity of redemption is liable to escheat.

Mortgages to the State. - Vide, 1 R. S. Pt. I, Chap. IX, Tit. 6: State Finance Law, L. 1897, Chap. 413.

Mortgages by Tenants for Life, and Married Women under a Power .-Vide supra, Chap. XII, Tit. IV.

Mortgages by Infants.- May be avoided even though money has been advanced. N. Y. Bldg. Loan Co. v. Fisher, 23 App. Div. 363; Kane v. Kane, 13 id. 544.

Adverse Possession.— Those having a just title to lands held under adverse possession, may execute a mortgage on such lands, which shall bind the lands from recovery of possession, and have preference over judgments and mortgages subsequent to the record of the above mortgage. 1 R. S. 739, § 148; Real Property Law, § 225. See also in this connection, Hoyt v. Thompson, 5 N. Y. 320 at 347; 41 Barb. 288.

Judicial sales are not within the condemnation of the Statute of Champerty. De Garmo v. Phelps, 176 N. Y. 455, revg. 64 App. Div. 590, and overruling

Eisemann v. Lapp, 38 Misc. 14.

Insurance.—A mortgagee whose mortgage does not contain an insurance clause has not an equitable lien on insurance moneys. Smith v. Knapp, 18 Wkly. Dig. 95. See also Reid v. McCrum, 91 N. Y. 412.

A covenant to insure does not run with the land. Reid v. McCrum, 91

N. Y. 412; Dunlop v. Avery, 89 id. 592.

If there is an insurance clause the mortgagee may insure his debt directly if the mortgagor fail to insure. Foster v. Van Reed, 70 N. Y. 19.

Breach of condition to insure can only be enforced upon notice to mort-

gagor. Doran v. Franklin Fire Ins. Co., 86 N. Y. 635. Even where there is an insurance clause the mortgagee cannot collect

if the policy is by its terms payable to another incumbrancer. Avery, 99 N. Y. 592.

Insurer may be subrogated to mortgagee in certain cases. Ulster Co. Savgs. Bk. v. Leake, 73 N. Y. 161; Thomas v. Montauk Fire Ins. Co., 43 Hun, 218.

Taxes.—May be paid by mortgagee (likewise insurance, etc.), and charged up to the loan, when necessary to protect the security, and may be collected on foreclosure, even though there be no tax clause in the mortgage. Sidenberg v. Ely, 90 N. Y. 257.

See also Mut. Life Ins. Co. v. Newell, 78 Hun, 293.

Under the tax clause the mortgagee may employ an expert to determine the validity of taxes and add his charges to the mortgage. Equitable L. A. Soc. v. Glahn, 107 N. Y. 637.

Subrogation.— A second mortgagee has the right, when necessary to protect himself, to compel an assignment of a prior mortgage and also of a collateral guarantee for its payment. Clark v. Mackin, 95 N. Y. 346; Ellsworth v. Lockwood, 42 id. 89, 97; Twombly v. Cassidy, 82 id. 155; Frost v. Yonkers Sayings Bk., 70 id. 553; Dings v. Parshall, 7 Hun, 522; Patterson v. Birdsall; 64 N. Y. 294; Vandercook v. Cohoes Savings Instn., 5 Hun, 641. He may compel an assignment by motion, if foreclosure is brought on prior

mortgage. De Forest v. Peck, 84 Hun, 299.

Person making loan on mortgage the proceeds of which are used to pay off an existing mortgage subrogated to save him from loss on failure of the new mortgage. Gans v. Thieme, 93 N. Y. 225; see also Murray v. Marshall, 94 id. 611, disapproved, 73 Hun, 236; Acer v. Hotchkiss, 97 N. Y. 395; Perkins v. Hall, 105 id. 539; Arnold v. Green, 116 id. 566; Dun v. Milne, 113 id. 303.

He must pay into court the amount of the mortgage with interest and costs if forcelosure be already begun. Day v. Strong, 29 Hun, 505; also see Twombly v. Cassidy, 82 N. Y. 155, if after judgment. The same rule was applied in favor of the maker of the mortgage who had sold the land in Johnson v. Zink, 51 N. Y. 333.

A party acquiring title to mortgaged premises, but not assuming the mortgage, is not entitled to be subrogated to the extent of moneys paid on the

mortgage. Schreyer v. Saunders, 39 App. Div. 8.

A person on paying off an existing mortgage, believing it to be the only lien on the land, and loaning on a new mortgage, is subrogated as to the canceled mortgage as against a judgment subsequent to the canceled mortgage and marked "secured on appeal." Barnes v. Mott. 64 N. Y. 397; 56 How. Pr. 382; Green v. Milbank, 3 Abb. N. C. 138.

Where the widow and executrix of a deceased mortgagor with her second husband, having no title, executed a mortgage and paid a former mortgage with the proceeds, subrogation was decreed. Gans v. Thieme, 93 N. Y. 225.

The same rule was applied to protect against the dower of infant wife, who executed the subsequent mortgage in Snelling v. McIntyre, 6 Abb. N. C. 469. Same rule applied as between legatees and remaindermen. Pease v. Egan, 131 N. Y. 262.

To protect grantee against dowress. Everson v. McMullen, 113 N. Y. 293. A mere volunteer cannot claim subrogation. Acer v. Hotchkiss, 97 N. Y.

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Where one has been compelled to pay a debt which ought to have been paid by another, he is entitled to a cession of all the remedies which the creditor possesses against such other person. Schram v. Werner, 85 Hun. 293.

Where a mortgagee relinquishes a mortgage lien and takes an order for payment out of a new mortgage loan, his equitable lien for the amount is superior to subsequent lienors. North East'n Savings Assn. v. Barker, 21 N. Y. Supp. 832.

Equitable subrogation, Wager v. Link, 150 N. Y. 549.

Defect in Title.—A vendee in possession who has made part payment and given a mortgage for the rest, cannot have the mortgage set aside for defect in title, but must rely on the covenants in the deed. Ryerson v. Willis, 81 N. Y. 277.

Receiver's Certificate.— The rights of mortgagees are superior to those of holders of receiver's certificates. Raht v. Attrill, 106 N. Y. 423.

Junior mortgages are prior to subsequent advances on prior mortgage only where such advances are purely optional and made after notice. Hyman v. Hauf, 21 N. Y. Supp. 984; s. c., 2 Misc. 388, affd., 138 N. Y. 48.

Order of Charge, when Lands are Sold.—When lands are contracted to be sold, or are sold to different purchasers at different times, the residue, if any, is the primary fund for the payment of the original mortgage, and if a purchaser transfer different parcels, they are chargeable in the inverse order of sale. This right is an equitable, but not a legal right. Skeel v. Spraker, 8 Paige, 182; Crafts v. Aspinwall, 2 N. Y. 289; How. Ins. Co. v. Halsey, 4 Sandf. 565; s. c., 8 N. Y. 271; Stoddard v. Whiting, 46 id. 627; Halsey v. Reed, 9 Paige, 446. See this case as to the rights of heirs and the various

owners. Schryver v. Teller, 9 Paige, 173; Grosvenor v. Lynch, 2 id. 300; Guion v. Knapp, 6 id. 35; Snyder v. Stafford, 11 id. 71; N. Y. L. Ins. Co. v. Milnor, 1 Barb. Ch. 353; Stuyvesant v. Hall, 2 id. 151; Miles v. Fralich, 11 Hun, 561; Crafts v. Aspinwall, 2 N. Y. 289; Welling v. Ryerson, 94 id. 98; Hart v. Wandle, 50 id. 381; Zabriskie v. Salter, 80 id. 555.

The right enures to subsequent mortgagees of portions of the land. Hop-

kins v. Wolley, 81 N. Y. 77.

Mortgage in Blank.— When one delivers a mortgage in blank to get a loan. the agent may fill in the mortgagee's name. Hemmenway v. Mulock, 56 How. Pr. 38.

Parol authority is sufficient to authorize the filling up of a blank, as to a material part in a sealed instrument. Forster v. Moore, 79 Hun, 472.

The fact that the mortgagee, in filling in the consideration, in good faith and by miscalculation inserted a sum greater than that actually due. does not affect the validity of the mortgage. Id.

One who signs an instrument with blanks estopped to deny validity as

against an innocent holder. Nesbit v. Albert, 85 Hun, 212.

Form.— New and short forms of instrument provided. Real Property Law. § 223. See L. 1890, Chap. 475, § 6.

The Abstract of Title is part of the security, and the mortgagor cannot have it till he pays the debt. Holm v. Wust, 11 Abb. N. S. 113.

Cemetery Lots.— A mortgage of a Greenwood Cemetery lot after interments is void as against public policy. Thompson v. Hickey, 8 Abb. N. C. 159.

Dower .- A wife's dower is affected by her joining in a mortgage with her husband, only to the extent of the mortgage. If the mortgage fail as to the husband, it likewise fails as to her dower. Hinchliffe.v. Shea, 103 N. Y. 153, revg. 34 Hun, 365.

Fixtures, Trees, etc., as between mortgagor, mortgagee and others. See

Mirrors with frame of same wood as mantel and firmly attached, held fixtures. Lockwood v. Lockwood, 3 Redf. 330.

But not if resting on a bracket and connected with the house only, as

picture frames usually are. Id. See also below "Gas Fixtures."

Theatre chairs held fixtures. See Voorhees v. McGinnis, 48 N. Y. 278;

Potter v. Cromwell, 40 id. 287; Grosz v. Jackson, 6 Daly, 463.

A building though erected on posts is not movable as a fixture as against the mortgagee of the land, unless so understood at the time of erection by the builder and the owner of the equity in the land. Rowland v. Sevorts, 17 N. Y. Supp. 399.

As to collateral agreements and estoppel. McFadden v. Allen, 134 N. Y.

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Where nursery trees growing upon mortgaged land have been sold on execution against the mortgagor, a subsequent foreclosure sale cuts off the purchaser's right, since it operates to convey title from the mortgagor as of the date of the mortgage. Batterman v. Albright, 122 N. Y. 484.

Fixtures as between mortgagors and bondholders of corporation.

Security Co. v. Saratoga Gas Co., 88 Hun, 569.

Hand-painted canvases fastened to ceiling pass under a mortgage. Cahn v. Hewsey, 8 Misc. 384.

Mortgage on potatoes not yet planted not a lien as against subsequent purchaser on execution sale. Rochester Distilling Co. v. Razy, 20 N. Y. Supp. 583, affd., 60 St. Rep. 284,

Where the owner of a mortgaged farm sells the growing crop, and then before it is harvested delivers possession of the land to the mortgagee, the mortgage debt not being due, the mortgagee thereby acquires no title to the crops as against the purchaser. Sexton v. Breese, 135 N. Y. 387.

Hop-poles are covered by a mortgage of the land to which they belong.

Sullivan v. Toole, 26 Hun, 203.

Machinery in a building especially adapted to hold it, and permanently fastened to the floor with the intention of leaving it there for permanent use, held as between mortgagee and creditors of mortgagor to be fixtures. McRea v. Central Nat. Bank of Troy, 66 N. Y. 489, distinguished in Wells v. Maples, 15 Hun, 90. See also Walrath v. Henderson, 6 Wkly. Dig. 293; Hart v. Sheldon, 34 Hun, 38.

But as between mortgagor and mortgagee, when only sufficiently fastened to hold it in place, and there being no evidence of any intention to make it part of the freehold. Potter v. Cromwell, 40 N. Y. 287; Murdock v. Gifford, 18 id. 28; Voorhees v. McGinnis, 48 id. 278, distinguishing Potter v. Cromwell, supra; McRea v. Central Nat. Bank of Troy, 66 N. Y. 489. It is personal property. Wells v. Maples, 15 Hun, 90.

Gas fixtures and mirrors, when detachable by simply unscrewing them, and mirrors not built into the walls but supported on hooks, whence they may be taken without injury, do not form part of the realty. McKeage v. Hanover Fire Ins. Co., 81 N. Y. 38. Even when it was the intention that they should pass, if in conflict with an innocent purchaser of them as chattels. Id. also as to mantels following same rule. Cottrell v. Griffin, 18 Wkly. Dig. 270.

Action to Cancel Mortgage. - An action for equitable relief from fraud as to the value of the land may be maintained by a mortgagor as to a purchase money mortgage given to the grantor, and that before money damage has been sustained. See Ranney v. Warren, 17 Hun, 111.

But he cannot have such a mortgage set aside for failure of title. He must rely on the covenants in his deed. Ryerson v. Willis, 81 N. Y. 277.

Action regulated by L. 1862, Chap. 365, amd. L. 1868, Chap. 798; L. 1873, Chap. 551 and L. 1884, Chap. 326; L. 1898, Chap. 174; L. 1901, Chap. 287; Real Property Law (L. 1896, Chap. 547), § 270a (as added by L. 1903, Chap. 490, amd. L. 1907, Chap. 347). See also L. 1907, Chap. 289; L. 1907, Chap. 621; also supra, p. 625.

Extension.— Time for payment of a mortgage may be extended by parol. Burt v. Saxton, 1 Hun, 551; Valentine v. Heydecker, 12 Hun, 676.

The extension does not necessarily affect the provisions respecting nonpay-

ment of interest, etc. Jester v. Sterling, 25 Hun, 344.

Extension of time of payment is not a waiver of the option given by the mortgage to consider the entire principal sum due on default in the payment of taxes which occurred before the extension was given, unless such extension was associated with acts indicating an intelligent purpose to renounce such privilege, or which makes it inequitable or unconscionable for him to enforce Weber v. Huerstel, 11 Misc. 214.

Acts of the Mortgagor cannot affect the mortgagee's estate and interest in the land mortgaged. Erie Co. Savings Bank v. Roop, 80 N. Y. 591.

Land Bought by Husband and Conveyed to Wife.—A bond given by a husband secured by a mortgage on property bought by him and conveyed to his wife is good against him as between them. White v. Button, 37 Hun, 556.

Sale of Land for Taxes; Mortgages, how Apportioned .- See Laws of 1855, Chap. 427; 1 R. S. 937; Tax Law, L. 1896, Chap. 908, § 107.

Purchasers of Lands Sold for Quit Rents.—See Act of April 13, 1819; People v. Comptroller, 1 Wend. 301.

Madison Co. Mutual Insurance Notes .- By Laws of March 23, 1836, the deposit notes of said company, when filed with a county clerk where the property is situated, are made a mortgage lien.

Consideration Money Mortgages a Prior Lien to Judgment.- Where real property is sold and conveyed and at the same time a mortgage thereupon is given by the purchaser to secure the payment of the whole or a part of the purchase money, the lien of the mortgage is superior to the lien of a previous judgment against such purchaser. Code Civ. Proc., § 1254, superseding 1

R. S. 749, § 5, to the same effect.

If both instruments are of the same date, the presumption is that the mortgage is for the consideration. Such preference is given over judgments even if the mortgage is executed to a third person, who advances the money.

Jackson v. Austin, 15 Johns. 477; Card v. Bird, 10 Paige, 46; Cunningham v. Knight, 1 Barb. 399; Coutant v. Servoss, 3 id. 128.

Effect of Partition.- Where a mortgage was given on an undivided share. on partition, the mortgage is to be considered attached to the divided share. Jackson v. Pierce, 10 Johns. 414.

Unexpired Term of Five Years or Over .- Mortgages, etc., may redeem within a year on removal of a lessee holding such a term for nonpayment of rent. Code Civ. Proc., § 2257, following Laws of 1842, Chap. 240, which was repealed by Laws of 1880, Chap. 245.

This does not apply in cases of removal for nonpayment of taxes. Witty v. Acton, 9 N. Y. Supp. 247, affd., 58 Hun, 552. See Code Civ. Proc., § 2256.

National Banks.- It was held in Crocker v. Whitney, 71 N. Y. 161, that national banks being prohibited by law from taking mortgages except for antecedent debts, a mortgage to such a bank to secure future advances was void; but this decision was reversed in National Bank v. Whitney, 13 Otto. 99, on the ground that only the United States could raise the objection, and such mortgages were held to be valid in Simons v. First Nat. Bk., 93 N. Y. 269.

Estoppel. - A void mortgage may be validated under estoppel by payment of interest, and by sale subject to it. Haussaner v. Terry, 20 N. Y. Supp. 337. Estoppel as to denying validity of mortgage for future advances. Dunn v. Sharpe, 9 Misc. 636.

Delivery of Mortgage. - Record of mortgage shows delivery and delivery of bond will then be presumed. Geisemann v. Wolf, 46 Hun, 289.

Record by grantor is good present delivery regardless of intent. Messelback v. Norman, 46 Hun, 414, affd., 122 N. Y. 578.

Unconditional delivery to third party of mortgage for another and record by him makes it good though mortgagee be ignorant of it. Munoz v. Wilson, 111 N. Y. 295. Vide Grannis v. Hobby, 137 N. Y. 559, as to agent, extent of authority, and delivery of mortgage.

See also as to delivery, in general, Chap. XX.

Purpose of the Mortgage.— The purposes may be various, viz., mortgage to secure annuities. Beeman v. Beeman, 88 Hun, 14.

Mortgage for support for life, and when not creating a trust. Townsend v. Rackham, 143 N. Y. 516.

Execution .- The seal upon a mortgage is only presumptive evidence of a sufficient consideration, which may be rebutted; and, therefore, evidence of declarations at and before the execution of the mortgage are admissible to show want of consideration and the purpose for which it was given. Baird v. Baird, 81 Hun, 300.

Held, it is not essential to the due execution of a bond and mortgage that the signature thereto should be in the handwriting of the mortgagor; if the mortgagor directs another to sign his name to the papers or assents to such signing, and afterward acknowledges the execution thereof, it is a legal execution.

A regular certificate of acknowledgment on a mortgage is presumptive, but not conclusive, evidence of the due execution of the instrument. Albany Co. Svgs. Bk. v. McCarty, 71 Hun, 227.

See Real Property Law, § 207, as to the necessity of subscription on the grantor or his lawful agent thereunto authorized by writing.

See also supra, Chap. XX, Tit. VII.

Awards Carried .- A mortgage of land made prior to the passage of the act under which a portion of the land is taken for public purposes, operates as an assignment of the award made for such taking, and entitles the purchaser on forclosure to such award. Burkard v. City of Brooklyn, 6 Misc. 431.

Semble, otherwise when made after the act. Kuhlman v. City of Brooklyn,

6 Misc. 429.

Covenants in Mortgages Bind Whom.—All covenants contained in any grant or mortgage of real estate bind the heirs, executors, administrators, successors and assigns of the grantor or mortgagor, and inure to the benefit of the heirs, executors, administrators, successors and assigns, of the grantee or mortgagee, in the same manner and to the same extent, and with like effect as if such heirs, executors, administrators, successors and assigns were so named in such covenants, unless otherwise in said grant or mortgage expressly provided.

Real Property Law, § 222. This was formerly L. 1890, Chap. 475, § 5.

Taxation of Mortgages.— Mortgages are subject to a recording tax of fifty cents for each one hundred dollars or fraction thereof, and are otherwise exempt.

See the Tax Law, Art. XIV, being L. 1905, Chap. 729, as amended by L. 1906, Chap. 532; and see amendments, L. 1907, Chap. 340; L. 1908, Chap. 296.

CHAPTER XXIV.

THE HOLDING AND TRANSFER OF REALTY BY CORPORATIONS.

TITLE I .- GENERAL POWERS TO TAKE AND TRANSFER LAND.

II .- TRANSFERS AND MORTGAGES, HOW MADE,

III .- MISCELLANEOUS PROVISIONS AS TO CORPORATIONS.

IV .- RELIGIOUS, EDUCATIONAL AND CHARITABLE CORPORATIONS.

V .- MONEYED CORPORATIONS.

VI .- Insurance Corporations.

VII .- RAILROAD CORPORATIONS.

VIII.— CEMETERIES AND BURIAL CORPORATIONS.

IX .- OTHER SPECIAL CORPORATIONS, ETC.

TITLE I. GENERAL POWERS TO TAKE AND TRANSFER LAND.

The power to purchase lands, in the course of its lawful operations, is a power incident at common law to every corporation, unless specially or impliedly restrained by its charter, or by statute; and when an authority to purchase is allowed or conferred, the power to sell is necessarily implied. The law as to devises to corporations has been reviewed in Chap. XV.

Jackson v. Bowen, 5 Wend. 590; Angell & Ames on Corporations, 83, et seq.; Moss v. The Rossie Lead Co., 5 Hill, 137; DeRuyter v. St. Peter's Church, 3 N. Y. 238; Barry v. Merchants' Ex. Ins. Co., 1 Sand. Ch. 280; Central Gold Co. v. Platt, 3 Daly, 263; Tyson v. Gibbs Mfg. Co., 11 Reporter,

A community not incorporated could not formerly purchase and take in succession. It has been so held with respect to the people of a county, Jackson v. Cory, 8 Johns. 385; and of a town, Hornbeck v. Westbrook, 9 id. 73; Hornbeck v. Sleight, 12 id. 199. The Revised Statutes altered this restriction as to counties, towns, etc. 1 R. S. 337, 364; 2 id. 473; County Law, L. 1892, Chap. 686, § 2; Town Law, L. 1890, Chap. 569, § 2; and infra, Tit. IX. See also, as to towns, Lorillard v. Town of Monroe, 11 N. Y. 392; People v. Stout, 23 Barb. 338. As to counties, Hill v. Livingston Co., 12 N. Y. 52; Jackson v. Hartwell, 8 Johns. 422.

A change of name or extension of powers does not alter rights in property

A change of name or extension of powers does not alter rights in property of a corporation. Girard v. Philadelphia, 7 Wall. 1. As to devises and the restrictions imposed by L. 1860, Chap. 360, see Robb v. Washington and Jefferson College, 185 N. Y. 485.

The term "corporations" as used in Article VIII of the Constitution of 1894 is to be construed to include all associations and jointstock companies having any of the powers or privileges of corporations not possessed by individuals or partnerships. Const. 1894, Art. VIII., § 3.

Definitions.— The word "person" when used generally in a statute declared to include corporations and joint-stock associations. Statutory Construction Law, G. L., Chap. I., L. 1892, Chap. 677, § 5.

See also General Corporation Law, L. 1890, Chap. 563 (amd. L. 1892, Chap. 687 and L. 1895, Chap. 672), which defines municipal, stock, nonstock, moneyed, domestic corporations and the various offices and terms used in connection therewith.

The General Corporation Law.—By L. 1890, Chap. 563 and L. 1802, Chap. 687, a complete consolidation and revision of the general law relating to corporations was made. L. 1890, Chap. 563, was to be "The General Corporation Law," being Chap. XXXV. of "The General Laws." It went into effect May 1, 1891, and the amending Act of 1892 was provided to take effect immediately. See also the amendments from time to time to "The General Corporation Law."

General Powers.—Under the head of "General Powers," L. 1890, Chap. 563, § 11 (as amd. L. 1892, Chap. 687 and L. 1895. Chap. 672) it is declared among other things, that every corporation as such has power to have a common seal and alter the same at pleasure, to acquire by grant, gift, purchase, devise or bequest, to hold and to dispose of such property as the purposes of the corporation shall require, subject to such limitations as may be prescribed by law.

The right to purchase was added by L. 1892, Chap. 687, § 11. Vide L. 1892, Chap. 687, and L. 1894, Chap. 400, amending "The General Corporation Law," enlarging limitation of amount of property that may be held by nonstock corporations.

A domestic corporation is authorized to acquire property in other states or foreign countries. Gen. Corp. Law, § 14 (amd. L. 1892, Chap. 687, L. 1903, Chap. 178).

Foreign Corporations .- Any foreign corporation created under the laws of the United States, or of any state of territory thereof and doing business in this State may acquire real estate necessary for its corporate purposes in the transaction of its business in this State, and convey same by deed or otherwise in the same manner as a domestic corporation. Gen. Corp. Law (L. 1890, Chap. 563, as amd. L. 1892, Chap. 687), § 17.

Any foreign corporation, however, may purchase at a sale, real estate mortgaged or taken as security for debts, and hold the same for not exceeding five years, and convey it the same as a domestic corporation. Id. § 18; and such corporations may take by devise and hold for five years and convey

it in the same way as a domestic corporation. L. 1894, Chap. 136.

A foreign corporation organized under the laws of one of the United. States may pursue a real estate business. Lancaster v. Amsterdam Impt. Co., 140 N. Y. 576.

To Acquire New Land.—Additional lands may be acquired, when any corporation shall have sold and conveyed any part of its real estate notwith-standing any provision of a general or special law by authority from the Supreme Court, had upon satisfactory proof that the value of the land so purchased does not exceed the value of the land so sold and conveyed, within three years next preceding the application. L. 1890, Chap. 563, § 13, amd. L. 1892, Chap. 687.

Conflicting Laws .-- As to conflicts of law, see L. 1890, Chap. 563 (Amd. L: 1892, Chap. 687), § 33.

Change of Name. - Vide, Code Civ. Proc., §§ 2411-2415.

The Stock Corporation Law.—An act was also passed June 7. 1800 (L. 1800, Chap. 564) to be known as "The Stock Corporation Law." It was not to apply to moneyed corporations. See L. 1890. Chap. 564, and L. 1892, Chap. 688 (G. L. Chap. XXXVI).

By this act a stock corporation may mortgage its property and franchises for debts or borrowed money contracted or used in its business. Every such mortgage, except purchase money mortgages and mortgages authorized prior to May 1, 1891, must have the consent of holders of not less than two-thirds of the capital stock, given either in writing or by vote at special meeting called for the purpose upon the same notice as is required for annual meetings, and a certificate under seal must be subscribed, acknowledged, filed and recorded.

In determining whether the necessary two-thirds are represented in the written consent to a mortgage, the amount of stock actually issued and owned is the basis. Swan v. Stiles, 94 App. Div. 117.

A creditor cannot take advantage of the omission of the two-thirds prerequisite, as the statute was intended for the benefit of stockholders, not creditors. Market & Fulton Nat'l Bank v. Jones, 7 Misc. 207.

Business Corporations Law.— This is supplementary to "The General Corporation Law" and "The Stock Corporation Law." It is known as "The Business Corporations Law" and is Chap. XLI of the General Laws, L. 1890, Chap. 567, as amd.

Prior Laws, etc.—Previous to the General Corporation Law of 1890, supra, now regulating the subject, corporations had, unless restrained by charter, the power to mortgage their property to secure borrowed money, or their debts; but without some special statute allowing it they could neither sell nor mortgage their franchises.

Carpenter v. Black Hawk Gold Mining Co., 65 N. Y. 43, criticised, 44 Hun, 133.

Receiving and applying the avails of a mortgage ratifies it though it had not been sufficiently authorized before execution. Whitney v. Trust Co.,

A corporation, though incorporated for a limited period, might acquire title in fee to lands necessary for its use; and it would take such fee without words of succession, and pass it to others; and a grant to it generally

would be a grant in fee.

Nicoll v. N. Y. & E. R. R., 12 N. Y. 121; People v. Mauran, 5 Den. 389;

Owen v. Smith, 31 Barb. 641; 1 R. S. 600, § 9; Gen. Corp. Law, § 30. See also 31 Barb. 411; id. 645; 30 id. 587; 7 Johns. Chan. 128; 46 Barb. 365; 42 id. 174; Yates v. Van De Bogert, 56 N. Y. 526. Contra, Turnpike Co. v. Illinois, 6 Otto, 63.

By the Revised Statutes of 1830, every corporation, as such, had power to hold, purchase and convey such real and personal estate as the purposes of the corporation should require, not exceeding the amount limited in its charter; and also to make and use a common seal, and alter the same at pleasure. 1 R. S. 599.

These provisions were made applicable as well to future corporations. 1 R. S. 600, § 2. McCullough v. Moss, 5 Den. 567; N. Y., etc., Ins. Co. v. Sturges, 2 Cow. 664. Unless otherwise provided, a majority of its directors, etc., was to act, and a decision of a majority assembled as a board was a

valid act. Id.

Its corporate powers ceased unless it organized and transacted business within a year from the date of incorporation; and its charter was subject to repeal, alteration or suspension by the Legislature. 1 R. S. §§ 7, 8; 5 Hill,

333; 14 Barb. 559; 10 Barb. 260; 17 id. 603; 8 id. 364.
Where its charter specified the objects for which it may hold real estate, held it could take it for another purpose. Boyce v. St. Louis City, 29 Barb. 650; Central Gold Mining Co. v. Platt, 3 Daly, 263. A provision in the charter enabling a corporation to take land by purchase or otherwise, held authority, within the statute of wills, to take by devise. Downing v. Marshal, 23 N. Y. 366. Held, one purchase does not exhaust the power. Johnson v. Utica, etc., Co., 67 Barb. 415.

States.— A statutory conveyance of property cannot strictly operate beyond the local jurisdiction, although its effect may be extended by State comity. Oakey v. Bennett, 11 How. 33; Van Horn v. Dollrance, 2 Dall. 304. See fully also, as to transfers from the State by letters patent, charter, grant, and legislative act, supra, Chap. I.

The United States .- The United States is a body corporate, having capacity to contract and to take and hold property in any of the States. When the United States purchases lands within the boundaries of a State, without the consent of the State, which it may do, the jurisdiction over the lands still continues, and the lex rei sitæ will govern. When the purchase is made for forts, docks, arsenals, etc., with the consent of the State, the lands fall within the exclusive legislation of Congress (U. S. Const. Art. People v. Godfrey, 17 Johns. 225; Stearns v. United States, 2 Paine, 300; U. S. v. Cornell, 2 Mass. 60; Constitution of U. S. Art. I, § 8; U. S. v. Ames, 1 Wood. & M. 76; Irvine v. Marshall, 20 How. 558; Act of April 28, 1828, 5 St. at L. 264; see also supra, Chap. XV, Tit. II, as to devises to the United States.

Cessions, etc.— See fully list of cessions to United States. L. 1892, Chap. 678. As to jurisdiction, condemnation, reservation, etc. Id.

Provision against Mortgaging. -- A provision against mortgaging does not preclude an equitable lien in favor of vendors of land to the corporation. Dubois v. Hull, 43 Barb. 26. See also McComb v. Barcelona App't Ass'n, 134 N. Y. 598; Rettenhouse v. Winch, 133 N. Y. 678.

Unlawful Alienations may be set Aside.— The Supreme Court is authorized to set aside and restrain all alienations of property made by a corporation contrary to law or its charter. Code Civ. Proc., § 1781. So formerly by 2 R. S. 462, § 33, repealed by Laws of 1880, Chap. 245. See Miller v. Quincy, 179 N. Y. 294; Lilienthal v. Betz, 185 N. Y. 153.

But where a corporate act is within the general power of the corporation and the invalidity arises from something not apparent in the grant of power, and extrinsic thereto, one dealing with the corporation in ignorance of that which vitiates, will not be necessarily affected thereby. So held for the protection of a title acquired for value and of long standing. Alward v. Holmes, 10 Abb. N. C. 96.

Only the corporation stockholders or creditors can impeach a transfer for want of previous action by the board of directors. Castle v. Lewis, 78 N. Y. 131. Cf. Market v. Fulton Nat. Bk., 7 Misc. 207.

See further as to ultra vires, infra, pp. 650, 651.

Transfers after Proceedings for Dissolution.—All conveyances, mortgages, assignments and transfers, etc., of real and personal estate made by a corporation after filing a petition for dissolution were declared *void* as against the receiver and creditors. 2 R. S. 469. As to such proceedings now, see Code Civ. Proc., §§ 2419-2431; also Sands v. Hill, 55 N. Y. 18, explaining the statute.

Increase beyond Amount Allowed to be Held by Law .- This has been held not to divest title, and the holding in excess invalid only as to the State. Chamberlain v. Chamberlain, 3 Lans. 348, modified in 43 N. Y. 424; Bogardus v. Trinity Church, 4 Sandf. Ch. 663, declared overruled 45 Hun, 371.

And indebtedness of the corporation it was held should be deducted in making the estimate. Wetmore v. Parker, 7 Lans. 12, affd., 52 N. Y. 450.

By Laws of 1882, Chap. 290, it was provided that any corporation having conveyed part of its real estate, might, with leave of court, acquire other property adjacent to that which it already holds, provided that the value of the new land does not exceed the value of the lands sold by the corporation within three years previous to the application.

See Laws 1889, Chap. 191, as to limit of value for other than business

corporations.

Foreign Corporations .- A legally constituted corporation in another State might hold land ad libitum in this State, provided it was authorized by charter. 2 Kent, 283.

This was the general rule. Christian v. Yount, 11 Otto, 352.

See Laws of 1877, Chap. 158, allowing foreign corporations to purchase lands at foreclosure in this State, and Laws of 1890, Chap. 563, and 1892, Chap. 687; Laws of 1894, Chap. 136, supra; Lancaster v. Amsterdam Imp. Co., 140 N. Y. 576; vide also supra.

TITLE II. TRANSFERS AND MORTGAGES, HOW MADE.

The real estate of a corporation can be conveyed by it only in its corporate capacity, and not by the individual members of the corporation or the stockholders; unless individuals have the title in their names. Nor can directors contract with themselves, as individuals, on behalf of the corporation.

Cammeyer v. United Lutheran Churches, 2 Sandf. Ch. 186; Wilde v. Jenkins, 4 Paige, 481; De Zeng v. Beekman, 2 Hill, 489; Coleman v. 2d Av.

Directors may lease without ratification by shareholders. Except by express provision of law ratification by shareholders is never requisite to contracts by directors. Beveridge v. N. Y. El. R. R. Co., 112 N. Y. 1.

The conveyance or mortgage is effected by the signing of the instrument by the proper officer or agent of the corporation, who has charge of the corporate seal, under its direction, and by the impression of the seal, with a proper attestation thereof; and that the same was affixed by authority of the corporation.

Proceedings by a corporation to mortgage, sell or lease its realty, whenever it is required by law to make application to court for leave are regulated by Code Civ. Proc., §§ 3390-3397.

The Affixing of the Seal is Prima Facie evidence that it was done by the authority of the corporation. Lovett v. The Steam Saw Mill Assn., 6 Paige, 54; Gillett v. Campbell, 1 Den. 520; Hoyt v. Thompson, 5 N. Y. 355; Jackson v. Campbell, 5 Wend. 572; Bank of Vergennes v. Warren, 7 Hill, 91; Whitney v. Union Trust Co., 65 N. Y. 576; Canandaigua Academy v. McKechnie, 19 Hun, 62, and 90 N. Y. 618.

If directors have been deprived of authority, except to close its concerns,

their conveyance would be void. Green v. Seymour, 3 Sandf. Ch. 285.

The instrument is usually signed by the president, and attested by the secretary. How far the authority to sign from the board should be shown, where a previous direction is necessary, vide Johnson v. Bush, 3 Barb. Ch. 207; Hoyt v. Thompson, 5 N. Y. 320; 3 Bosw. 267, 285; 2 Black. 715; Bank of Vergennes v. Warren, 7 Hill, 91.

It is stated in Hoyt v. Sheldon, 3 Bosw. 285, that a company would be

estopped from denying the authority of its officers to execute the instrument. So also Phillips v. Campbell, 43 N. Y. 271.

If the company receives and applies the avails of a mortgage, it ratifies it, even though made without authority. Whitney v. Union Trust Co., 65 N. Y. 576.

An assignment of all its property without specific authority from the company would be void. Murray v. Vanderbilt, 39 Barb. 140.

A treasurer cannot assign a mortgage without authority from the directors (Jackson v. Campbell, 5 Wend. 572), nor can the president and cashier. Hoyt v. Thompson, 5 N. Y. 320; 39 Barb. 140.

The recitals showing authority are not conclusive evidence. Hoyt v.

Thompson, 5 N. Y. 320.

Banking Associations under Law of 1838.— The president might assign mortgages under his own name. Valk v. Crandall, I Sandf. Ch. 179.

The Seal.—The seal must be that of the corporation. Mann v. Pentz, 2

Sandf. Ch. 257, revd., 3 N. Y. 415.

A seal of a corporation, court or public officer may be impressed directly upon the instrument or writing to be sealed or upon the wafer, wax or other adhesive substance affixed thereto, or upon paper or other similar substance affixed thereto by mucilage or other adhesive substance.

An instrument or writing duly executed, in the corporate name of a corporation, which shall not have adopted a corporate seal, by the proper officers of the corporation under their private seal, shall be deemed to have been executed under the corporate seal. been executed under the corporate seal. Statutory Construction Law, L. 1892, Chap. 677, § 13.

Formerly its seal had to be on wax or some other tenacious substance. By recent laws the seal, when it is authorized by law to be affixed, may be impressed on the paper. Code Civ. Proc., § 960, replacing Laws of 1848, Chap. 197, § 1, which was repealed by Laws of 1880, Chap. 245. By § 2 of the Act of 1848, instruments which had been so sealed before that act are declared valid.

Proof by the president signing the deed that the seal is the corporate seal, and was affixed by its authority, entitles it to be recorded. Lovett v.

Steam Saw Mill Assn., 6 Paige, 54; Johnson v. Bush, 3 Barb. Ch. 207.

It should be affixed by the officer having custody, by the direction of the managing officers. In the absence of proof, courts would presume it was affixed by authority of trustees, etc. Jackson v. Campbell, 5 Wend. 572; Moore v. Rector, etc., 4 Abb. N. C. 51. See also Curtis v. Leavitt, 17 Barb. 309, modified in 15 N. Y. 1; Leavitt v. Blatchford, 17 N. Y. 521, 541, as to bonds of a corporation.

A temporary seal may be adopted if the corporation have none, e. g., the seal of the trustees, Christie v. Gage, 2 Supm. 344, affd., 71 N. Y. 189; South Bap. Soc. v. Clapp, 18 Barb. 36; Hunter v. Hud. Riv. Co., 20 id. 494. See the latter case as to attestation by the treasurer, where the

company had no seal.

Two out of an appointed committee of three may act and affix the seal where the third is absent but has approved the act. Pres., etc. v. Troy, etc., Co., 7 Lans. 240. The body may subsequently ratify any act not ultra vires: as to acts of this nature, vide infra.

Execution by Agent .- It seems that the corporate seal and formal resolution of the directors are not necessary to the validity of a contract by a corporation. It may be signed by its proper agent with the name of office attached. Hascall v. Life Assoc. of America, 5 Hun, 151, affd., it seems, 66 N. Y. 616; Hoag v. Lamont, 60 id. 96.

See also Chap. XIX.

Acknowledgment .- The officer who is intrusted with and affixes the seal is the one to acknowledge the instrument; stating his authority, that he knows the seal, and that the same was affixed by the order of the board. Lovett v. The Steam Saw Mill Assn., 6 Paige, 54, 60; Johnson v. Bush,

Barb. Ch. 207.

A bond of a corporation is defectively executed, when the attorney signing on behalf of the corporation merely stated in the acknowledgment that "he executed the same." Howe Machine Co. v. Avery, 16 Hun, 555.

See § 258 of The Real Property Law for form of certificate of acknowledgments by corporation, and for form of certificate when by attorney in fact. Fowler's Real Property Law (2d ed.), 803.

Delivery .- The deed of a corporation, it has been said, does not need delivery, if the seal has been duly affixed with that intent, unless there is a direction to the contrary. Derby Canal Co. v. Wilmot, 9 East, 360.

Foreign Corporations.— As to validity of their acts see Code Civ. Proc. § 1779 (L. 1873, Chap. 634); also supra, Tit. I.

Sales of New York City Corporation realty to be published in "City Record." L. 1889, Chap. 108. N. Y. City Charter, § 220.

Utra Vires.— See Parmalee v. Assoc., Phys., etc., 11 Misc. 363.

Purchase money mortgage held valid. Farmers' L. & T. Co. v. Equity G. L. Co., 84 Hun, 373.

Creditors cannot take advantage of omission to obtain assent of stock-holders; the provision was intended to protect stockholders. Market & Fulton Nat. Bk. v. Jones, 7 Misc. 207.

Presumption of authority for deed by a corporation to a city. Hall v. City of Syracuse, 71 Hun, 465.

See also infra further as to unauthorized acts.

TITLE III. MISCELLANEOUS PROVISIONS AS TO CORPORATIONS.

The following provisions are of importance to note:

By the general corporation laws passed since 1889 almost all the corporation laws then existing in detailed form and for the most part mentioned in this chapter, were re-enacted, modified or repealed, and a codification was made under the appropriate general heads. They are referred to in this chapter. Laws of 1890, Chaps. 563, 564, 565, 566, 567; 1892, Chaps. 687, 688, 689, 690, 691; 1895, Chaps. 559, 723, and amendments. Vide Supra.

Certain Transfers Void-By the Revised Statutes any incorporated company that had refused the payment of any of its notes or evidences of debt, in specie or lawful money of the United States, could not make any transfer

of its property, etc., to any of its officers or stockholders, directly or indirectly, in payment of a debt; and no transfer, etc., in contemplation of insolvency to any person whatever, would be legal. And if insolvent for a year, or if it had neglected to redeem its notes, etc., or suspended business, etc., for a year, it should be deemed dissolved. 1 R. S. 603, § 4. The latter part of this section was repealed by Laws of 1880, Chap. 245. The whole section was repealed by subd. 39 of § 1, Chap. 402, of the Laws of 1882, but this repeal was stricken out by Laws of 1884, Chap. 434, so that the prohibition as to transfers again became operative.

The law as to prohibited transfers to officers and stockholders is now con-

tained in the Stock Corporation Law, § 48.

The above limitations did not, however, apply to religious corporations or to moneyed corporations created or renewed after Jan. 1, 1828.

1 R. S. 605; L. 1871, Chap. 883. . See also Tits. IV and V as to the present law. An assignment made not with the intent to prefer, but to enable the corporation to continue business, held valid. Swan v. Stiles, 94 App. Div. 117.

An assignment to pay creditors pro rata would be void. Harris v. Thompson, 15 Barb. 62; Sibell v. Remsen, 33 N. Y. 95.

Vide Tits. IV and V, as to moneyed corporations and religious societies; also Laws of 1825, Chap. 450; 3 Barb. 121; 11 id. 265; 30 id. 646; Bowen v. Lease, 5 Hill, 221; 44 Barb. 631; 36 id. 261.

Associations under the banking law held to be within the prohibition. Robinson v. Bank of Attica, 21 N. Y. 406.

Otherwise than as above provided, held a general assignment might be made of property, but not of the franchise. De Ruyter v. St. Peter's Church, 3 N. Y. 238; Hurlbut v. Carter, 21 Barb. 221.

But it seems that a general assignment by the directors of a corporation

of all its property would be void as against stockholders not consenting, whether the company were solvent or not. Smith v. N. Y. C. Stage Co., 18

Abb. Pr. 419.

A withdrawal of a bank deposit by a corporation whose president was a director in the bank held not to be within the prohibition of the statute. O'Brien v. East River Bridge Co., 161 N. Y. 539.

See Lopez v. Campbell, 163 N. Y. 340; Matter of Rogers Con. Co., 79 App.

Div. 419.

Unauthorized Purchase or Loan.—A corporation cannot avoid an obligation on the ground that it was given for property which the corporation was unauthorized to purchase. Moss v. The Rossie Lead Co., 5 Hill, 137; State of Indiana v. Woram, 6 Hill, 33.

That an act was ultra vires is no defense where the contract has been performed by the other party and the corporation has had the benefit of it. Woodruff v. The Eric Railroad Co., 93 N. Y. 609; Brower v. Brooklyn Trust

Co., 21 N. Y. Supp. 324.

If it loan in any manner unauthorized by its charter, the security is void.

Life, etc., Ins. Co. v. Mechanics' Ins. Co., 7 Wend. 31.

But the money may be recovered back. Steam Nav. Co. v. Weed, 17 Barb. 378; Mott v. U. S. Trust Co., 19 id. 568; Moss v. McCullough, 7 id. 279. See also on this subject supra, Title II.

Legislature May Confirm Void Grant .- The Legislature has the power to confirm a grant attempted to be made by a corporation, but void for irregularity. The People v. Law, 34 Barb. 494.

Banking Department.— As to assigning of mortgages held by it, without acknowledgment, see Banking Law, L. 1892, Chap. 689, § 4.

Sales by Court. Of railroad franchises; and reorganization. Laws of 1890, For amendments see railroad corporations and the general laws Chap. 565. as to them, infra, Tit. VII.

Reverter of Lands on Dissolution.—On the dissolution of a corporation without having aliened its lands, it was formerly the law that the title to land not transferred by it would revert to the original grantor or his heirs, unless there was provision to the contrary in its charter or by statute. Property undisposed of would now belong to the corporators.

The People v. Mauran, 5 Den. 389; Owen v. Smith, 31 Barb. 641; Tinkham v. Borst, 31 id. 407; Mahon v. N. Y. C. R. R., 24 N. Y. 658, is to the contrary as far as a turnpike franchise is concerned, the company having but an easement. The case of Bingham v. Weiderwax, 1 N. Y. 509, also intimates that there would be a reverter to the original grantor on a dissolution. See also Code Civ. Proc., § 2423. As to plank roads holding that the entire fee is taken, vide Heath v. Barmore, 50 N. Y. 302; id. 624.

Dissolution does not affect prior mortgages. People v. O'Brien, 111 N. Y. 1. See also Gunther v. Mayer, 67 Hun, 116, affd., 138 N. Y. 654.

Consolidation.— If two corporations be legally consolidated the rights and franchises of both the old ones vest in the new one.

People v. Brooklyn F. & C. I. R. R. Co., 89 N. Y. 75; L. 1892, Chap. 691, §§ 8, 10; The Transportation Corporation Law, L. 1890, Chap. 566, Art. VI, § 61; Art. VIII, § 104; Art. IX, § 138; also appropriate General Laws.

Change of Name of Corporations. By Act of April 21, 1870, Chap. 322, as amended Laws of 1874, Chap. 76, and Laws of 1876, Chap. 280, corporations, associations or societies, except banks or banking associations, trust companies, and insurance companies, may have their names changed on complying with the provisions of the act. The excepting clause originally covered companies created by special charter and railroad companies. See later law (amdg. L. 1870, Chap. 322, § 2), L. 1891, Chap. 38.

Banks, banking associations and trust companies might change their names

by complying with the provisions of Chap. 518 of the Laws of 1887.

Change of corporate name is now regulated by Code Civ. Proc., §§ 2411 et seq.

As to change of name and identity see First Society, etc. v. Brownell, 5 Hun, 464; also appropriate General Law.

Corporation adopting a name for the purpose of contract estopped from asserting that it was not the appropriate appellation. Hascall v. Life Assoc. of America, 5 Hun, 151, affd., it seems, 66 N. Y. 616.

Extension of Corporate Existence.— See Laws of 1890, Chap. 563; 1892, Chap. 687, § 32, and amendments.

Proceedings Against Corporations by Injunction and to Obtain Receivers .-Vide Code Civ. Proc., §§ 1809 to 1812, which substantially follow the Act of April 7, 1870, Chap. 151, which act was repealed by Laws of 1880, Chap. 245.

Dissolution for Insolvency, etc.—By the Revised Statutes if an incorporated company remained insolvent for a year, or for that time refused to pay its notes, etc., or for one year suspended its ordinary business, it was to be adjudged dissolved. 2 R. S. 463, § 38. This provision was repealed by Laws of 1880, Chap. 245, and, in place of it, the Code of Civil Procedure provides for an action to dissolve the corporation for such causes. Code Civ. Proc., §§ 1785, 1786.

Purchases of Franchises and Property of Corporations Sold by Mortgage, or by the Court, and Reformation of Companies.—L. 1873, Chap. 469, amd. by Laws of 1880, Chap. 113; L. 1890, Chaps. 564, 565; also appropriate General Law.

Certificates.— All certificates of incorporation required to be filed must also be recorded. L. 1881, Chap. 22; Gen. Corp. Law, § 5.

Amended Certificate. By Law of April 5, 1870, Chap. 135, where corporations were organized under general acts, and the original certificate was defective, an amended one might be filed, and the corporation deemed created from the time of filing the original certificate.

This was held to allow amendment only of patent defects or omissions. Matter of N. Y. & Lack. R. R. Co., 25 Hun, 556, affd., 88 N. Y. 379.

Held also not to apply to corporations formed under the Rapid Transit Act. Matter of N. Y. Cab. Ry. Co., 109 N. Y. 32.

See now Gen. Corp. Law, L. 1890, Chap. 563, § 7, regulating amended

and supplemental certificates.

Transfers to Stockholders .-- Corporations cannot make dividends except from surplus profits, nor transfer to stockholders, nor reduce the capital stock, without the consent of the Legislature. 1 R. S. 601, § 2; Stock Corp. Law, L. 1890, Chap. 564, as amd., § 23.

A special provision of a similar character as to moneyed corporations (1 R. S. 589, § 1), was repealed by Laws of 1882, Chap. 402, such corporations being regulated by Laws 1882, Chap. 409; later by L. 1892, Chap. 689, etc.

Corporations may Acquire Lands in other States .- By Law of March 28, 1872, Chap. 146, corporations organized here, and transacting business in several States, may acquire and convey in such States, with the consent thereof, real estate requisite for the convenient transaction of their business. Amended Laws of 1875, Chap. 119, so as to include foreign countries and stocks of other corporations representing real estate.

See Gen. Corp. Law (L. 1890, Chap. 663, as amd. by L. 1892, Chap. 687, amd., L. 1903, Chap. 178), § 14. Vide also Tit. I.

Devises to Corporations.—See fully as to this, supra, Chap. XV, Tit. X. Unless authorized by statute they cannot take land by devise. 4 Abb. Ct. App. 227.

This subject is now regulated by the General Corporation Law (L. 1890,

Chap. 563), § 11, supra, Tit. I.

Contracts between corporations, vide Stokes v. Phelps Miss., 47 Hun, 570.

In General.— The laws relating to corporations, both general and special, and their amendments are so numerous, that only exhaustive examination of the statutes and decisions should satisfy on the various questions of the authority of directors and the acquisition and transfer of property.

TITLE IV. RELIGIOUS, EDUCATIONAL AND CHARITABLE CORPORA-TIONS.

Religious corporations do not have the common law rights of other corporations to alienate their real property, but are under restrictions imposed by the Legislature.

Religious Corporations.—A complete consolidation and revision of the laws relating to religious corporations was made by L. 1895, Chap. 723, General Laws, Chap. XLII. This to be known as the Religious Corporations Law and embraces all corporations created for religious purposes.

Provision is made by §§ 3, 4, for incorporation and transfer of property of unincorporated religious societies, by incorporation.

By § 5, such corporations may maintain charitable, benevolent or educational adjuncts.

By §§ 6, 9, such corporations may acquire property for associate houses, church buildings, chapels, mission, parochial and Sunday schools, dispensaries of medicine for the poor or residences for ministers, teachers or employees.

For a general consideration of the authority of such corporations to take and hold property, see Tabernacle Church v. Fifth Ave. Church, 60 App. Div.

By § 7 religious corporations may take and hold by purchase. grant, gift or devise lands for cemetery purposes, and any property granted, given, devised or bequeathed to them in trust for the improvement, repair, etc., thereof; and may convey lots in the same by conveyance to be signed, sealed and acknowledged in the same manner as a deed to be recorded, which may, in the same manner. be recorded, and with like effect.

By § 11 as amended, sale, mortgage and leasing are regulated. provision being made for same on application to court.

By § 18 churches created by special laws have all the powers and privileges of the General Law, in addition.

As to amount of property that may be held, vide General Corporation Law, L. 1890, Chap. 563, § 12.

As to dissolution, vide L. 1872, Chap. 424, § 1.

For prior laws, etc., relating to this subject, see the following:

Act of 1813.— The trustees of every "religious society," incorporated under the Statute of 1813, originally enacted, were authorized to take into their the Statute of 1813, originally enacted, were authorized to take into their possession all its real estate and other temporalities, and to purchase and to hold other real and personal estate, and to demise, lease, and improve the same for the use of the church, etc., or other pious uses, so that its whole real and personal estate should not exceed the annual value or income of \$3,000. By Laws of 1875, Chap. 79, they were authorized to receive property by bequest or devise subject to the provisions of Laws of 1860, Chap. 360, provided that the annual net income, exclusive of pew rents, should not exceed \$12,000. By Laws of 1875, Chap. 443, the provisions of Chap. 79 were made applicable to any religious society, organized under the laws of the State, applicable to any religious society, organized under the laws of the State,

and the exclusion of pew rents in computing income was repealed.

and the exclusion of pew rents in computing income was repealed.

The Reformed Protestant Dutch Church of the city of New York, by said Law of 1813, might have an income of \$9,000; the First Presbyterian Church of the city of New York, \$6,000; St. George's Church, of the city of New York, \$6,000; St. George's Church, of the city of New York, \$6,000 was altered to \$6,000 for the churches in the city of New York. Laws of 1819, Chap. 33. Formerly religious corporations in this State, although authorized to purchase, take and lease lands, were not authorized to sell the same. The first general act for incorporating religious societies was passed April 6, 1784 (1 Greenl. 71), altered for Dutch Churches, March 7, 1788 (2 Gr. 132), amd. 1806, Chap. 43. The general act in force until the Religious Corporations Law was enacted in 1895, was passed April 5, 1813 (2 R. L. 212). It was not re-enacted in the Revised Statutes, but 1813 (2 R. L. 212). It was not re-enacted in the Revised Statutes, but appears in 3 R. S. 292. The act of 1813 was amended in various particulars by Laws of 1801, Chap. 79; 1814, Chap. 1; 1819, Chap. 33; 1822, Chap. 187; 1825, Chap. 303; 1826, Chap. 47; 1844, Chap. 158; 1850, Chap. 122; 1866, Chap. 414; 1867, Chap. 656; 1875, Chap. 354; 1877, Chap. 177; 1880, Chap. 327; 1882, Chap. 290; 1886, Chap. 98; Laws 1890, Chap. 424, and as here-

after stated. The Supreme Court (23 Barb. 327, formerly the chancellor), and also the County Court (Code of Civ. Proc., § 340, Code of Procedure, § 30, and Law of December 14, 1847, Chap. 470 [repealed by Laws of 1877, Chap. 417], amending Act of May 12, 1847), in any case deemed proper, on application from a religious corporation, may make an order for sale of real estate belonging to it. This act was not to extend to any lands granted by this State for the support of the Gospel. The county courts are to act on lands in the county. Laws of 1806, Chap. 43; 2 R. L. 218. See Code Civ. Proc., § 340. The vice-chancellor had the same power as the chancellor. The conveyance cannot be made gratuitously. 45 Barb. 356. The court cannot order a gift or surrender (19 Abb. 105), but may order an exchange or union with another society; but not unless there is a corporate consolidation on either side, so as to amount to a sale. Mad. Av., etc., Church v. The Bap. Church, 30 How. 455; 3 Rob. 570; 11 Abb. N. S. 133; 1 id. 214, partially reversed 46 N. Y. 131, and 73 N. Y. 82, on another appeal; Alex. Pres. Church v. Pres. Church, etc., 64 N. Y. 274.

As to correcting conveyances under wrong name, L. 1888, Chap. 459; Re-

ligious Corps. Law, § 10.

As to unions, vide Laws of 1875, Chap. 209; Rel. Corps. Law, § 12.

As to the limitation in amount of property, see Rector v. Rector, 68 N. Y.

As to the effect of Chap. 79 of the Laws of 1875 and Chap. 110 of the Laws of 1876, infra, as restricting sales, vide Matter of First Presbyterian Church, etc., 106 N. Y. 251.

"Pious Uses."- As to what are pious uses under the Laws of 1813, and how far the Law of 1813 is within subsequent general statutes as to trusts. vide supra, Chap. X, Tit. VIII.

As to what are pious uses under Chap. 701, Laws of 1893 (The Real

Property Law, § 93), see Fowler's Real Property (2d ed.), 448-454.

Diocesan Conventions or Religious Governing Synods or Bodies.— As to their formation, government and power to hold lands, vide Laws of 1876, Chap. 110. This act also provided for the disposition of the temporalities of extinct churches or parishes. Amd. L. 1880, Chap. 55; L. 1882, Chap. 23; L. 1886, Chap. 209.

Administration of Temporalities and Union of Religious Societies .- Laws

of 1876, Chap. 176.

This applied only to denominational societies. Stokes v. Phelps Mission, 47 Hun, 570.

Transfers by Protestant Episcopal religious societies in Western New York to the parochial fund, vide Laws of 1884, Chap. 124.

The Sale.—The trustees could not sell, etc., except as provided by the Act of 1813, amd. L. 1890, Chap. 424, or other acts. They had no power to make an absolute sale of a pew without reservation of rent, nor to sell without Consideration, even if so ordered by the court. Voorhees v. Presb. Ch., 8 Barb. 135, and 17 id. 103; Abernethey v. Ch. of Puritans, 3 Dal. 1; The Mad. Av. Ch. v. Bap. Ch., 46 N. Y. 131; 73 id. 82, overruling 3 Rob. 570; 30 How.

455.

Nor to make a sale closing the existence of a church. 16 Barb. 237; Wheaton v. Gates, 18 N. Y. 395; Cammeyer v. United German Lutheran Churches, 2 Sandf. Ch. 186; People v. Fulton, 11 N. Y. 94, 9 How. 132.

Nor can the court compel the trustees to sell. Id.

They may remove the church edifice without application. Second Bap Soc.,

20 How. Pr. 324.

A deed taken virtually in trust for a religious corporation, i. e., a naked trust, either express or implied, even without written declaration, will vest the legal title in the corporation, if it be afterward incorporated. Voorhees v. The Presb. Ch., 8 Barb. 135; Baptist Church v. Witherell, 3 Paige, 296; The Refd. D. Ch. v. Mott, 7 Paige, 77.

As to correcting defective deeds, L. 1888, Chap. 752; Rel. Corps. Law, § 10. The trustees are special not general agents and their unauthorized acts do

not estop the corporation. Moore v. Rector, 4 Abb. N. C. 51.

A devise to the trustees of a church is a devise to the church and the consent of the court must be had for a sale. Christie v. Gage, 2 Supm. 344, affd., 71 N. Y. 189.

Law of 1890 as to Mortgaging and Selling Realty.—By L. 1890, Chap. 424, § 11 of the Act of April 5, 1813, was amended so that any religious corporation might apply to the court for leave to mortgage or sell its realty, and might do so on obtaining leave of supreme or county court of the locality, with the proviso that the right was not to extend to lands granted by the State. Vide Rel. Corps. Law, L. 1895, Chap. 723 (as amd.), § 11, as to present law.

Pews.—Vide supra, p. 115; and Voorhees v. Presb. Ch. 8 Barb. 135; 17 Barb. 103; The Elders, etc., v. Witherell, 3 Paige, 296; also 12 Barb. 135; as to changes in the church edifice, and the rights of pew-owners. Also Abernethey v. Church of Puritans, 3 Dal. 1.

Poor Houses, etc.— Vide L. 1895, Chap. 607.

Legislative Authority.—An authority given by a general law to a religious corporation, to sell, for its own benefit, its real estate, held not to impair the obligation of contract nor violate any law, although its charter forbade the alienation of its real estate. Burton's Appeal, 57 Pa. St. 213.

Interference of Courts.—As to how far courts may interfere with the internal action of a religious society, vide Robertson v. Bullions, 9 Barb. 64, affd., 11 N. Y. 243; Youngs v. Ransom, 31 Barb. 50; Burrill v. Associate, etc., Ch., 44 id. 282.

As to how far a donation to it may be restricted in its use, and confined to the purposes for which it was given, vide same cases; also People v. Dilcher. 6 Lans. 172, as to the rights of a corporator, revg. 3 Lans. 434.

Held, court cannot order an exchange; only a sale. Mad. Av., etc., Church

v. Oliver St., etc., Church, 73 N. Y. 82.

As to division and alienation by parent church to a branch, vide Reformed Church v. Schoolcraft, 65 N. Y. 134.

A sale subject to the payment of all debts of the church may be authorized in a proper case. Lynch v. Pfeiffer, 38 Hun, 603, affd., 110 N. Y. 33.

Alienation, by Whom .- Held, all the trustees might execute a mortgage without previous resolution. S. Bap. Soc. v. Clapp, 18 Barb. 36.

But the power to make sales is in the court, and it may make them through

a referee. De Ruyter v. St. Peter's Church, 3 N. Y. 238.

And a sale of lands, etc., would not carry the franchise. Id. In the case of The Mad. Av. Bap. Ch. v. The Baptist Church, 46 N. Y. 131, 73 id. 82, it is held, that the trustees are the proper persons to take steps under § 11, L. 1813, Chap. 60, to make the sale, and their acts are binding without the assent of a majority of the corporation, overruling Wyatt v. Benson, 23 Barb. 327; and s. c., 4 Abb. 182.

The trustees of a religious corporation are not its corporators, but its managing agents, to make applications for sale or mortgaging, etc. St. Ann's Church, 14 Abb. 424; Robinson v. Bullions, 9 Barb. 64, affd., 11 N. Y. 243; Cammeyer v. United German Lutheran Churches, 2 Sandf. Ch. 186.

Under the Act of 1813, a religious corporation might mortgage its property without the order of the court. Manning v. Moscow P. Society, 27 Barb. 52;

Fifth Baptist Soc. v. Clapp, 18 id. 35.

Held the trustees must act as a body and not individually. Constant v. St. Alban's Church, 4 Daly, 305. They have the legal control and may bring actions for the property. First Methodist Church v. Filkins, 3 Supm. 279.

Law 1868, Amending the Act of 1813.— The above Act of April 5, 1813,

was extensively modified by the Act of May 9, 1868, Chap. 803.

By that act the churchwardens and vestrymen, and their successors, and the rector, if any, were to be a body corporate and trustees under the name expressed in the certificate. The rector was to be present at all meetings affecting realty. The general provisions of the act were to apply to Protestant Episcopal churches in the State, incorporated under the Act of 1813, or its amending acts; also to the various acts for the incorporation of religious societies, passed April 6, 1784; March 27, 1801, and March 17, 1795; and also to societies incorporated by special charter, before or after July 4, 1776, whereof the vestry should by regular meeting, vote to adopt the same, and it should be ratified by a majority vote of all qualified votes, as prescribed; provided a certificate of the resolution passed, etc., be filed with the county clerk, as in the act required. This act also repealed § 1 of Act of March 5, 1819; also § 3 of February 15, 1826, was not thereafter to apply to any Protestant Episcopal churches in the State. Inconsistent acts were repealed. See amendments, L. 1886, Chap. 98; 1890, Chap. 66.

The following acts supplementary to the Act of 1813 are also noted for reference, as they would affect title made under them:

Presbyteries.—Incorporation, trustees and control of temporalities, vide Laws of 1875, Chap. 381.

True Reformed Dutch Church.—Vide Laws of 1825, Chap. 303; might be incorporated under the Act of 1813.

Reformed Protestant Dutch Church .- Vide Law of April 15, 1835, Chap. 90.

Names of Religious Corporations Might be Changed.— Act of June 4, 1853, Chap. 323. See also Tit. III.

Burial Places Acquired by Religious Corporations.—See infra, Tit. VIII.

Other Lands May be Acquired.—See Laws of March 3, 1850, Chap. 122; April 10, 1860, Chap. 235, as to acquisition of other lands for churches, chapels, schools, rectories, etc. As to errors in record of certificate in the city of New York, vide L. 1863, Chap. 287; Rector v. Rector, 68 N. Y. 570; L. 1882, Chap. 290.

Greek Churches .- Laws of 1871, Chap. 12.

Reformed Presbyterian Churches or Congregations.—By L. 1866, Chap. 447, they might incorporate under the Laws of 1813 and 1822, supra.

Parsonages, etc., for Elders, Priests and for other Ministers.—Act of April 5, 1867, Chap. 265; amd. by L. 1868, Chap. 784, and L. 1875, Chap. 408.

Roman Catholic Churches.— L. 1863, Chap. 45. They may incorporate under the Act of 1813. The whole real and personal estate in value, exclusive of the church edifice, parsonage and school houses, and the land therefor, and burying places was not to exceed annually \$3,000. The act was not to be construed to alter or repeal the Act of 1860, Chap. 360, as to devises to religious corporations, etc.; and confirmed conveyances theretofore made to the use of the corporation.

Free Churches.— They may hold real estate, as in the case of "benevolent, charitable, etc., societies," under the Act of April 12, 1848, and April 7, 1849, vide infra, except that the limitation as to value shall not apply to any church edifice or lot for the same owned or occupied in the city of New York. L. 1854, Chap. 218, provided that no real estate of a free church can be sold or mortgaged without the direction of the Supreme Court, to be given as in cases of religious corporations. See also as to free churches or chapels, L. 1867, Chap. 657.

Religious Societies.—By Law of April 10, 1872, Chap. 209, religious societies were allowed to be incorporated under "the act for the incorporation of benevolent, charitable and missionary societies," of April 12, 1848, infra. By act of April 27, 1872, Chap. 424, religious societies might be dissolved by the Supreme Court, except in the city and county of New York, on application of a majority of trustees, and a sale of their property decreed.

Law of 1871, Chap. 776. This act extends the rights and powers, under the Law of April 5, 1813, to all religious corporations; the value of any school house or rectory not to be computed in any valuation. As to extinction of religious societies, Laws of 1880, Chap. 55.

Young Men's Christian Associations .- L. 1887, Chap. 50; L. 1889, Chap. 33; L. 1890, Chap. 104.

Young Women's Christian Associations.— L. 1891, Chap. 167.

Cruelty to Animals Societies.-L. 1888, Chap. 490; L. 1892, Chap. 291.

General Provisions of Statute as to Corporations. - Religious societies and moneyed corporations created or renewed after January 1, 1828, were excluded from the operation of Tit. 1V, Chap. XVIII, Part I, of the Revised Statutes relative to corporations generally. Laws of 1871, Chap. 883. See Rel. Corps. Law, § 19.

Ecclesiastics.— The Law of 1855, Chap. 230, prevented conveyances, etc., to those holding ecclesiastical offices, or for religious purposes, except under certain conditions. It was repealed by Law of April 8, 1862.

Associate Churches.— Establishment of, by parent church, vide L. 1879. Chap. 117.

Baptist Churches.— Vide L. 1873, Chap. 965.

Consolidation with other Societies.— Vide L. 1875, Chap. 37; L. 1880. Chap. 167.

Qualification of Voters.— Vide L: 1875, Chap. 597.

Benevolent, Charitable, Scientific and Missionary Societies. The Membership Corporations Law, L. 1895, Chap. 559, being Chap. XLIII of the General Laws, as amended, now regulates the incorporation of all such and similar societies.

Purchase, etc.— Purchase, sale, mortgage or lease of real property requires the concurring vote of at least two-thirds of the directors, provided that a majority of a board not less than twenty-one shall be sufficient; and the assent of the court is necessary to a sale or mortgage, or a lease for a longer period than five years. Mem. Corps. Law, § 13.

Such a corporation may be formed for any lawful purpose, except a purpose for which a corporation may be created under any other general law. Mem. Corps. Law, § 30.

This embraces among other objects, cemetery corporations, fire corporations, corporations for the prevention of cruelty, hospital corporations, christian associations, bar associations, veteran soldiers and sailors' associations, soldiers' monument corporations, boards of trade, agricultural and horticultural corporations, historical corporations, fine arts corporations, library corporations, Sunday schools, etc.

Five or more persons might associate themselves for benevolent, charitable,

scientific or missionary purposes. L. 1848, Chap. 319.

By L. 1848, Chap. 319, as amended by L. 1885, Chap. 88, such corporations might take, receive, purchase and hold real and personal estate for the purposes of their incorporation only to an amount not over \$2,000,000, the clear income of both not to exceed \$200,000.

They may now take and hold to the value of \$3,000,000, the yearly income not to exceed \$500,000.

See Gen. Corp. Law (L. 1890, Chap. 563, as amd.), § 12. See also L. 1889, Chap. 191; L. 1890, Chap. 553.

As to the general restrictions on "devises" to them, see L. 1848, Chap. 319,

6; L. 1860, Chap. 360; and supra, Devises, Chap. XV, Tit. X. The benefit of the Law of 1860, Chap. 360 is not confined to relatives mentioned in it. Robb v. W. & J. College, 185 N. Y. 485.

By L. 1849, Chap. 273, the trustees of such societies, by conforming to the requisites of the first section of the Act of 1848, may reincorporate themselves for the time limited, and the property, etc., of the existing corporation shall vest in the reincorporation. The act was amended as to real property, etc. L. 1872, Chap. 649, and further amended so as to include many new objects by L. 1881, Chap. 254 and Chap. 526.

As to the number of trustees, vide L. 1875, Chap. 452, and as to extension of term of existence, L. 1876, Chap. 190; also L. 1882, Chap. 367, restricting

the formation of such corporations.

Benevolent Orders. - See Benevolent Orders Law, L. 1896, Chap. 377, being Chap. XLIV of the General Laws; also L. 1892, Chap. 290; L. 1893, Chap. 72; L. 1895, Chap. 713.

As to their acquisition and holding of property, see §§ 3, 9.

Fine Art Associations. - Such associations might be incorporated under the Law of April 12, 1848, and amending acts. As to what property they may take, vide Laws of 1860, Chap. 242.

The Membership Corporations Law, L. 1895, Chap. 559 is now applicable,

and such associations may be incorporated under it.

Held under the Law of 1848, a corporation for business purposes, although having the temporal interests of others for one of its objects, cannot be incorporated. People v. Nelson, 46 N. Y. 477.

Reports, Penalties, Inspection, Trials, etc.—Laws of 1881, Chap. 256: amended by Laws of 1881, Chap. 641.

This last act does not affect § 6, L. 1848, Chap. 319. Matter of Connor, 44 Hun, 424.

Sunday School, Mission, Religious Knowledge or Opinion .- The Law of 1848, Chap. 319, was amended to include corporations for such purposes. L. 1872, Chap. 649; religious societies; L. 1872, Chap. 209. The act was also further amended to include historical, literary and art societies. Laws of 1860, Chap. 242; 1862, Chap. 302; also orphan asylums. Laws of 1861, Chap. 58.

Sales and Mortgages .- The Supreme Court, upon the application of any benevolent, charitable, scientific or missionary society, incorporated by law, was authorized to make an order for the mortgaging of any real estate belonging to said corporation, and direct application of proceeds. Laws of 1854, Chap. 50. See further amendments, Laws 1862, Chap. 358; Laws 1870, Chap. 51; Laws 1889, Chap. 395; Laws 1890, Chaps. 425, 518. The Act of 1854, Chap. 50, giving the Supreme Court authority to make an order, on application of any charitable, benevolent, etc., association, authorizing the mortgaging of its real estate, operates to prohibit the execution of such a mortgage without the order, and a mortgage executed without it is void. Dudley v. Congregation, etc., 138 N. Y. 451. See also Laws of 1861, Chap. 58, allowing sales or leases through the Supreme Court on application of three-fourths of trustees; also including orphan asylums. No purchase, lease or sale of real estate, however, shall be made, unless two-thirds of the whole number of trustees are present at the meeting ordering it. See Laws of 1853, Chap. 487, as to the above and as to the trustees generally.

The subject of sales, mortgages and leases by such corporations is now regulated by the Membership Corporations Law, § 13. Vide supra.

Corporations to establish Educational Institutions, Chapels or Places of Worship, Parsonages, Rectories, Residences of a Bishop or Ministers.—The Law of April 12, 1848, supra, was, by Law of March 8, 1870, Chap. 51, extended to societies for the above purposes. See also L. 1889, Chap. 191; L. 1890, Chaps. 49, 553.

See now Mem. Corps. Law, L. 1895, Chap. 559.

Academies and Colleges.— By I. R. S. 460 colleges were authorized to take and hold by gift, grant and devise, any real or personal property, the yearly revenue or income of which shall not exceed the value of \$25,000, and to sell, mortgage, let and otherwise use and dispose of such property, in such manner as they shall deem most conducive to the interest of the college. Similar provisions are made as to academies (Id. 463), except that the limitation is \$4,000.

This applies to all colleges and is not affected by acts of 1840 or 1841, supra, Chap. X, Tit. VIII.

Matter of McGraw, 111 N. Y. 66.
Limit of property extended. L. 1889, Chap. 139.
By Law of March 8, 1870, Chap. 51, any university or college incorporated under said Act of 1848, or of 1870, may hold by gift, grant, devise or bequest, property or endowment not exceeding \$1,000,000, subject to the restrictions of the Act of 1860, Chap. 360, as to devises. The act was in other respects

See now Gen. Corps. Law, § 12, as amd., as to the amount of property which may be held. This removed prior limitations.

L. 1860, Chap. 360, as to devises is still in force and applicable.

Trusts in Favor of Charitable and Educational Corporations, etc.—Vide Chap. X. Tit. VIII. The only power in educational and charitable corporations to hold property in perpetuity in trust was formerly by virtue of their charters and the Acts of 1840 and 1841. Supra, Chap. X, Tit. VIII, vide Adams v. Perry, 43 N. Y. 487; Wetmore v. Parker, 52 id. 450.

See later general acts, supra.

Trustees of Charitable and Benevolent Institutions .- By Law of March 12, 1872, Chap. 104, no trustee or director of any charitable or benevolent institution organized either under a general act or special charter, shall receive any salary or emolument.

By the Mem. Corps. Law, the same regulation obtains unless the by-laws provide otherwise or the concurring vote of two-thirds of the directors authorizes same. Mem. Corps. Law, L. 1895, Chap. 559, § 12.

Public Libraries.— Laws of 1872, Chap. 458, amd. by Laws of 1885, Chap. 479; Laws of 1888, Chap. 328.

As to the validity of devises and bequests to these corporations and the restrictions upon them, vide Stephenson v. Short, 92 N. Y. 433; also supra, Chap. XV, Tit. X.

They are now within the Mem. Corps. Law.

Posts of the Grand Army of Republic authorized to hold land. Laws of 1888, Chap. 290.

TITLE V. MONEYED CORPORATIONS.

Banking Corporations.—By Laws of 1892, Chap. 689, a complete consolidation and revision of the law relating to Banking Corporations was made, being Chap. XXXVII, of the "General Laws." It was known as "The Banking Law."

It includes banks, savings banks, trust companies, building and mutual loan corporations, co-operative loan associations, mortgage, loan and investment corporations, and safe deposit companies. All the corporations subject to the Banking Department are included. The various classes are enumerated and defined; § 2.

See the various amendments from time to time.

Banks.— These are regulated by Article II of the Banking Law and specification is made as to what real property may be taken, or be mortgaged to them, in addition to the powers conferred by the General Corporation and Stock Corporation Laws.

They may not purchase, hold or convey real property in any other case or for any other purpose, and all conveyances of real property shall be made to them directly and by name. The Banking Law, § 43.

See L. 1882, Chap. 409.

As to merger of Banking Corporations, see Banking Law, §§ 34-38, added

by Laws 1895, Chap. 382, repealing §§ 45, 46, 47, 48 thereof. Effect of merger, Bank of Long Island v. Young, 101 App. Div. 88.

Joint-stock Corporations .- Laws 1894, Chap. 265, constituting Chap. XLV, General Laws.

Savings Banks.—These are regulated by Art. III of the Banking Law. Specification is made as to how funds may be invested, and the amount of property that may be held; also as to what property may be taken and held for a fixed time.

See amendments.

Banking Law. Specification is made as to how funds may be in-Banking Law. In addition to the general powers conferred by the General, and Stock Corporation Law, provision is made as to their taking and conveying of realty, and their general powers.

The deposits may be invested in securities of the same kind as the capital or in such real securities as such corporation may deem proper. Banking Law, § 159.

See amendments, L. 1903, Chap. 160, and L. 1904, Chap. 479.
Specially chartered trust companies shall possess these rights and be subject to the provisions of thic General Law when not inconsistent with their charters. § 163.

Building and Mutual Loan Corporations.—These are regulated by Art. V.

Building and Lot Associations.—These are regulated by Art. VI. (Added L. 1898, Chap. 193.)

Mortgage, Loan and Investment Companies.—These are regulated by Art. VII. (Amd. L. 1896, Chap. 452.)

Safe Deposit Companies.—These are regulated by Art. VIII.

Prior Laws, etc.—By Chap. 409 of the Laws of 1882, § 186, no conveyance, assignment or transfer of real estate, etc., by a moneyed corporation, over the value of one thousand dollars, was valid without previous resolution of its board of directors. But conveyances in hands of bona fide purchasers for value were protected. As to who are bona fide purchasers as above, vide Curtis v. Leavitt, 15 N. Y. 9.

1 R. S. 540, § 8, was similar in its terms and was repealed by Laws of 1882, Chap. 402. Chap. 409 of the Laws of 1882 was the general banking

act and superseded many former laws which had accordingly been repealed.

It was repealed by the Banking Law of 1892, Chap. 689.

It was held in Gillet v. Campbell, 1 Den. 520, that this provision only applied to corporations that had a board of directors or trustees by their charters. See also Gillet v. Moody, 3 N. Y. 479, 486, declared overruled, 52 Hun, 216, partially overruling the above. Leavitt v. Blatchford, 17 N. Y. 521, partially reversing the latter case.

An assignment, though made without previous resolution, may be made valid if ratified by a subsequent one. Curtis v. Leavitt, 15 N. Y. 9.

The above provision of the Revised Statutes, § 8, did not apply to a sale of mortgages or securities pledged to secure a loan, made to realize the money secured by the pledge. The Corn Bank v. Ten Eyck, 48 N. Y. 305.

As to who may object to the transfers as illegal, vide Eno v. Crooke, 10 N. Y. 60; Elwell v. Dodge, 33 Barb. 336. The latter case is partially overruled in Houghton v. McAuliff, 26 How. Pr. 270.

Preferences.—By Code Civ. Proc. § 2430, all assignments, conveyances, mortgages or other transfers made by a corporation after filing a petition for dissolution are void.

No conveyance, assignment, etc., made by any such corporation, or any judgment suffered, lien created or security given by any such corporation when insolvent or in contemplation of insolvency with a view of creating a preference to creditors, should be valid. This was in the act of 1882, Chap. 409, repealed as above. This is now embodied in § 48 of the Stock Corporation Law, L. 1802, Chap. 688.

When a friendly suit amounts to such an assignment. In re Bowery Bank, 16 How. Pr. 56.

An assignment to pay creditors pro rata, not made to officers, has been held valid. Haxton v. Bishop, 3 Wend. 13; 16 Barb. 280; 21 id. 221; Curtis v. Leavitt, 15 N. Y. 9. The section applies to insurance companies. Id.

As to whether the provision of the Revised Statutes applied to associations organized under the old banking law, vide Gillet v. Campbell, 1 Den. 520. Compare Gillet v. Moody, 3 N. Y. 479, and Leavitt v. Blatchford, 17 N. Y. 521.

compare Gillet v. Moody, 3 N. Y. 479, and Leavitt v. Blatchford, 17 N. Y. 521. The intent to prefer must be shown under an insolvency that exists or is expected. Curtis v. Leavitt, 15 N. Y. 9; Leavitt v. Blatchford, 17 id. 521. In order to avoid the transfer, it is immaterial whether the creditor has knowledge or not of the status of the corporation. Brower v. Harbeck, 9 N. Y. 589. See also 17 Barb. 316; 5 Barb. 15; Leavitt v. Blatchford, 1 Sandf. Chan. 209; 4 Edw. 170; 1 Du. 129; Furniss v. Sherwood, 3 Sandf. 523; Gillet v. Moody, 3 N. Y. 479; 16 How. Pr. 57; Marine Bank of N. Y. v. Clements, 31 N. Y. 33. 31 N. Y. 33.

For further decisions under this section, see O'Brien v. E. River Bridge Co., 161 N. Y. 539; Lopez v. Campbell, 163 id. 340; Matter of Rogers Construction Co., 79 App. Div. 419; Swan v. Stiles, 94 id. 117.

Conveyances, etc., for its benefit, to be valid, must be made to a moneyed corporation directly and by name. Banking Law, § 43.

Conveyances or assignments for the benefit of creditors were excepted.

L. 1882, Chap. 409, § 185, following 1 R. S. 591, § 7.

Banking Associations.— A banking association might hold real estate. The laws regulating this were Law of 1890, Chaps. 429, 525; 1888, Chap. 373; 1889, Chap. 177; 1882, Chap. 409, repealing R. S., Part 1, Chap. XVIII, Tit. III; 1838, Chap. 260; 1849, Chap. 313. The subject is now regulated by the Banking Law (L. 1892, Chap. 689), and its amendments, supra.

Trust Companies. See Law 1887, Chap. 546; Law 1888, Chap. 373; Law 1890, Chap. 439; Law 1891, Chap. 374; now L. 1892, Chap. 689.

Savings Banks.— Saving Banks might hold real estate as provided by Law of 1882, Chap. 409. See also p. 669.

These provisions were in Laws of 1875, Chap. 371, § 29, which was repealed by Laws of 1882, Chap. 409. These subjects are now regulated by the provisions of the Banking Law, L. 1892, Chap. 689, and its amendments,

National Banks.- Mortgages to national banks to secure future advances are valid. National Bank v. Whitney, 13 Otto, 99; Simons v. First Nat. Bk., 93 N. Y. 269.

TITLE VI. INSURANCE CORPORATIONS.

By Laws of 1892, Chap. 690, a complete consolidation and revision of the laws as to these was made, being Chap, XXXVIII of the General Laws, to be known as the Insurance Law. As regards their taking and transferring of land, see Insurance Law (as amd.). § 20.

The Insurance Law was amended generally, L. 1896, Chap. 326.

Prior Laws, etc.— The following are some of the most important former acts relating to insurance companies as regards their realty:

Fire, Marine and Life Insurance Companies. - By L. 1849, Chap. 308, amd. 1889, Chap. 424, repd. 1892, Chap. 690, such companies may hold and convey real estate, as is provided for banking associations, supra, p. 662. Other real estate not required shall be sold and disposed of in five years after acquisition, unless the "comptroller" give a certificate to the contrary.

Law of 1853, Chap. 466, for the incorporation of fire insurance companies; similar provisions as in the Law of 1849; the 3rd subdivision being modified that they are to take real estate for debts previously contracted in their legitimate business or for moneys due. Companies incorporated under the Law of 1849 are brought under the provisions of the act, and the Law of 1849 is partially repealed as to fire and inland navigation insurance companies. As to investment on mortgage, vide Law of April 29, 1863, Chap. 242; also Chap. 263; also L. 1864, Chap. 563; L. 1865, Chap. 451; L. 1871, Chap. 608; L. 1875, Chap. 423.

Life and Health Companies; Law of 1863, Chap. 263.— This law contained similar provisions to those in the above Law of 1849. Certain sections of the latter act were repealed. See also amendment, L. 1865, Chap. 328, extending the law to every kind of insurance except fire, marine, and life. See also Law of 1866, Chap. 525, as to their investments; amended, as to annual statements, Law of 1866, Chap. 785; see also Law of 1873, Chap. 170.

Life and Casualty Companies.- Laws of 1883, Chap. 175; Law of 1887. Chap. 285; Law of 1889, Chap. 566.

Life and Health Insurance Companies in New York city. Restrictions as to investments on mortgage to certain property. See Laws of 1876, Chap. 357. Original act, Laws of 1853, Chap. 463, amended by Laws of 1888. Chap. 511.

Health and Casualty Companies .- Law of 1887, Chap. 215; Law of 1889. Chaps. 203, 338.

Co-operative Insurance Companies.— L. 1881, Chap. 171; 1883, Chap. 175; 1884, Chap. 353; 1887, Chaps. 167, 285.

Town Insurance Companies.—Law of 1873, Chap. 561, amending prior Law of 1872, Chap. 235; see also L. 1874, Chap. 560.

As to real estate bought in by an insurance company on foreclosure and the effect of L. 1853, Chap. 466, vide Home Ins. Co. v. Head, 30 Hun, 405.

TITLE VII. RAILROAD CORPORATIONS.

By Laws 1890, Chap. 565, a complete consolidation and revision of the laws as to railroads was made, being Chapter XXXIX of the General Laws, to be known as the Railroad Law. The acquisition of property is provided for in said law, § 7.

See Railroad Law, L. 1890, Chap. 565, and amendments.

Prior Laws, etc.—The following of the many general acts relating to railway corporations, under former laws, are designated for reference as bearing more or less on their real estate.

April 23, 1839, Chap. 218.—To contract for the use of other roads. May 7, 1847, Chap. 222.—To connect tracks of different companies.

May 7, 1847, Chap. 222.—To connect tracks of different companies. May 12, 1847, Chap. 272.—To alter lines and to acquire title to land. Nov. 27, 1847, Chap. 404. To alter routes and to acquire title to lands. Nov. 27, 1847, Chap. 405. To lay second tracks. Apr. 2, 1850, Chap. 140, amd., 1889, Chap. 426; 1890, Chap. 98, repd., 1892, Chap. 687. A general act. Amended 1876; Chap. 77 and Chap. 198. The acquisition of the title to lands. Amended Apr. 15, 1854, Chap. 282; Apr. 14, 1857, Chap. 444; 1851, Chap. 19; Feb. 13, 1851, Chap. 637. To use a common track. 1853, Chap. 53. As to acquiring lands, etc. 1854, Chap. 282. As to acquiring lands. Laws 1871, Chap. 560; 1872, Chap. 81; 1877, Chap. 222. As to roads to be laid over railway tracks, see 1853, Chap. 62; Boston, etc., R. R. v. Greenbush, 52 N. Y. 510.

Judgment creditors are not entitled to compensation as "owners" under the above statutes. Watson v. N. Y. C. R. R. Co., 47 N. Y. 157.

Railroads in Cities.— Act of April 4, 1854, Chap. 140; and supra, p. 54. A railroad company may lease to another railroad company, but not to an individual. Fisher v. Met., etc., Co., 34 Hun, 433.

Street Railroads.- Laws 1884, Chap. 252; Laws 1890, Chap. 483.

Railroads Held under Lease .- Vide supra, p. 221.

Apr. 12, 1855, Chap. 302.—As to railroads under lease and the acquisition of stock of another company, vide Fisher v. The N. Y. C. & H. R. R., 46 N. Y. 644.

Apr. 14, 1857, Chap. 444.—Purchases on mortgage sales, and as to acquisition of special lands.

May 5, 1864, Chap. 582.— As to fences, railways over highways, taking lands for railway purposes.

Apr. 20, 1866, Chap. 697.—Railroads operating by stationary power, etc.

Apr. 3, 1867, Chap. 254.— In relation to railroads held under lease.

Apr. 22, 1867, Chap. 515.— Proceedings to obtain lands for the road.

Apr. 22, 1867, Chap. 515.—Proceedings to obtain lands for the road. Apr. 25, 1867, Chap. 775.—Corporate existence to cease, unless the road is begun in five years, and ten per cent. of capital expended, and the road operated in ten years from formation.

May 9, 1868, Chap. 779.—Mortgages need not be filed as chattel mortgages. But see Hoyle v. Plattsburgh, etc., R. R. Co., 54 N. Y. 314.

Apr. 17, 1869, Chap. 237.—As to acquiring additional real estate and the use of waters. 1875, Chap. 586.

May 20, 1869, Chap. 917.—Authorizing the consolidation of railroad companies. Land may be taken for depots, and other conveniences for railroads, under the general railroad act and amendment of 1869, Chap. 237, even though the company is a lessee. *In re* N. Y. & H. R. R. v. Kip, 46 N. Y. 542, approved; Matter of U. E. R. R. Co., 113 N. Y. 281. The lands when taken are taken free of judgment liens, under certain statutes, when "owners" have to be made parties. Judgment-creditors are not "owners." Watson v. N. Y. C. R. R., 47 N. Y. 157. The use of the track by a railroad is a franchise in the nature of a contract, and inviolable, except under the general power of the State to alter or repeal the charter. In re Central Park, 63 Barb. 282. See, as to taking land in invitum, In re Norton, 63 Barb. 77. This act was amended by Laws of 1873, Chap. 352; 1874, Chap. 240, as to extension of time of the franchise.

Mortgages by Railroads of the Franchise and Property.- Such mortgages must be recorded in the several counties where the road is laid. The track

must be recorded in the several counties where the road is laid. The track and fixtures may be mortgaged without the franchise.

See, as to such mortgages, Seymour v. The Canandaigua, etc., R. R., 25 Barb. 284; Stevens v. Buffalo, etc., Co., 31 id. 590; Beardsley v. Ontario Bk., 31 id. 619; Pennock v. Coe, 23 How. (U. S.) 117; Farmers' Loan, etc., Co. v. Hendrickson, 25 Barb. 484, overruled, 47 id. 104; Hoyle v. Plattsburgh, etc., R. R. Co., 54 N. Y. 314; Elwell v. Grand St., etc., Co., 67 Barb. 83. See also Law of 1854, p. 608, allowing a new company to be formed after sale. Also supra, p. 608. Also Laws of 1874, Chap. 430; Laws of 1876, Chap. 446. Also Law of 1868, Chap. 779. See also supra, p. 609, as to mortgages of franchises and after-acquired property; and Pennock v. Coe, 23 How. 117; Stevens v. Watson, 45 How. Pr. 104. See Shaw v. Bill. 5 Otto. 10. See also, as to the taking of land by railroad Shaw v. Bill, 5 Otto, 10. See also, as to the taking of land by railroad corporations, "Eminent Domain," supra, Chap. II.

One Line Used by Two Companies.— Laws of 1872, Chap. 843.

Transportation Corporations Law.—By Laws 1890, Chap. 566, a consolidation and revision of the law pertaining to various corporations engaged in transportation, excluding railroads was made. It includes ferry, navigation, stage coach, tramway, pipe line, gas and electric light, water works, telegraph and telephone, turnpike, plank-road and bridge corporations, and was to be known as the Transportation Corporations Law, being Chap. XL of the General Laws.

As to the acquiring and disposition of realty by them, vide Laws of 1890, Chap. 566, as amended.

This act of 1890 does not affect railroads.

TITLE VIII. CEMETERIES, AND BURIAL CORPORATIONS.

These are now regulated by the Membership Corporations Law, Laws 1895, Chap. 559, being Chapter XLIII of the General Laws.

Vide Art. III, as to these corporations.

Prior Laws, etc.- The following former acts with reference to corporations or associations of the above character, are designated for reference:

By the Revised Statutes, land used as a burying ground for fourteen years before January 1, 1830, is declared to be vested in the town so using it. 1 R. S. 360. Act April 11, 1842, Chap. 153, allowing religious corporations to acquire lands for burial purposes. Act of April 11, 1842, Chap. 215, restricting mortgages of burial grounds by religious corporations. Section 2 of this act was partially amended by Laws of 1878, Chap. 349, as to the removal of remains. This latter act was amended by Laws of 1887, Chap. 600.

Code Civ. Proc., §§ 1395, 1396, following Act of 1847, Chap. 85, which was repealed by Laws of 1877, Chap. 417, as to exemption of burial lots from execution. April 27, 1847, Chap. 133. Rural Cemetery associations.— Makes provision as to the acquisition and transfer of their realty; and the use thereof. This act was amended April 14, 1852, Chap. 280; also April 5, 1853, Chap. 122; April 14, 1852, Chap. 238; April 5, 1860, Chap. 163; 1861, Chap. 94; also 1869, Chap. 708; 1870, Chap. 760; 1871, Chaps. 378 and 696; May 8, 1873, Chap. 361; 1874, Chaps. 201 and 245; 1877, Chaps. 31 and 156; 1879, Chaps. 107 and 108; 1886, Chap. 593; L. 1888, Chap. 484; 1891, Chap. 344. The association owns the fee, the lot owners have the usufruct of their lots. The Buff. C. Cem. v. City of Buf., 46 N. Y. 503; Law of 1871, Chap. 419, as to sale of unoccupied lands.

May 7, 1847, Chap. 209.— Cemeteries may be purchased and established in incorporated villages, and lands acquired therefor; amended, Laws of April 2, 1864, Chap. 117; 1872, Chap. 696; 1881, Chap. 497; 1890, Chap. 229; 1891,

Chap. 382.

March 30, 1850, Chap. 122.—Allowing religious societies to acquire land for burial purposes; also, cities, etc., by trusts, *supra*, p. 312. *Vide* Laws of 1881, Chap. 501, as to sale of lots.

Private and Family Cemeteries.—April 1, 1854, Chap. 112; amended March 6, 1871, Chap. 68.

Monument Associations, to perpetuate the memory of Union soldiers, March 30, 1866, Chap. 273; Supplementary Acts, 1875, Chap. 35; 1877, Chap. 136.

National Cemeteries.—Act of Congress, February 22, 1867, Chap. 61, and July 1, 1870, Chap. 200.

Cemeteries in Villages.—1869, Chap. 727; 1870, Chap. 760; 1871, Chap. 696; 1873, Chap. 452; 1875, Chap. 206.

Burying Grounds .- March 5, 1873, Chap. 46.

Taxes on Lot Owners of Rural Cemeteries.—Vide Law 1847, Chap. 133; 1852, Chap. 280; 1854, Chap. 238; 1868, Chap. 402, amended by Laws of 1877, Chap. 426; 1888, Chap. 415; 1889, Chap. 389; and Buff. City Cem. v. City of Buffalo, 46 N. Y. 503 and 506, showing that assessment should be against cemeteries, and not lot-owners; and that such associations, though exempt from taxes, are liable to assessment for local improvements. Mortgaging and foreclosing on cemetery lots, vide Lantz v. Buckingham, 11 Abb. N. S. 64; Thompson v. Hickey, 8 Abb. N. C. 159. See preceding chapter "Mortgages."

A cemetery lot bought by husband, improved by wife's money and used for her family, cannot be sold by the husband without the wife's consent.

Shroder v. Wanzor, 36 Hun, 423.

As to taking and holding land by Rural Cemetery Associations, see L. 1892, Chap. 498.

As to necessity of consent of supervisors in New York, Kings, Westchester and Rockland counties, to purchase land, L. 1889, Chap. 389.

Sale of realty on dissolution, L. 1895, Chap. 149.

Deed.— Deed is not necessary where interment follows purchase and payment. Conger v. Weyant, 7 N. Y. Supp. 809, affd., 132 N. Y. 578. See also p. 533 supra.

Monument Associations. - Laws 1888, Chap. 299.

TITLE IX. OTHER SPECIAL CORPORATIONS, ETC.

By Chap. 567 of Laws of 1800, a consolidation and revision of the many laws relating to these was made, being Chapter XLI of the General Laws, under the title of the Business Corporation Law.

Vide L. 1890, Chap. 567 and amendments.

By L. 1894, Chap. 235, a consolidation of the laws relating to joint stock companies and associations was made, being Chapter XLV of the General Laws, to be known as the Ioint Stock Association Law.

Vide L. 1894, Chap. 235, and amendments.

As to the authority of a joint stock association to take, hold and convey real estate, see § 6.

It must be done in the name of its president. Id.

Prior Laws.—General acts were from time to time passed for the formation of corporations for specified purposes. The principal of these acts, with such amendments to them as are deemed desirable to notice, as affecting the powers of such corporations with respect to real estate, are below briefly indicated. These corporations are all now included in and regulated by appropriate General Laws, supra.

Corporations for Manufacturing, Mining, Mechanical or Chemical Business.—Act of February 17, 1848, Chap. 40. The above act has been amended as follows: June 7, 1853, Chap. 333, as to places of business; and the corporation may issue stock for property acquired. February 16, 1857, Chap. 29, as to salt companies; and as to term of existence and place of business. April 11, 1866, Chap. 269, as to number of trustees; April 12, 1861, Chapter 170, as to place of business. May 2, 1864, Chap. 517, allowing change of place of business, and an amended certificate therefor; and to mortgage property for past or future debts contracted in its business. See Greenpoint v. Kings Co., 7 Hun, 44, affd., 69 N. Y. 328. February 21, 1866, Chap. 73, as to increase of capital stock. April 25, 1866, Chap. 799, title amended so as to read after "chemical," the words, "or other." April 28, 1866, Chap. 838, title further amended to include various general purposes. 1867, Chap. 12, as to extension of term. 1867, Chap. 248, as to increase in number of trustees. May 7, 1869, Chap. 706, as to mortgages on land without the State. April 20, 1871, Chap. 657, as to judgments against trustees. Also see L. 1890, Chaps. 193, Chap. 657, as to judgments against trustees. Also see L. 1890, Chaps. 193,

1871, Chap. 481.— As to mortgaging by filing consent of two-thirds of the stockholders in the county where the property is situated.

1871, Chap. 652.—As to refiling certain certificates.

1874, Chap. 149.—As to filing certificate, liability of stockholders, etc.

Repealed as to liability of stockholders. L. 1876, Chap. 363.

1875, Chap. 88.—As to filing consent to mortgage nunc pro tune, in

certain cases.

1878, Chap. 163.— As to mortgaging franchises.

Consolidations. - Laws of 1867, Chap. 960, amd. 1877, Chap. 374.

Dissolution .- Laws of 1876, Chap. 442.

Powers as to Real Estate. - Companies organized under the above general act of 1840 might purchase, hold and convey any real and personal estate whatever necessary to carry on their operations as designated in the certificate of incorporation. They could not make a general assignment (Sibell v. Remsen, 33 N. Y. 95), in contemplation of insolvency. By Law of 1853, Chap. 333, they might purchase mines, manufactories and other property necessary for their purposes, and issue stock in payment. 36 Barb. 329, afig. 30 id. 644. By a law of March 22, 1811, Chap. 67, amd. 1815, Chap. 47, manufacturing companies might be formed, and hold and convey lands necessary for their operations. This act was extended for other purposes. 1816, Chap. 58; 1817, Chap. 223; 1818, Chap. 67; 1819, Chap. 102; 1821, Chap. 14; 1822, Chap. 213. This last act gave power to mortgage on assent of two-thirds in value of stockholders. By Laws of 1848, p. 54, these companies could not mortgage their lands for any purpose. By Law of May 2, 1864, Chap. 517, they can do so only to secure an existing debt, or one which may be contracted in the business for which it was incorporated, on filing with the county clerk assent of two-thirds of the capital stock-owners in value. A subsequent assent held to validate a mortgage if there are no intervening rights and the filing of the assent is only for notice and is not essential to validity. Rochester Savings Bk. v. Averell, 96 N. Y. 467. A mortgage of property and franchises, where consent is only given as to property, held still valid as to the property though not as to the franchises. Lord v. Yonkers, etc., Co., 99 N. Y. 547. It was held in the case of the Central Gold Mining Co. v. Platt, that the debt must have been already contracted to authorize the execution of a mortgage to secure it. The General Term, however, reversed the decision, and held valid a mortgage given by the company to secure coupon bonds. 3 Dal. 263; Lord v. Yonkers, etc., Co., 99 N. Y. 547. Corporations formed under the Act of 1848, could not issue new stock in addition to capital stock, nor make any increase thereof in payment for property required; but might apply the whole capital stock for such purposes; and when so paid, the owner thereof was not liable to creditors of the company, under § 10, of the Act of 1848. Schenck v. Andrews, 46 N. Y. 589. And when the stock was so paid, and the certificate filed, stockholders were released from personal liability, unless there was fraud. But the stock paid must have been for or represented the actual value of the property acquired. Boynton v. Hatch, 47 N. Y. 225. Vide further decision in Schenck v. Andrew, 57 N. Y. 133. (Vide Law of May 7, 1869, Chap. 706, as to filing assent of the corporation to mortgage its lands beyond the State.) As to sales under Act of 1848 vide Laws 1890, Chap. 193, repealed Laws 1892, Chap. 687.

The corporation could not mortgage for the purpose of carrying on busi-

ness. Carpenter v. Black, etc., 65 N. Y. 43, criticised, 44 Hun, 133.

See fully as to these mortgages, Greenpoint v. Whitin, 69 N. Y. 328;
Vail v. Hamilton, 20 Hun, 355, affd., 85 N. Y. 453; Astor v. Westch., etc., Co., 33 Hun, 333.

Manufacturing corporations might give a mortgage to secure future advances. If it were invalid no one but the State could take advantage of that fact. Martin v. Niagara Falls Paper Mfg. Co., 44 Hun, 130, affd., 122 N. Y. 165.

By Law of 1880, Chap. 254, corporations formed under the Act of 1848, were exempted from the special provisions of the Revised Statutes, but the exemption was repealed by Law of 1881, Chap. 116.

The Act of 1848 was extended to corporations for almost all purposes. The more important amendments to effect these extensions were as follows:

Agricultural, Horticultural, Medical or Curative, Mercantile and Commercial. -April 28, 1866, Chap. 838.—The act had been extended to agricultural companies; also by Law of March 29, 1865, Chap. 234. See also Laws April 13, 1855, Chaps. 425, 512; amended 1872, Chap. 116; April 12, 1856, Chap. 183; June 8, 1953, Chap. 339. See also Laws April 28, 1866, Chap. 838; Laws 1876, Chap. 346; Laws 1888, Chap. 340; Laws 1891, Chap. 10. As to curative purposes, see also Act of 1886, Chap. 799.

Constructing and Using Machines for the Raising of Vessels and other Heavy Bodies.—Feb. 7, 1851, Chap. 14.

Salt Companies .- Feb. 16, 1857, Chap. 29.

Printing and Publishing Companies for Books, Pamphlets, or Newspapers.—April 6, 1857, Chap. 262; April 20, 1871, Chap. 657.

Bottling and Selling Natural Mineral Water .- March 31, 1863, Chap. 63.

Towing and Wrecking Companies.—April 23, 1864, Chap. 337.

Buying, Selling and Transporting Coal and Peat.— April 6, 1865, Chap. 307.

To Supply Water.— April 4, 1866, Chap. 371; Laws 1873, Chap. 737; Laws 1876, Chap. 415; Laws 1880, Chaps. 85, 241; Laws 1883, Chap. 483; Laws 1885, Chap. 422; Laws 1889, Chap. 369.

Quarrying Stone .- 1867, Chap. 248.

Skating Rinks, Companies for Fairs, Meetings, Exhibitions, Entertainments, and Amusements.— May 9, 1868, Chap. 781.

Elevating, Warehousing, Storing, or Milling.— May 9, 1868, Chap. 781; May 5, 1869, Chap. 605; April 22, 1867, Chap. 509.

Ice Companies .- April 12, 1855, Chap. 301.

Real Estate Companies. - 1871, Chap. 535; 1888, Chap. 313.

Erecting Buildings and Hotel Keeping, Museums, etc.— April 20, 1871, Chap. 657. 1880, Chap. 182, provides for mortgages by these companies. See also Laws 1874, Chap. 143; Laws 1885, Chap. 127; Laws 1886, Chap. 592; Laws 1889, Chap. 57, repd. Laws 1890, Chap. 567; Laws 1890, Chap. 119; Laws 1892, Chap. 687.

Preserving and Dealing in Meats.—April 20, 1871, Chap. 657; April 27, 1872, Chap. 426.

Dairy Products, Church Sheds and Laundry Purposes.—April 27, 1872, Chap. 426.

Medical or Surgical Colleges and Institutions may hold real and personal property to the extent of \$200,000. Laws of 1853, Chap. 184. Under the Law of April 10, 1813, Chap. 94, they could hold for county, \$1,000, and for State societies, \$5,000. See also Law 1866, Chap. 838.

Hospitals, Infirmaries, Dispensaries and Homes for Aged and Indigent, may hold property, real and personal, whose annual net income was not to exceed \$200,000. For further provisions see 1889, Chap. 95.

Homœopathic Medical Societies.—Act of April 13, 1857, Chap. 384.

Savings Banks.— Laws 1853, Chap. 32; 1857, Chap. 136; 1867, Chap. 257; 1868, Chap. 845; 1869, Chap. 213.

Social and Recreative Corporations.—April 11, 1865, Chap. 368; April 25, 1867, Chap. 799, amd. Law of May 6, 1869, Chap. 629; Law of 1870, Chap. 668; 1871, Chap. 705; and infra, 6.

Odd Fellows .- Law May 6, 1873, Chap. 417.

Free Masons and Knights Templar .-- Law of April 2, 1866.

Grand Commanderies, etc.—1869, Chap. 176; April 22, 1873, Chap. 254.

Order of Red Men .- Laws 1891, Chap. 65.

Bridge Companies.— April 11, 1848, Chap. 259; April 16, 1852, Chap. 372.

Literary Societies and Libraries.— The earliest act was April 1, 1796, Chap. 43. The recent acts are Laws of 1853, Chap. 23; Laws 1875, Chap. 419. See also, as to devises to, L. 1853, Chap. 295.

As to trusts for literary institutions, vide supra. See also Adams v. Perry, 43 N. Y. 487, and supra, "Trusts for Charitable Purposes," Chap. X, Tit. VIII.

See also Laws 1875, Chap. 343.

Steam Heating.—1879, Chap. 317, and 1881, Chaps. 422 and 295; 1880, Chap. 187 (the last act amd. 1881, Chap. 551); 1878, Chap. 334.

Title Guarantee Companies.—1885, Chap. 538 (amd. 1891, Chap. 80), repealed 1892, Chap. 690.

Credit, Guaranty and Indemnity Companies.— 1886, Chap. 611.

Full Liability Companies -- 1885, Chap. 535.

To Purchase and Improve Lands for Depots.- L. 1882, Chap. 273.

Steam.- 1882, Chap. 309.

Residences and Apartment Houses and Buildings.— L. 1881, Chaps. 58, 232, 589.

Warehouses, Wharves and Docks.—1881, Chap. 650.

Petroleum, Storage and Transportation of .- 1875, Chap. 113.

Telegraph Companies.— Law of April 12, 1848, Chap. 265; April 8, 1851, Chap. 98; June 29, 1851, Chap. 471, amdg. act of 1848; April 22, 1862, as to extending lines, and joining lines with other corporations or associations; Law of May 13, 1845, Chap. 243, allowed placing poles in the waters in the State, so as not to interrupt navigation.

By Law of 1870, Chap. 568, they may sell or lease their property or franchises to, or purchase those of another company, on a three-fifths vote by the directors, and by written consent of three-fifths in interest of its share-

holders.

Skating Ponds and Sporting Grounds.— April 8, 1861, Chap. 149.

Business Corporations.— General act for, Laws of 1875, Chap. 611 amended 1880, Chap. 187; 1881, Chaps. 295, 422, 551; 1883, Chap. 102; 1884, Chaps. 208, 397 (a supplementary act); 1885, Chap. 534 (a supplementary act), Chap. 540; 1886, Chaps. 579, 586 (supplementary acts); 1887, Chap. 561 (supplementary act); 1888, Chap. 394; 1890, Chap. 23.

Fire and Hose, etc., Companies.— May 2, 1873, Chap. 397, amended; 1879, Chap. 250.

Trades' Union and Working Men.- 1871, Chap. 875.

Park Corporations.—These may acquire lands for parks. L. 1888, Chap. 293; see also L. 1888, Chap. 525; L. 1895, Chap. 879.

The above Act of 1888, Chap. 293, applies to societies for parks, etc.

Companies for the Recovery of Stolen Cattle., etc., and to Catch Thieves, etc., and to Insure Against Loss, and to Prevent Horse Stealing.—April 7, 1859, Chap. 168.

Gas-Light Companies.— February 16, 1848, Chap. 37; April 15, 1854, Chap. 312; April 20, 1867, Chap. 480; April 25, 1871, Chaps. 95, 697; 1872, Chap. 374; 1875, Chaps. 120, 611; 1889, Chap. 422. Natural Gas, L. 1889, Chap. 422.

Guano and Fertilizing Companies.—Act of May 15, 1847, Chap. 546. They are made subject to the provisions of the Revised Statutes.

Societies or Clubs for Social or Recreative Purposes.— April 11, 1865, Chap. 368; amended Laws of 1866, Chap. 457; Laws of 1869, Chap. 629; 1873,

Chap. 698; 1874, Chap. 35; 1875, Chap. 380; 1880, Chap. 98; 1887, Chap. 645, Chap. 389, Chap. 301. Amended so as to include societies for "social, temperance, benefit, gymnastic, athletic, musical, yachting, hunting, batting, or lawful sporting purposes." May 1, 1865, Chap. 668; also 1871, Chap. 705; L. 1875. Chap. 267; 1876, Chap. 53; 1885, Chap. 474; 1888, Chap. 536; 1890, Chap. 68, and supra, p. 669.

Dental Societies .- April 7, 1868, Chap. 152.

Musical Colleges and Schools,- 1875, Chap. 176.

Stage-coach Companies. August 6, 1867, Chap. 974; 1878, Chap. 85.

Co-operative and Industrial Unions. June 24, 1867, Chap. 971.

Companies to Navigate Lakes and Rivers.—April 15, 1854, Chap. 232, § 2; amd. March 10, 1857, Chap. 83, amdg. § 1 and extending it; amd. February 18, 1858, Chap. 10, as to dissolution, etc.; amd. April 12, 1862, Chap. 205; May 11, 1865, Chap. 691; amd. April 15, 1861; 1875, Chap. 58; 1878, Chap. 394.

Caloric Engine Ocean Navigation Companies.—April 12, 1852, Chap. 228; amd. Law April 5, 1853, Chap. 124; amd. April 2, 1866, Chap. 322; amd. April 17, 1867, Chap. 419; 1875, Chap. 445.

Navigation of Lake George.-Act April 14, 1854, Chap. 3.

Turnpike and Plank Road Companies.—Act of April 18, 1838, Chap. 262; toll bridges and turnpikes are to become highways on dissolution of the corporabridges and turnpikes are to become nignways on dissolution of the corporation. Act of May 7, 1847, Chap. 210, providing for the formation of companies to construct plank or turnpike roads, and how the land is to be acquired. Act of November 24, 1847, Chap. 398; Act of July 10, 1851, Chap. 487; see also Act of April 17, 1869, Chap. 234. Act of April 15, 1857, Chap. 482, as to sales on execution of their lands. Act of May 20, 1872, Chap. 780, as to presumed dissolution. Vide Heath v. Barmore, 50 N. Y. 302; Acts of 1872, Chaps. 128, 283; 1878, Chap. 121; 1879, Chap. 253.

Building, Mutual Loan, and Accumulating Fund Associations.—Act of 1851, Chap. 122. As to building companies, 1873, Chap. 616; 1875, Chap. 504; 1878, Chap. 96; 1889, Chap. 57.

Foreign Co-operative Loan and Building Associations.- L. 1890, Chap. 146; L. 1892, Chap, 689,

Homestead Companies.— 1871, Chap. 535; May 22, 1872, Chap. 820.

For Erection of Buildings, Villa Plots, etc.—Act of April 5, 1853, Chap. 117; amd. April 22, 1867, Chap. 509, to include companies for the construction or leasing of elevators and warehouses for storage or elevating grain, or for making, constructing, and selling materials for the construction of buildings. Amended by Law of May 10, 1870, so as to include corporations for laying out and dividing lands into building lots or villa plots, and the improvement or sale thereof; and amending the Act of 1867. Amended further, 1881, Chap. 351; see also 44 Barb. 631.

Ocean Steamship Companies.— Law of April 5, 1853, Chap. 124.

Ferry Companies.—Act of April 9, 1853, Chap. 135.

Companies to Navigate Long Island Sound.—April 15, 1861, Chap. 238.

Driving Park, and Agricultural Associations.—April 11, 1872; May 9, 1872, Chap. 609; April 16, 1872, Chap. 248; 1875, Chap. 159; 1888, Chap. 359.

For Improving Breed of Horses.—Act of April 15, 1854, Chap. 269; amended April 15, 1857, Chap. 768; March 28, 1864. Veterinary and medical, L. 1890, Chap. 286.

For Keeping and Guaranteeing Personal Property.—1875, Chap. 613; amended 1877, Chap. 10.

Trades Unions .- 1871, Chap. 875.

Military Drill .- 1871, Chap. 705.

Armories .- L. 1888, Chap. 292.

Railroads Rolling Stock .- 1873, Chap .814.

Small Birds, Poultry, Fish, and Domestic Animals.—1874, Chap. 288; 1877. Chap. 266; 1885, Chap. 474; 1888, Chap. 536.

Societies or Clubs, etc., for Certain Purposes.— 1875, Chap. 267, amd. L. 1885, Chap. 474 (amd. L. 1888, Chap. 536); 1876, Chap. 53; 1887, Chap. 645; 1889, Chap. 301; 1890, Chap. 68.

Dredging, Filling and Docking .- 1875, Chap. 365.

Corporations for any Lawful Purpose Except, etc. 1875, Chap. 611. Full liability and limited liability amended. L. 1880, Chap. 187.

Boards of Trade and Exchange.- 1877, Chap. 228.

Steam and Hot Air, Laundry and Church Sheds.- 1879, Chap. 290.

Elevated Tramways.- L. 1888, Chap. 462.

Life, Health, Injury, Fidelity, Live Stock, Boilers, Theft.—1853, Chap. 463: 1889, Chap. 338; 1892, Chap. 690.

Forest Commission, etc.- L. 1885, Chap. 283; L. 1888, Chap. 520; 1890. Chaps. 8, 37.

Municipal Corporations.—By L. 1892, Chap. 685, a consolidation and revision of much of the law relating to these corporations was made, under the title General Municipal Law, to be known as Chapter XVII of the General Laws.

See L. 1892, Chap. 685, as amended.

The term municipal corporation includes only a county, town, city or village. Gen. Mun. Law, § 1.
As to limitation of indebtedness, see § 2.

See also generally the following (as amd.):
General City Law, L. 1900, Chap. 327; Gen. Laws, Chap. XXII.
County Law, L. 1892, Chap. 686; Gen. Laws, Chap. XVIII.
The Town Law, L. 1890, Chap. 569; Gen. Laws, Chap. XX.
The Village Law, L. 1897, Chap. 414; Gen. Laws, Chap. XXI.
See the above generally as to the right of municipal corporations under the present law to take and hold real property; also the individual charters.

Without attempting to go into the subject at length reference may be had to the following laws and decisions which have a bearing on the subject:

As to earlier restrictions on their power to make loans, borrow money, and make contracts. R. S., Part I, Chap. XVIII, Tit. V; Law of July 21, 1853, Chap. 603. Such a corporation may, at common law, purchase and hold real property necessary for its powers. Patterson v. The Mayor, 17 N. Y. 449. But the land must be within its boundaries, so far at least as its governmental powers are concerned. Riley v. City of Rochester, 9 N. Y. 64, revg. 13 Barb. 321. Such a corporation has not the power to make a contract or covenant that would embarrass or impede its legitimate powers or duties. Brick Church v. The Mayor, 5 Cow. 538; Stuyvesant v. Mayor, 7 id. 588; Davis v. Mayor, 14 N. Y. 506; Costar v. Brush, 2 Wend. 68. Those dealing with such a corporation must see that it acts within the restrictions of its charter. Brady v. The Mayor, 20 N. Y. 312. See as to special powers to each municipal corporation their respective charters; see also supra p. 15, as to transfers from the State to municipal corporations; see also as to the powers of such corporations in holding and transferring realty. People v. Platt, 17 Johns. 195; Britton v. The Mayor, 21 How. Pr. 251; Davidson v. The Mayor, 27 id. 342; The People v. Morris, 13 Wend. 325; Benson v. The Mayor, 10 Barb. 225; Darthmouth College v. Woodward, 4 Wheat. 697; Hooper v. Scheimer, 23 How. (U. S.) 235; People v. Lowber, 28 Barb. 65; People v. Bronnan, 39 id. 522. As to the powers of supervisors, vide 1 R. S. 364, and as to their rights to the realty of a county, Id.

The powers of municipal corporations are to be strictly construed even against an innocent purchaser. See Brenham v. German Am. Bk., 144 U. S. 173.

As to certain defects not invalidating municipal bonds, see Gen. Mun. Law,

As to the rights of towns and villages to take and hold lands, vide 1 R. S. 337, and Laws of December 7, 1847, Chap. 426; April 20, 1870, Chap. 291. These are general acts for the incorporation of villages and have frequently been amended in matters of detail. Formerly counties were not esteemed a corporate body, and a community not incorporated could not take by succession. By the Revised Statutes, each county was made corporate, with a right to take and hold lands within its limits. Jackson v. Corry, 8 Johns. 388; Hornbeck v. Westbrook, 9 id. 73; 1 R. S. 364. See as to the power of counties and towns to take lands, and how they are to be conveyed. People v. Stout, 23 Barb. 349; Hill v. Supervisors, 12 N. Y. 52; Baker v. The Mayor, 9 Abb. 82; Lorillard v. Town of Monroe, 11 N. Y. 394; Denton v. Jackson, 3 Johns. Ch. 320. It is supposed that neither a county nor town can hold lands out of their respective limits, nor for purposes not connected with their duties or the use of the inhabitants. Dickson v. Hartwell, 8 Johns. 422; and see supra, p. 672.

Powers of villages over drains, roads, grades, assessments, etc. Law 1889,

Chap. 186.

Acquiring land. Law of 1895, Chap. 879.

Joint-Stock Companies and Associations, Prior Laws, etc.—By Law of April 9, 1867, Chap. 289, any joint-stock company or association might purchase, hold and convey real estate for the following purposes, and no other: 1. Such as shall be necessary for its immediate accommodation in the convenient transaction of its business. 2. Such as shall be mortgaged to it in good faith for loans made or debts due to it. 3. Such as it shall purchase at sales under judgments, and mortgages held by it. All conveyances were to be made to the president (as such), who and his successors might sell, assign and convey the same, free from all claims by shareholders or those under them. See Act of April 22, 1868, Chap. 290, as to reducing the capital of such associations. See Act of April 15, 1854, Chap. 245, as to continuation of such associations on the death of shareholders, and as to the appointment of managers. A lease to a Masonic lodge purporting to be by certain persons as a committee, but signed merely by their names without addition, held to bind the lodge. Cohn v. Borst, 36 Hun, 562. As to the present law, vide supra.

CHAPTER XXV.

ESTATES OF INFANTS, LUNATICS, IDIOTS, DRUNKARDS, ETC.

I .- ALIENATION, ETC., BY INFANTS.

II.— GUARDIAN OF INFANTS.

III .- SALE OF LANDS OF INFANTS.

IV .- ESTATES OF LUNATICS, IDIOTS, AND DEUNKARDS.

TITLE I. ALIENATION, ETC., BY INFANTS.

By the Revised Statutes, "idiots, persons of unsound mind, and infants" were not allowed to alien real estate.

1 R. S. 719, § 10; 1 R. L. 74, § 5.

By the Real Property Law "a minor and idiot, or person of unsound mind" may not transfer.

Real Property Law, L. 1896, Chap. 547, § 3.

Deeds of infants were also void at common law, and were voidable on arrival at full age, not only by themselves but by their heirs.

Fonda v. Van Horne, 15 Wend. 631; Bool v. Mix, 17 id. 119; 5 N. Y. Surr. (1 Red.) 498; Gillett v. Stanley, 1 Hill, 121; 25 Barb. 399; Chapin v. Shafer, 49 N. Y. 407.

They are good, however, until disaffirmed. Eagle Fire Ins. Co. v. Lent, 6 Paige, 635; Hill's Supplement, 260.

If grantees, they may also, when of age, disaffirm any deeds and waive any estates conveyed to them during infancy, or may affirm the same. Jackson v. Carpenter, 11 Johns. 539; Jackson v. Burchin, 14 id. 124; Tucker v. Moreland, 10 Pet. 73; Walsh v. Powers, 43 N. Y. 23.

A ratification may be implied by not dissenting, and by acts of ownership,

A ratification may be implied by not dissenting, and by acts of ownership, or otherwise; and would relate back to the original instruments. Irvine v. Irvine, 9 Wall. 618; Bool v. Mix, 17 Wend. 119; Henry v. Root, 33 N. Y. 526; Jones v. Phœnix Bk., 8 *id.* 228; Dominick v. Michael, 4 Sandf. 374; Voorhies v. Voorhies, 24 Barb. 150; Spencer v. Carr, 45 N. Y. 406; Tafft v. Sergeant, 18 Barb. 320; Palmer v. Miller, 25 *id.* 399. *Cf.* Eagan v. Scully, 29 App. Div. 617.

Three years of passive acquiescence after coming of age is not a ratification. Green v. Green, 69 N. Y. 553. A subsequent conveyance would be a disaffirmance of a prior conveyance made during infancy. Tucker v. Moreland, 10 Pet. 58; Boole v. Mix, 17 Wend. 119.

The deed being voidable only, it can only be impeached by the infant when of age, or privies in blood or estate, and not by a stranger. Dominick v. Michael, 4 Sandf. 374; Irvine v. Irvine, 9 Wall. 618; Boole v. Mix, 17 Wend. 119.

It is binding on adults with whom he dealt, so long as it is not rescinded by the infant. Smith v. Bowen, 1 Mod. 25; Holt v. Ward, Str. 937; Warwick v. Bruce, 2 Maule & Sel. 205; Brown v. Caldwell, 2 Serg. & Rawle, 114.

A bond and mortgage given by a minor to secure payment for the erection of a building on his land may be avoided on the ground of infancy. Allen v. Lardner, 78 Hun. 603.

Where an infant purchases real estate, and on becoming of age receives and uses it, the defense of infancy will not prevail to release her from the burdens, subject to which the real estate was taken. Kincaid v. Kincaid, 85 Hun. 141.

The infant need not restore the consideration as a prerequisite to disaffirmance. Green v. Green, 69 N. Y. 553. An infant partner may make an assignment for the benefit of creditors with his copartners. Yates v. Lyon, 61 N. Y. 344, revg. 61 Barb. 205.

As to an infant wife who releases dower. See Wells v. Seixas, 23 Blatchf.

The remedy of the infant is by ejectment. Weidersum v. Naumann, 10 Abb. N. C. 149. Cf. O'Rourke v. Hall, 38 App. Div. 534.

Infant Heirs to Convey.— Provision is also made in the Code of Civil Procedure for infant heirs or others to perform contracts made by a deceased ancestor, for a sale of real property or an interest in real property, on action brought by any parties interested, or the representatives of the deceased.

Code Civ. Proc., §§ 2345, 2346 (as amended by Laws 1882, Chap. 399), 2347. Formerly regulated in a similar way by 2 R. S. 194, § 167, which was

repealed by Laws of 1880, Chap. 245.

The contract must have been legally binding on the ancestor. Knowles v. McCamley, 10 Paige, 342. Where the infant is a lunatic, vide Swartout v. Burr, 1 Bar. 495. Infants will not be obliged to covenant in the deed. Hill v. Ressegieu, 17 Barb. 162.

Determination of Age .- The age of an infant may be determined by an inspection. Laws 1882, Chap. 340.

Conversion of Real Estate of an Infant. See fully as to this supra, Chap. XIV, Tit. II; and infra, Tit. III, as to the nature of the converted lands. Also Petition of Thomas, 1 Hun, 473.

Partition of Infant's Lands .- Vide infra, Chap. XXX.

Collusive Recovery of Dowress .- Infants' rights on, vide Chap. VII, Tit. IV.

Infant Trustees and Mortgagees.— May be made to convey, etc., and the court has power over them, independent of statute. Code Civ. Proc., §§ 2345, 2346, as amended by Laws of 1882, Chap. 399. 2 R. S. 194, which was repealed by Laws of 1880, Chap. 245; Anderson v. Wood, 44 N. Y. 249; Wood W. Mather 38 Barth 473, As to former practice on the application side Em v. Mather, 38 Barb. 473. As to former practice on the application, vide Ex parte Quackenboss, 3 Johns. Ch. 408; see also Hyatt v. Seeley, 11 N. Y. 52; 6 Barb. 499; Hunter v. Dashwood, 2 Edw. 416; Matter of Whittaker. 4 Johns. Ch. 378.

TITLE II. GUARDIANS OF INFANTS.

The following statutory provisions, as to the guardianship of infants, affect the realty belonging to them. The father, as a general rule, if a proper person, is the natural guardian of his infant children. In many cases, however, courts will dispose of the care and custody of the children to the mother or others. As guardian by

nature, a father has no control over the property of his child. On the death of the father, the mother is the guardian by nature, by the common law. As to modifications of the above rules, by our laws, vide infra.

People v. Nickerson, 19 Wend, 16; Fonda v. Van Horne, 15 id. 631; Wilcox v. Wilcox, 14 N. Y. 575.

Statutory Guardians as of Socage .- The father, and if none, the mother, or if none, the nearest and eldest relative of full age and legal capacity, males being preferred as between those of the same consanguinity, is guardian of an infant, with the rights, powers and duties of guardians in socage. To such guardians statutory provisions relative to guardians in socage are to apply. But the authority of such guardian is superseded whenever a testamentary or other guardian is appointed under the proceedings provided for in the Revised Statutes, Part II, Chap. VIII, Tit. III. See now Code Civ. Proc., §§ 2821–2860; 1 R. S. 718, 719, §§ 5 to 7; Domestic Relations Law, L. 1896, Chap. 272, § 50. Previous to the Revised Statutes a father could not be guardian in socage of his child. Fonda v. Van Horne, 15 Wend. 631.

Such guardianship continues if no other guardianship succeeds. Jackson v. DeWaltz, 7 Johns. 157; Byrne v. Van Hoesen, 5 id. 66.

Such guardian in socage has the custody of the land, and is entitled to the profits for the infant's benefit. Beecher v. Crouse, 19 Wend. 306. And may bring ejectment. Holmes v. Seely, 17 Wend. 75. And collect rents and sue for injuries to the possession. Sylvester v. Ralston, 31 Barb. 286.

A lease made in the guardian's own name will bind the infant; a general guardian has the same power. Such lease is assignable. Thacker v. Henderson, 63 Barb. 271; see also as to leases by guardians and when they expire, supra, p. 189. infant, with the rights, powers and duties of guardians in socage. To such

expire, supra, p. 189.

He may lease for as long as his guardianship continues, or within the minority of the ward, subject to the appointment of another guardian, and the latter's election to avoid it. Emerson v. Spicer, 55 Barb. 428, affd., 46 N. Y. 594; Putnam v. Ritchie, 6 Paige, 390; Field v. Schieffelin, 7 Johns. Ch. 150, 154. See further as to such guardianship, 30 Barb. 635; Jackson v. Combs, 7 Cow. 36, at 38; Bank of Ogdensburg v. Arnold, 5 Paige, 38, at 41, and also infra, this title.

The judgment creditor of a guardian in socage held not to be able to reach money he invested in his ward's realty. Hickey v. Dixon, 42 Misc. 4.

Guardianship in socage arises only where real property vests in an infant. Whitlock v. Whitlock, 1 Dem. 160.

Guardianship in socage ceases when the infant reaches the age of fourteen years, but if the infant does not choose another guardian, the former guardianship will continue. Byrne v. Van Hoesen, 5 Johns. 66.

Guardians by Deed or Will .- A father, whether of full age or a minor, of a child likely to be born, or a living minor child unmarried, may, by deed or will, dispose of the custody and tuition thereof, during its minority, or for a less time, to any person or persons, in possession or remainder; which shall be effectual as against every other person. Such guardian is to take the profits of the realty and the management of the personalty, and bring actions as might a guardian in socage. 2 R. S. 150, §§ 1-3. Section I was amended by Law of February 10, 1871, Chap. 22, by allowing the mother to make the appointment if the father is deceased, and has not done so. The Law of 1860, Chap. 90, made the wife joint guardian with the husband. This Act was repealed by Law of 1862, Chap. 172, making the same provision, and that the father should not create a testamentary guardian without assent and that the father should not create a testamentary guardian without assent of the mother. A married man could not, under the Married Woman's Act of 1860, Chap. 90, supra, appoint a testamentary guardian of his child without the consent of his wife, nor could he do so under the Act of 1862, Chap. 172, supra. In both cases the power survived to the wife on his death. People v. Boice, 39 Barb. 307. The Act of 1862 was repealed and the father restored to his rights by Laws of 1871, Chap. 32, which, however, retained the wife's power to act where the husband had not appointed. Matter of De Marcellin, 24 Hun, 207. By Laws of 1888, Chap. 454, if the mother survive the father one year, she may appoint, in spite of, or in default of appointment by the father. Letters will not issue to a nonresident though appointed by will. Matter of Taylor, 3 Redf. 259. By Laws of 1877, Chap. 206, testamentary guardians in New York, were to qualify within thirty days after probate, or might renounce. Objections might be filed to the issue of letters as in case of executors and for like causes. In case of failure to qualify as provided such proceedings might be taken as were allowed against renouncing executors, and in no case was the guardian to have any power before letters issued. Repealed by Laws of 1880, Chap. 245.

The whole matter of testamentary guardian is now regulated by Domestic Relations Law, L. 1896, Chap. 272, §§ 50-54, and Code Civ. Proc., §§ 2821-2860. The present law in general follows the Act of 1877. The time for qualifying may be extended by the surrogate for cause, but not longer than three months. Security, inventory, accounting, removal, etc., are all provided for by Code Civ. Proc., §§ 2821-2860, and the provisions applicable to objections to the issue of letters to an executor (§§ 2636-2638) are made

applicable to a guardian.

The Code requires the deed or will to be recorded or probated. § 2851:

see also Domestic Relations Law, supra, § 51.

Since L. 1893, Chap. 175, amdg. 2 R. S. 150, § 1, either surviving parent may appoint guardian by will or deed. Dom. Rel. Law, § 51.

Father and mother are now equal in their rights of guardianship over their child. People v. Elder, 98 App. Div. 244; see In re Schmidt, 28 N. Y. Supp. 350.

Powers and duties of such guardians. Domestic Relations Law, § 52.

Guardians Appointed by Surrogate .- By the Revised Statutes, Part II., Chap. VII., Tit. III, if no guardian had been appointed, by deed or will, the surrogate where the minor resided might appoint one. This portion of the Revised Statutes and the Act of 1837 were repealed by Laws of 1880, Chap. 245. Similar provisions are now contained in Code Civ. Proc., §§ 2821 to 2841.

Formerly the surrogate had no jurisdiction, unless the minor resided in his county. Brown v. Lynch, 2 Bradf. 214. Change of residence within this section, vide Matter of Daniels, 71 Hun, 195.

Now he has jurisdiction, in case of a petition, over a nonresident who has

property in his county. Code Civ. Proc., §§ 2822, 2827.

He cannot appoint a nonresident guardian. Matter of Hosford, 2 Redf. 168. Nor can he appoint on petition of the infant where there is a testamentary guardian. Matter of Reynolds, 11 Hun, 41; Code Civ. Proc., § 2822, subd. I.

No guardian of the person can be appointed of a married woman.

Civ. Proc., § 2825.

A guardian appointed for an infant under the age of fourteen years holds his office only till the infant attains that age or until, after that time, his

successor qualifies or he is removed. Code Civ. Proc., § 2828.

A guardian appointed on the application of an infant over the age of fourteen years must be nominated by the infant, subject to the approval of the supercents.

the surrogate. Code Civ. Proc., § 2826.

By Law of April 22, 1870, Chap. 341, surrogates have the same power as has the Supreme Court, and may appoint a guardian for an infant whose father or mother is living, and they shall ascertain the amount and value of the estate; amending 2 R. S. 151, § 6, which was repealed by Laws of 1830, Chap. 245. Section 7 was repealed by Laws of 1830, Chap. 320, § 31. The same provision is in the Law of April 25, 1871, Chap. 708, with addition as to the notice to be given. The Act of 1871 was an amendment of § 6, and was repealed by the repeal of that section. See now Code Civ. Proc., § 2821, conferring similar powers on the surrogate, and giving him like power and authority to appoint a general guardian of the person or of the property, or of both, of an infant which the chancellor had, on the 31st day of December, 1846.

The appointment of a guardian supersedes guardianship in socage. Otis v. Thompson, Hill & D. Supp. 131.

The surrogate's power over infants is purely statutory. Matter of Bolton.

159 N. Y. 129.

Power of Such Guardians.—He was to have the same powers as a testamentary guardian. 2 R. S. 151, § 10. See also, as to their duties in the care of the infant. Clark v. Montgomery, 23 Barb. 464.

He cannot be authorized by the Surrogate's Court, even with the ward's consent to invest the ward's funds in real property to be used by the ward as a residence, since it is not a court of general jurisdiction, but merely such jurisdiction as is conferred by statute. Matter of Bolton, 159 N. Y. 129,

Guardians Appointed by the Supreme Court.—The Supreme Court, succeeding to the functions of the Court of Chancery, has power, as a branch of its general jurisdiction over minors and their estates, to appoint guardians for infants who have no testamentary or other guardian. By our statutes, the powers and jurisdiction of the Court of Chancery are made coextensive with those of the Court of Chancery in England, except as modified by the Constitution or by law. 2 R. S. 173, repealed by Laws of 1880, Chap. 245; see now Code Civ. Proc., § 217; In re Nicoll, I Johns. Ch. 25; Wilcox v. Wilcox, 14 N. Y. 575.

Accounting and Removal before the Code of Civil Procedure. - Provision was made in the Revised Statutes, as to the accounting of such guardians appointed by the surrogate, both voluntary and compulsory; also, as to the removal for waste, misconduct, etc., or in case of removal from the State, or insufficiency of sureties; and for the appointment of another; also, for appeals to the Supreme Court. 2 R. S., §§ 11 to 19. And see Laws of 1837, Chap. 460, §§ 45, 49; April 25, 1867, Chap. 782; 1871, Chap. 482, as to removal of guardians generally, and their accounting. These acts were all repealed by Laws of 1880, Chap. 245. See now Code Civ. Proc., §§ 2821–2860; see also Seaman v. Duryea, 10 Barb. 523, affd., 11 N. Y. 325; Diaper v. Anderson, 37 Barb. 168; People v. Delamater, 15 Abb. 323; Laws of 1874, Chap. 156, repealed, Laws of 1880, Chap. 245; Laws of 1874, Chap. 469, repealed by the same act by the repeal of the provision of the Revised Statutes which it amended.

The Supreme Court has power to change the guardian appointed for the custody of the child, if for the benefit of the child, and may make the order at chambers (so called). Wilcox v. Wilcox, 14 N. Y. 575.

An action brought by a ward to compel an accounting held to be under

the limitation of six years. Matter of Vanderzee, 73 Hun, 532.

Remarriage.—A widow who is guardian will be removed on remarriage. Swartout v. Swartout, 2 Redf. 52.

Accounting and Removal under the Code of Civil Procedure. By §§ 2832-2834, provision is made for the removal of a guardian upon petition of the ward, a relative, or a surety, for incompetency, waste, misconduct, removal from the State, obtaining the letters by fraud, or for the general welfare of the infant. By §§ 2835, 2836, provision is made for revocation of letters on the guardian's petition. By §§ 2842, 2843, 2844 (amended by Laws of 1881, Chap. 534) and 2845, provision is made for an annual inventory and account. Other accountings by a guardian appointed by the surrogate are regulated by §§ 2837, 2847, 2848 (amended by Laws of 1881, Chap. 535), 2849 (amended L. 1893, Chap. 304), 2850 (amended by Laws of 1882, Chap. 2849 (amended L. 1893, Chap. 304), 2850 (amended by Laws of 1882, Chap. 400, and Laws of 1887, Chap. 143).

Accountings of a guardian appointed by will or deed are regulated by §§ 2855, 2856 (amended L. 1891, Chap. 197), 2857, and removals and resignations of the same by §§ 2858-2860.

Acts and Purchases by .- Guardians cannot purchase the ward's property for themselves. Vide surrogate's sales, supra, p. 486; 2 R. S. 104; Code Civ. Proc., § 1679; Dodge v. Thompson, 13 Wkly. Dig. 104; Valentine v. Belden, 20 Hun, 537; Cahill v. Seitz, 93 App. Div. 105. Such sale is merely voidable, however. Bostwick v. Atkins, 3 N. Y. 53; White v. Parker, 8 Barb. 48; Dugan v. Sharkey, 89 App. Div. 161. They cannot convert the personal property into realty, or vice versa, nor use the ward's money. All advantages will enure to the ward. They cannot build on the ward's land without order of the court, nor contract for sale of his land. White v. Parker, 8 Barb. 48; Hassard v. Rowe, 11 id. 22; Thacker v. Henderson, 63 id. 274; Bover v. East, 161 N. Y. 580; O'Donoghue v. Boies, 159 id. 87.

A contract as to infant's lands will not be enforced in equity unless it

be for the infant's benefit. Sherman v. Wright, 49 N. Y. 227.

Guardians Holding Over after determination of particular estate. Vide supra, p. 253.

As to temporary guardians, i. e., if infants under the age of fourteen years.

Code Civ. Proc., § 2828.

Duties of Guardians.— Every guardian in socage, and every general guardian, whether testamentary or appointed, is to keep safely the ward's property and inheritance, and is to prevent waste, sale, or destruction thereof; to keep up and sustain the houses, gardens, and other appurtenances of the lands, with the issues and profits thereof, or other moneys of the ward, and deliver the same up in good order, etc., and account for issues and profits. They are allowed their reasonable expenses, and the same compensation as executors. If they commit waste, sale or destruction, they forfeit custody of the inheritance and triple damages. 2 R. S. 153, §§ 20, 21; Dom. Rel. Law, L. 1896, Chap. 272, § 53. See fully, as to guardian's duties, White v. Parker, 8 Barb. 48.

A guardian cannot rebuild destroyed buildings under the above powers.

Copley v. O'Neill, 1 Lans. 214.

Nor sell the real estate, nor lease over the period of the ward's majority.

Emerson v. Spicer, 55 Barb. 428, and 46 N. Y. 594. They are bound to keep moneys invested. Depeyster v. Clarkson, 2 Wend.

As to leasing see Matter of Stafford, 3 Misc. 106; Gallagher v. David, etc.,

Co., 13 Misc. 40; Putnam v. Ritchie, 6 Paige, 390. They are under the control of the court. Wood v. Wood, 5 Paige, 596;

Putnam v. Ritchie, 6 id. 391.

They can reap no benefit from the estate. Lefevre v. Laraway, 22 Barb. 168. The general guardians of infants have the same powers as a testamentary guardian. They may collect the profits and income of real estate, and give discharges therefor, and may discharge mortgages of record. Chapman v. Tibbets, 33 N. Y. 289.

They may bring actions on securities taken by them as guardians. Code

Civ. Proc. § 749.

As to personal liability for brokerage. Myers v. Cohn, 4 Misc. 185.

Sureties and Security.- No guardian to receive property of an infant until he give security. Code Proc., 420; Code Civ. Proc., § 2830; see also §§ 2853, 2854; Supreme Court Rules, 5; 10 Abb. 41; 2 id. 11. As to release of sureties, see Laws of 1876, Chap. 278, repealed by Laws of 1880, Chap. 245; Code Civ. Proc., § 2600.

As to liability of sureties, Matter of Brown, 72 Hun, 160.

Bonds, see Code Civ. Proc., § 2830, amd., Laws of 1892, Chap. 559. No security is required of trust companies, acting as guardians, etc. Banking Law, L. 1892, Chap. 689, § 158, as amended.

Guardians ad Litem .- There are various provisions of statute as to the appointment of guardians of infant parties to actions. The general rule is that an infant may sue or be sued in actions relating to real property. If plaintiff, he formerly appeared by a next friend duly appointed, and later by a guardian ad litem likewise duly appointed; if defendant, a guardian ad litem is to be appointed, and security is to be given. The details of these proceedings are matters of practice. They will be found in 2 R. S. 445 et seq.; Code of Proc., §§ 116, 471; Code Civ. Proc., §§ 469-477. As to guardians in

partition suits, Laws of 1833, Chap. 227, repealed Laws of 1880, Chap. 245; 1852, Chap. 277, repealed Laws of 1880, Chap. 245; Code Civ. Proc., §§ 1535, 1536 (amended by Laws of 1884, Chap. 404); and see infra, Chap. XXX, "Partition." The above section 116 of the Code of Procedure was amended by Laws of 1851, Chap. 479; 1852, Chap. 392; 1862, Chap. 460; 1863, Chap. 392; 1865, Chap. 615. As to guardians ad litem, and for proceedings in surrogate's courts, see sales by surrogates, supra, Chap. XVIII; and Laws of 1867, Chap. 782. This act was also repealed by Laws of 1880, Chap. 245, but was amended by Laws of 1887, Chap. 630, which possibly revives it.

A guardian ad litem cannot make a settlement of the whole matter in controversy, so as to bind his ward. Morgan v. Morgan, 39 Barb. 589. And cannot receive property until he has given sufficient security. Code Civ. Proc.

§§ 474, 475.

The Code of Procedure was repealed by Laws of 1880, Chap. 245, which, by § 2, effects also the repeal of all acts amendatory thereof. The Acts of 1851, 1852, 1862, 1863 and 1865, above referred to, are therefore repealed, as well as § 116 of that Code. The Code of Civil Procedure now governs. See Code Civ. Proc., §§ 468-477; Gen. Rules of Practice, 49-51.

Indigent Children.—As to the appointment of trustees of orphan, etc., asylums, as guardians of indigent children, by the parent or by the court, vide Laws of April 27, 1870, Chap. 431; repealed by Laws 1884, Chap. 438, which now regulates such matters; also as to the care and binding out of such children, Laws of 1857, Chap. 61; 1855, Chap. 159; 1869, Chap. 411; 1870, Chap. 431; 1875, Chap. 522; 1878, Chap. 112. All these acts with the exception of § 3 of the Act of 1878, were also repealed by the general Act of 1884, Chap. 438; which, in so far as it was not repealed by the Domestic Relations Law, now regulates the subject. See L. 1884, Chap. 438, § 1.

Female Ward.— Marriage terminates the guardianship. Brick's Estate, 15-

No guardian of the person of an infant married woman will be appointed. Code Civ. Proc., \S 2821.

Surplus Moneys paid into Surrogate's Court.—As to guardians obtaining these, vide Law of April 11, 1870, Chap. 170, amending Act of April 23, 1867, repealed by Laws of 1880, Chap. 245. See Code Civ. Proc., § 2799, as to distribution of surplus moneys paid into Surrogate's Court.

Compensation of Guardians.— Vide Morgan v. Hannas, 49 N. Y. 667; Foley v. Egan, 13 Abb. N. S. 361, revg. Morgan v. Morgan, 30 Barb. 20; Clowes v. Van Antwerp, 4 id. 416, affd., 6 N. Y. 466; Vanderheyden v. Vanderheyden, 2 Paige, 287; Matter of Hawley, 104 N. Y. 250; Phillips v. Lockwood, 4 Dem. 299, and supra, p. 678.

Ancillary Letters.— Nonresident guardians may obtain property in this State belonging to their wards resident in other States or territories. Law of March 10, 1870, Chap. 59; amd. Laws of 1875, Chap. 442. Both acts were repealed by Laws of 1880, Chap. 245. See Code Civ. Proc., §§ 2838-2840, for the present law and procedure. As a general rule, foreign guardians have no extra-territorial authority, and letters of foreign guardianship afford no title within this State. M'Loskey v. Reid, 4 Bradf. 334.

TITLE III. SALE OF LANDS OF INFANTS.

Authority for the care, disposal, and protection of infants' estates is contended to be inherent in the Supreme Court of this State, as successor to the Court of Chancery, independent of any statutory provisions. This, however, is disputed and sales not authorized by statute have been held void. The powers conferred by statute, here-

inafter referred to relate only to lands of which the infant is seized or in which he may have a contingent interest and not to equitable interests.

See the cases fully reviewed, supra, p. 316; Cochrane v. Van Surlay, 15 Wend. 439; 20 id. 365; Pitcher v. Carter, 4 Sandf. Ch. 1; Onderdonk v. Mott, 34 Barb. 106; Anderson v. Wood, 44 N. Y. 249; Wood v. Mather, 38 Barb. 473; Fonda v. Van Horne, 15 Wend. 631; Wilcox v. Wilcox, 14 N. Y. 575; Knott v. Stearns, 1 Otto, 91. The cases of Rogers v. Dill, 6 Hill, 415; Baker v. Lorillard, 4 N. Y. 257, 266; Onderdonk v. Mott, 34 Barb. 106, and Muller v. Struppman, 6 Abb. N. C. 343, are to the effect that the whole power of the court to direct the sale of lands of infants is derived from the statute below given; and that there is no such original jurisdiction in a court of equity. See also Horton v. McCoy, 47 N. Y. 21; Forman v. Marsh, 11 id. 544; Losey v. Stanley, 147 id. 560.

It is otherwise, however, as to equitable estates of infants. Wood v. Mather, 38 Barb. 475, affd., 44 N. Y. 249.

Sale of Lands of Infants.—By the Code of Civil Procedure upon the application of the guardian, or any relative of an infant (in which he must join if over fourteen years of age) the court may order the sale, leasing or mortgaging of any real property, or a term, estate, or other interest in real property belonging to an infant (1) Where his personal property and the income from his realty are not enough to pay his debts or to support and educate himself and his family, or (2) Where, for any reason, his interests require such disposition, or (3) Where an action might be maintained to compel a conveyance, (4) Where the infant's interest will be substantially promoted by releasing or joining with others in releasing a possibility of reverter.

Code Civ. Proc., §§ 2348, 2349. As to compelling conveyance, vide supra,

No leave of court is required for a sale where the guardian purchased the lands on foreclosure of a mortgage held by him as such. Bayer v. Phillips, 17 Abb. N. C. 425.

A contingent remainder of an infant may be ordered to be sold. Dodge v.

Stevens, 105 N. Y. 585.

By the Revised Statutes any infant seized of any real estate, or entitled to any term of years in any lands, might, by his next friend or by his guardian, apply to the Supreme Court or a county court for its sale or disposition. 2 R. S. 194, § 170. Repealed by Laws of 1880, Chap. 245, and re-enacted in Code Civ. Proc., § 2349.

This section held not to authorize an exchange. Moran v. James, 21 App.

In general as to the powers of the court under this section, see Warren v. Union Bank, 157 N. Y. 259; Gomez v. Gomez, 147 id. 195; Strauss v. Bendheim, 162 id. 469; Brown v. Wadsworth, 168 id. 225.

Whether Seizin Necessary .- For the above proceedings under the Revised Statutes the infant's estate must have been vested; he must have been seized to make the sale valid.

A vested remainder, however, might be sold. The legal estate must have been in the infant. Baker v. Lorillard, 4 N. Y. 257; also Matter of Jones,

2 Barb. Ch. 22; Rogers v. Dill, 6 Hill, 415; Wood v. Mather, 38 Barb. 473; Matter of Haight, 14 Hun, 176; Jenkins v. Fahey, 73 N. Y. 355.

The Code of Civil Procedure provides for the sale of "real property or a term, estate or other interest in real property of an infant in being or the contingent interest therein of an infant not in being." § 2348. "Real property" was defined as "lands, tenements and hereditaments" (§ 3343, subd. 6), but this was repealed by Law 1892, Chap. 677, which substantially re-enacts it. "Real property" is defined by the Real Property Law, as coextensive in meaning with lands, tenements and hereditaments. Real Property Law, § 1. See Ebling v. Dwyer, 149 N. Y. 460. Vide supra, Chap. IV, Tit. II.

The original act authorizing sales of infants' estates through the chancellor was passed April 9, 1814, Chap. 108; also Laws of 1815, Chap. 106. See also

Ex parte Quackenboss, 3 Johns. Ch. 408.

That the infant did not join in the petition, if over fourteen, did not invalidate title of the purchaser in proceedings under the Revised Statutes. Cole v. Gourlay, 79 N. Y. 527. See Cohn v. Lippman, 2 Law Bull. 46. The rule is otherwise now under the Code of Civil Procedure, § 2349.

A contingent interest in property depending on the mother's remarriage is an estate capable of being sold under the statute. Dodge v. Stevens, 105 N. Y.

585, revg. 40 Hun, 443.

Where there is a vested remainder, there is seisin in law within the statute,

Jenkins v. Fahey, 73 N. Y. 355, revg. 11 Hun, 351.

County Courts.-As to the power and jurisdiction of county courts now and formerly in such proceedings, vide Code of Procedure, § 30, subd. 6; Code Civ. Proc., § 340, subd. 4; Styles v. Beman, 1 Lans. 90; Brown v. Snell, 57 N. Y. 286; Aldrich v. Funk, 48 Hun, 367. As to supervisory jurisdiction thereof in Supreme Court. Spelman v. Terry, 74 N. Y. 448.

Supreme Court.-An application to the Supreme Court must be made in a district where at least some of the property is situate. Code Civ. Proc., § 2349.

Guardian for the Purposes of the Sale .-- By the Revised Statutes a guardian was to be appointed, who was to give a bond as the court might direct, to be filed with the clerk. The guardian could be appointed at chambers. 21 Barb. 348; also, Matter of Lansing, 3 Paige, 265; Matter of Wilson, 2 id. 412; Matter of Morrell, 4 id. 44.

Such is still the law under the Code of Civil Procedure, § 2352, the court

appointing a special guardian. Vide Rule 57 of the Supreme Court.

The court retains control of the guardian and regulates his conduct until final paying over of the proceeds to the infant when of age. See Matter of Price, 67 N. Y. 231.

The general guardian as such is not entitled to receive the moneys derived from the sale. Allen v. Kelly, 55 App. Div. 454; Blanchard v. Blanchard,

33 Misc. 284.

Petition .- For contents of the petition see Code Civ. Proc. § 2350, as amended, Laws of 1893, Chap. 311. Aldrich v. Funk, 48 Hun, 367; Matter of Hopkins, 33 App. Div. 615.

Reference and Final Order.—Code Civ. Proc. §§ 2354, 2355, amended, L.

1893, Chap. 268; L. 1907, Chap. 49.

A reference held not essential to the validity of the proceedings, where objection was not made at trial. A reference is discretionary, but the court Aldrich v. Funk, 48 Hun, 367. See also Ellwood v. must be informed. Northrup, 106 N. Y. 172.

Judgment.— Effect of, where minor was regularly represented in court, etc. See Matter of Tilden, 98 N. Y. 434.

Sale, etc., Under the Code of Civil Procedure. Before any sale, leasing or mortgaging can be effected, the special guardian must enter into an agreement therefor and report it to the court, under oath, and if it be approved the proper instrument must be executed. If a deed is made in a case where it could be compelled, it must be reported to the court under oath. But nothing can be done contrary to the terms of a will or other instrument by which the infant derived title. The deed has the same effect as if the infant were of age and executed it himself.

Code Civ. Proc., §§ 2356, 2357, 2358, as amended by L. 1893, Chap. 639; L. 1906, Chap. 127; L. 1907, Chap. 49.

The proceeds of the sale are to be deemed real property. Code Civ. Proc.,

Held, section 2356 does not require agreement to be in writing. Blanchard v. Blanchard, 33 Misc. 284. See, however, Matter of Hazard, 9 Paige, 365; Hardie v. Andrews, 13 C. P. R. 413.

Sales, etc., under the Revised Statutes .- If it appeared necessary and proper for the support and maintenance of the infant, or for his education, or that his interests required it, after report of referee or on the facts by determination of the court (15 Abb. 91), the court might order the leasing, sale or other disposition of the real estate or interest by the guardian; but not so as to conflict with the provisions of any will or conveyance under which the infant received the estate. 2 R. S. 195, §§ 174-176. Also in Laws of 1814 and 1815. Miller v. Struppman, 6 Abb. N. C. 343.

The court was to direct a conveyance to be executed on the agreement for sale, etc., being reported on oath and confirmed; which sales, leases, or dispositions, if bona fide, when confirmed, were to be effectual and valid. The proceeds were to be invested or applied under the direction of the court; and they were to be deemed real estate of the same nature as the lands, etc., sold; and the infant was to have no other estate therein. 2 R. S. 195, §§ 177-180. The conveyance was to have no other estate therein. The conveyance was to be executed by the guardian ad litem, by subscribing the name of the infant, and adding "by ——, his guardian ad litem." In re Hyatt v. Seeley, 11 N. Y. 52. By statute of May 6, 1872, Chap. 524, sales made as above, before January 1, 1852, were confirmed, notwithstanding

the deed may be erroneously signed.

A "mortgage" is a "sale" within the meaning of the statutes, which requires a report of the proposed sale by the guardian and a confirmation thereof. Battel v. Torry, 65 N. Y. 294. See Matter of Valentine, 72 N. Y.

The provisions prohibiting the disposition against the directions of a will, etc., do not apply to land descended to an infant or a legal trust estate held by . him. Wood v. Mather, 38 Barb. 473, affd., 44 N. Y. 249.

Proceeds.—As to the nature of the proceeds continued as realty, and for how long, *vide* Davidson v. DeFreest, 3 Sandf. Ch. 456; Shumway v. Cooper, 16 Barb. 556; Sweezy v. Thayer, 1 Duer, 286, and *supra*, p. 378; Foreman v. Marsh, 11 N. Y. 544; Wells v. Seely, 47 Hun, 109.

As to disposition of the proceeds, vide Code Civ. Proc., § 2361 (as amended).

Particular Estates, Gross Sum may be Taken in Lieu of.—Any person who has any actual or contingent interest in the infant's real estate to be sold, may file a consent to accept a gross sum calculated on the annuity tables in lieu of his rights or to have a proportionate share of the proceeds invested and the income paid to him during the time when his particular estate would run. He must, however, file with the clerk a full and complete release of his interest in the land, acknowledged like a deed. On like terms, if the infant hold an estate of dower, for life, or for years the court may authorize the special guardian to join in a conveyance by the reversioners.

Code Cov. Proc., §§ 2362, 2363.

L. 1890, Chap. 276, a special act authorizing sale of infant's interest in certain lands, held good, the adult owners consenting. The question of unborn contingent owners thus losing their possible remainder, held could be provided for by an order of the court for investing. In re Feld, 17 N. Y. Supp. 19, affd., 131 N. Y. 184; Smith v. Secor, 157 N. Y. 402.

Statute to be Strictly followed.— Any sale of an infant's real estate made by order of a court, contrary to the provisions of the statute, is utterly void. The power of the court to direct a sale is derived entirely from the statute.

Rogers v. Dill, 6 Hill, 415, and supra, p. 683. Any order in the proceedings fraudulently obtained will also make them void. Rogers v. Dill, 6 Hill, 415; Clark v. Underwood, 17 Barb. 202. It seems that courts of equity have an inherent jurisdiction, independent of statute, to order a sale of the equitable interests of infants. The statutory proceedings apply only to legal estates. Wood v. Mather, 38 Barb. 473; In re Turner, 10 id. 552.

By Laws of 1878, Chap. 129, amending Laws of 1850, Chap. 82, all such sales, mortgages or leases are validated in spite of irregularities. But these acts were repealed by Laws of 1880, Chap. 245, having been superseded by the Code of Civil Procedure.

Statutory requirements must be strictly carried out. One claiming under sale must affirmatively show regularity of proceedings. Elwood v. Northrup, 106 N. Y. 172. As to regularity, see also Stillwell v. Swarthout, 81 N. Y. 109.

As to how laches of infant may ratify an invalid proceeding, vide Aldrich v. Funk, 48 Hun, 367.

The absence of an order of reference, though a sale was made after a referee's report held a fatal defect in a title. Hegeman v. Stearns Realty Co., 117 App. Div. 754.

Infants Unborn .- It has been questioned whether the estates of infants unborn could be divested by the courts under the above proceedings. See Bowman v. Tallman, 27 How. Pr. 212; Baker v. Lorillard, 4 N. Y. 257. See, however, as to the power of the Legislature to pass acts affecting such interests, supra, Chap. X, Tit. IX, and infra, Chaps. XXVIII and XXX. Brevoort v. Grace, 53 N. Y. 245, and Powers v. Bergen, 6 N. Y. 358, hold that the Legislature may, by statute, authorize such divesting, but not without consent of adults interested, except the sale be for taxes or assessments. See also Ebling v. Dreyer, 149 N. Y. 460.

A private act of the Legislature, authorizing the sale of an infant's estate, is valid. See the cases of Cochran v. Van Surlay, Towle v. Forney, and Williamson v. Suydam, supra, pp. 316, 317; Leggett v. Hunter, 19 N. Y. 445; Powers v. Bergen, 6 id. 258; Brevoort v. Grace, 53 id. 245; Smith v. Secor, 157 id. 402; Rhodes v. Caswell, 41 App. Div. 229. So also acts rendering valid defective proceedings. Marshall v. Marshall, 4 Bush (Ky.) 248. See as to taking lands of infants for public purposes under an act therefor. Battell v.

Burrill, 50 N. Y. 667; vide also supra, Chap. X, Tit. IX.

Dower.— The Revised Statutes also provided that on such sale, on the consent of a party entitled to dower in the lands, the court might award a gross sum or direct an investment of a sum for such dower, on a release thereof being given. 2 R. S. 196, § 181; Laws of 1815, 103. As to the present law, vide Code Civ. Proc., §§ 2361, 2363; and supra.

Mortgaging .- The above provisions apply to mortgages as well as sales. Battell v. Torrey, 65 N. Y. 294.

Devises by Infants, Idiots and Lunatics.—Such devises are not allowed.

2 R. S. 56, § 1, as amd. L. 1867, Chap. 782, § 3; supra, Chap. XV, Tit. I; Shumway v. Cooper, 16 Barb. 556.

Accumulations for Minors and application of moneys for their support. Vide L. 1891, Chaps. 172 and 173; Code Civ. Proc. § 2846; vide supra, Chap. IX, Tit. V; Chap. X, Tit. IV.

Partition of Infants' Estates without Action.—Vide infra, Chap. XXX.

Also 2 R. S. 330 (repealed by Laws of 1880, Chap. 245; Code Civ. Proc., § 1590, amd. L. 1895, Chap. 946; 1905, Chap. 434); §§ 1591, 1592 (amd. by Law of 1886, Chap. 208).

Security by Guardian before Proceeds are Paid to Him .- Vide Code of Procedure, § 420; Code of Civ. Proc., §§ 474, 475, and Supreme Court Rules, 57, 59. Hunt v. Church, 65 Barb. 577.

TITLE IV. ESTATES OF LUNATICS, IDIOTS AND DRUNKARDS.

By the common law, idiots or lunatics are incapable of bringing themselves by a deed; but mere imbecility, not amounting to idiocy, will not avoid it, and sanity is presumed until the contrary is shown.

Jackson v. King, 4 Cow. 207; Stewart's Exor. v. Lispenard, 26 Wend. 255; Blanchard v. Nestle, 3 Den. 37. The acts of a lunatic before office found were not void, but voidable. Jackson v. Gumaer, 2 Cow. 552. A deed held void, however; see Van Deusen v. Sweet, 51 N. Y. 378. Brown v. Miles, 16 N. Y. Supp. 251; s. c., 61 Hun, 452. A mortgage executed by a lunatic is only voidable at his election or that of those claiming under him. Ingraham v. Baldwin, 9 N. Y. 45. Lunacy does not revoke a power of attorney until the fact is judicially established. 2 Hall, 495. Deeds of a lunatic are not set aside as matter of course, but only on equitable principles. Canfield v. Fairbanks, 63 Barb. 462.

By the Revised Statutes, idiots, persons of unsound mind, and infants, are excepted from those who are authorized by law to alien lands. 1 R. S. 719, § 10; Real Property Law, § 3.

The terms lunatic and lunacy when used generally in statutes declared to include every kind of unsoundness of mind except idiocy. Statutory Construction Law (G. L., Chap. I), L. 1892, Chap. 677, § 7.

An habitual drunkard is not necessarily incompetent. Van Wyke v.

Brasher, 81 N. Y. 260.

A deed or other instrument executed by a lunatic before office found is not void, but voidable, and one not in privity with the lunatic cannot allege or prove the lunacy as matter of defense thereto. Warmsley v. Darragh, 12 Misc. 199; Sander v. Savage, 75 App. Div. 333.

It is also provided that the Supreme Court (formerly Chancery). and the County courts within their respective jurisdictions (the Superior courts also being included formerly), shall have the care and custody of all idiots. lunatics and habitual drunkards, and of their real and personal estates, and shall provide for their safe keeping and maintenance, and for the maintenance of their families and the education of their children out of their personal estates, and the rents and profits of their real estate.

Law of March 20, 1801; 1 R. L. 148; 2 R. S. 52, § 1; Laws of 1874, Chap. 446. These former laws being repealed (Laws of 1880, Chap. 245), the subject is now regulated by Code Civ. Proc., §§ 340, 2320, 2321. By 2 R. S. 52, § 3, the Common Pleas were to have the powers of the Court of Chancery over the real and personal estate of an habitual drunkard. Laws of 1821, Chap. 99. Jurisdiction of Supreme Court over person and property of incompetents, enlarged to include those suffering from old age, loss of memory, etc. Code Civ. Proc., § 2320, amd., Laws 1894, Chap. 504, and Laws 1895, Chap. 946. Vide also Wadsworth v. Sharpsteen, 8 N. Y. 388; 28 Barb. 51; 16 id. 313; 8 id. 552; 1 id. 441; 2 Barb. Ch. 326; Matter of Morgan, 7 Paige, 236; Matter of Wager, 6 id. 11; Matter of Lynch, 5 id. 120; Matter of Heller, 3 id. 199; Matter of Tracy, 1 id. 580; Matter of McClean, 6 Johns. Chan. 440; Matter of Wendell, 1 id. 600; Matter of Mason, 3 Ed. 380; Petrie v. Shoemaker, 24 Wend. 85; 1 Abb. 110; 8 How. Pr. 220; 6 id. 248; 30 id. 448; 39 id. 329; Hyatt v. Seeley, 11 N. Y. 52, as to the estates of the above classes of persons generally. is now regulated by Code Civ. Proc., §§ 340, 2320, 2321. By 2 R. S. 52, § 3, persons generally.

Superior Court of the City of New York, Court of Com. Pleas, Superior Court of Buffalo, and City Court of Brooklyn, now abolished. Const. of 1894, Art. VI, § 5.

As to appointment of committee of person of unsound mind, see Code Civ. Proc., §§ 2320-2344.

Foreign committee has no standing in courts of this State. In re Neally,

26 How. Pr. 402. Trust company may be appointed without giving bond. Banking Law,

A committee taking and remaining in possession of leased premises is liable for rent. Matter of Otis, 34 Hun, 542, affd., 101 N. Y. 580.

The committee has no title to the lunatic's lands. Pharis v. Gere, 110 N. Y. 336.

He is entirely subject to the Court, as its agent. Kent v. West, 33 App.

Div. 112.

Sale of Lands.— The same sections of the Code of Civil Procedure which regulate the proceedings for the sale of lands of infants, and their effect, cover the case of lunatics, idiots, etc. Reference may, therefore, be had to Tit, III of this chapter, where the procedure in the case of infants is considered. The only difference between the cases is that a committee acts for a lunatic or idiot instead of a special guardian, the appointment of a committee being necessary before the petition for the sale of lands is presented.

Code Civ. Proc., §§ 2345, 2363. The proceedings for appointment of a committee are regulated by §§ 2320 to 2344, inclusive. Prior Laws, etc.

Application for Sale of Lands .- It was formerly provided that his committee might apply to the court having jurisdiction, for permission to mortgage, lease, or sell as much of his real estate as might be necessary to pay his debts, or for the maintenance of himself or family, etc.; the proceedings for so doing being given at length. The court might thereupon direct the mortgaging, leasing, or sale of the whole or such part of the real estate as might be necessary. 2 R. S. 51 et seq.

All the provisions of the Revised Statutes on this subject were repealed by Laws of 1880, Chap. 245.

The proceedings would not be regular unless the application was to raise money for the above purposes, and unless the personalty was insufficient. In re Petit, 2 Paige, 596. As to the necessity of a reference, see Matter of Valentine, 72 N. Y. 184, and cases supra, Tit. III.

Where mortgage back on the land is provided by the court's order, a mortgage taken on some other property by the committee, will not discharge the

purchase price of the land sold. Walrath v. Abbott, 75 Hun, 445.

The Conveyance.—By 2 R. S. 54, 55, §§ 18, 21, all conveyances, etc., executed by the committee under the direction of the court, were to be as valid as if executed by the lunatic, etc., when of sound mind. No conveyance was to be executed, however, until the sale had been reported on the oath of the committee, and confirmed by the court.

As to the remedy of purchasers in case of defective title, see Matter of Valentine, 72 N. Y. 184.

Leases, etc.—By 2 R. S. 55, § 23, such real estate could not be leased for more than five years, nor mortgaged, aliened, or disposed of, except as above. A lease by the committee without order of court held void. Pharis v. Gere, 110 N. Y. 336.

When Lunatic, etc., is a Trustee, etc.—If the lunatic, etc., were seized of any estate as trustee, mortgagee, etc., the court might also direct a proper conveyance to be made to the persons entitled. 2 R. S. 55, §§ 19, 20. Code Civ. Proc., § 2345.

Restoration to Sanity.—If he becomes of right mind, the real estate, etc., of such person was to be restored to him. 2 R. S. 55, § 24. Code Civ. Proc., § 2343.

Mortgages held by committee, being investments of the estate made by him, may be released as to a portion of the lands mortgaged without applying to the court. Pickersgill v. Reade, 5 Hun, 170.

Sale of Lunatic's Lands under Law of 1864.—By Laws of 1864, Chap. 417, lunatics, whether married or not, might apply by committee, or by a husband, if married, to the Supreme Court, for the sale of their real estate, and any and all interest therein. The committee was to give bonds, and the court might order a reference, and decree a disposition of such estate, not inconsistent with the provisions of any will or conveyance by which the lunatic obtained the estate. The court might also order specific performance of contracts. The court, under this law, was to be the judge of the expediency and necessity of the sale. The sale was to be confirmed by the court before the deed was to be given. See Matter of Valentine, 72 N. Y. 184.

This act was superseded by Laws of 1874, Chap. 446, which consolidated all provisions of law relating to lunatics. The Act of 1874, was amended as to the care of lunatics' estates by Laws of 1875, Chap. 574, and Laws of 1876, Chap. 267. These portions of the Act of 1874, as well as the Act of 1864, were repealed by Laws of 1880, Chap. 245.

Proceeds.—Proceeds were to be deemed realty, and dower or other interests were to be ascertained and provided for, and the lunatic was to have the same interest as he had in the realty. Code Civ. Proc., § 2359.

Descent of Proceeds of Real Estate of Lunatics, etc.—As to this, vide supra. Chap. XIV, Tit. II.

Descent of Real Estate. See Chap. XIV.

Idiots and those of Unsound Mind.—By Law of May 6, 1869, Chap. 627, the provisions of the above Act of 1864, were extended to "idiots and persons of unsound mind." So also by Act of March 2, 1870, Chap. 37.

Contracts Made When Sane .- Specific performance by the committee might be adjudged. Swartout v. Burr, 1 Barb. 495; Matter of Ellison, 1 Johns. Ch. 261; 2 R. S. 55, § 22. This was amended by Act of 1880, Chap. 423, providing that, where the person entitled to performance is the committee, the courts may appoint another person to perform. For the present law, vide Code Civ. Proc., §§ 2345 and 2351.

Receivers.- Receivers of lunatics and habitual drunkards, appointed by a court of chancery, might take and hold real estate, on such trusts and for such purposes as the court should direct, subject to its order. And receivers and committees of such persons appointed by the court might sue claims in their own names, as also might purchasers of claims sold. of April 28, 1845, Chap. 112. See as to transfers to such receivers, Wilson v. Wilson, 1 Barb. Ch. 592.

Dower.— As to committee's petition for sale of lands to pay dower, vide Laws of 1880, Chap. 487, amdg. Laws of 1870, Chap. 717, § 7. Repealed by Laws of 1880, Chap. 245, § 1, subd. 46. Compare Code Civ. Proc., §§ 2362, 2363, now making provision for the same. See also Agricultural Ins. Co. v. Barnard, 96 N. Y. 526; Matter of Valen-

tine, 72 N. Y. 184.

See as to release of right of dower, Dunn v. Heuther, 18 N. Y. Supp. 723.

Partition Proceedings.— See as to a party defendant being insane, but not so declared judicially. Prentiss v. Cornell, 31 Hun, 167, affd., 96 N. Y. 665.

Suits By and Against Lunatics, etc.— In general, all suits by or against them should be in their individual names.

McKillip v. McKillip, 8 Barb. 552; Petrie v. Shoemaker, 24 Wend. 85; Burnet v. Bookstaver, 10 Hun, 481.

A committee is authorized now, however, to sue in his own name, adding his official title. Code Civ. Proc., § 2340; Love v. Schermerhorn, 1 Hill, 97.

Under Code Civ. Proc., § 113, however, the committee might sue to set aside a deed made by the lunatic, Pierson v. Warren, 14 Barb. 488; or to the lunatic. Fields v. Fowler, 2 Supm. 508.

But not to recover real property belonging to the lunatic before appoint-

ment of committee. Burnet v. Bookstaver, 10 Hun, 481.

Equitable Rule. A court of equity, when invoked to set aside deeds and contracts of a person on the ground of insanity, acts upon equitable principles. It is by no means a matter of course to declare them void; it is only done upon equitable terms. Canfield v. Fairbanks, 63 Barb. 461. Compare Van

upon equitable terms. Canfield v. Fairbanks, 63 Barb. 461. Compare Van Deusen v. Sweet, 51 N. Y. 378, and 5 N. Y. Supp. 275.

A person though feeble in mind and adjudged to have been at the time of unsound mind, may make a valid mortgage. Hirsch v. Trainer, 3 Abb. N. C. 274; Mutual Life Ins. Co. v. Hunt, 79 N. Y. 541; explained, Riggs v. Am. Tract Soc., 84 N. Y. 330, 337.

As to sale to lunatic and enforcement of equitable rules, see Johnson v. Stone, 35 Hun, 380, citing Van Deusen v. Sweet, 51 N. Y. 378; 8 Hun, 327; Riggs v. Am. Tract Soc., 84 N. Y. 330; Mut. Life Ins. Co. v. Hunt, 79 id. 541.

Lunatics, Idiots and Habitual Drunkards.— As to accounting of committees and claims by persons interested in estates of, payments, etc. Laws 1893, Chap. 697. Code Civ. Proc., §§ 2341, 2342, 2344.

Limitation of Action.—Rule for computing period of disability caused by infancy. Muller v. Manhattan Ry. Co., 124 App. Div. 295.

Persons Imprisoned for Life .- See Laws 1889, Chap. 401.

CHAPTER XXVI.

THE ACKNOWLEDGMENT, PROOF, AND RECORD OF INSTRUMENTS,

I .- THE ACKNOWLEDGMENT AND PROOF OF INSTRUMENTS.

II .- BEFORE WHAT OFFICERS INSTRUMENTS MAY BE PROVED AND ACKNOWLEDGED.

III .- RECORDING OF INSTRUMENTS.

IV.— THE ACKNOWLEDGMENT, PROOF, AND RECORD OF INSTRUMENTS BEFORE THE REVISED STATUTES.

V .- THE DOCTRINE OF NOTICE.

TITLE I. THE ACKNOWLEDGMENT AND PROOF OF DEEDS.

Acknowledgment or Attestation of Grants in Fee, why Necessary.— By the law of this State, every grant in fee or of a freehold estate, if not duly acknowledged previous to its delivery, shall have its execution and delivery attested by at least one witness: or if not so attested, it shall not take effect as against a burchaser or incumbrancer, until so acknowledged.

1 R. S. 738, § 137; Real Property Law (L. 1896, Chap. 547), § 208. See supra, p. 575, as to decisions under this provision and as to how far

the grant is good as between the parties; also 62 Barb. 272.

A deed unattested and unacknowledged is invalid as against a subsequent grantee from the same grantor by a proper deed. Chamberlain v. Spargur, 86 N. Y. 603.

This law includes mortgages under seal. Canandaigua Academy v. McKechnie, 19 Hun, 62.

The law in force at the time of the acknowledgment governs. 1 R. S. 760, § 22; Real Property Law, § 243. Richardson v. Pulver, 63 Barb. 67.

The provision of the Revised Statutes held not in effect until January 1, 1830. Canandaigua Academy v. McKechnie, 19 Hun, 62.

Acknowledgments Necessary Before Deed can be Recorded.-

Conveyances also have to be acknowledged in order to be recorded with the clerk or register of the county. The object of the record is to give constructive legal notice to subsequent purchasers or incumbrancers, and to make the record evidence. To entitle any conveyance to be recorded, it must be acknowledged by the party or parties executing the same, or proved by a subscribing witness thereto, before any one of certain specified officers.

1 R. S. 756, § 4; Real Property Law, §§ 241, 242.

See L. 1904, Chap. 692, § 1, amdg. Real Property Law, § 241, and requiring the recording of instruments transferring interests in estates of decedents in the Surrogate's office and in the office of the County Clerk, according to whether real or personal property of the decedent is affected.

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Not necessary, however, in cases of assignment of mortgages by Banking Department. Banking Law, L. 1892, Chap. 689, § 4; Chap. 690, § 4.

Effect.—Persons acknowledging when estopped to deny. Mutual Life Ins. Co. v. Corey, 135 N. Y. 326.

Acknowledgments by the Party.—" No acknowledgment of any conveyance having been executed, shall be taken by any officer. unless the officer taking the same, shall know, or have satisfactory evidence, that the person making such acknowledgment, is the individual described in, and who executed such conveyance."

1 R. S. 758, § 9. Real Property Law, § 252 to the same effect, without material change.

The identification of the grantor need not be by the subscribing witness, but by a third person, and his residence need not be stated. Dibble v. Rogers, 13 Wend. 537.

But if not known to him, the commissioner must take proof of the identity,

The knowledge which the officer is to have is a question for his own conscience, and the means of his obtaining knowledge are not essential. Wood v. Bach, 54 Barb. 34, revg. Jones v. Bach, 48 id. 568; Rexford v. Rexford, 7 Lans. 6.

The certificate need not state that the officer had "satisfactory evidence."

Ritter v. North, 58 N. Y. 628.

But knowledge of the party must in some way appear. Miller v. Link, 2 Supm. 86.

Though the words "to me known" are not, it seems, necessary. Hutton v. Weber, 17 N. Y. Supp. 63, affd., 137 N. Y. 615.

It is sufficient if the officer state that he knew the grantor to be the one who executed the deed without the words "described in." Thurman v. Cameron, 24 Wend. 87.

The words "to me known," alone held sufficient, where the other words, viz.: "to be the person described in and who executed," etc., were omitted. Jackson v. Gumaer, 2 Cow. 552; Jackson v. Osborn, 2 Wend. 555, in 1824. A certificate that the parties appeared as "grantors of the within indenture" is insufficient. Fryer v. Rockfeller, 63 N. Y. 268.

If there is an omission of words of acknowledgment of the execution of the conveyance, the certificate is not sufficient. The People v. Harrison,

8 Barb. 560.

The certificate is only prima facie evidence, and may be rebutted. Thurman v. Cameron, 24 Wend. 87.

See also, as to this section, Duval v. Covenhoven, 4 Wend. 561.

The words "to be the individuals described in and who executed the same"

are held sufficient. Smith v. Boyd, 101 N. Y. 472.

An introduction of the party making the acknowledgment to the officer by persons known to him is sufficient to enable him to certify that he knows by persons known to him is sunicient to enable him to certify that he knows the party as required by law; though if he make a mistake the deed could be avoided. Rexford v. Rexford, 7 Lans. 6.

The words "personally appeared A. B." with nothing further as to knowledge that he was the individual described in and who executed the conveyance, are insufficient. Miller v. Link, 2 Supm. 86.

A certificate in due form proves itself. Canandaigua Academy v. Mc-

Kechnie, 19 Hun, 62.

Rules of construction of a certificate of acknowledgment, collated and commented on in Claflin v. Smith, 35 Hun, 372, s. c., 15 Abb. N. C. 241.

Omission of venue and "ss.:" Babcock v. Kuntzsch, 85 Hun, 33.

Acknowledgment by Married Women in the State.—The acknowledgment by a married woman residing in the State was not

to be taken, unless, in addition to the above requisites, she acknowledged "on a private examination, apart from her husband that she executed such conveyance, freely, and without any fear or compulsion of her husband."

1 R. S. 758, § 10. Bradley v. Walker, 138 N. Y. 291. See also supra, Chap. III.

This held to be unnecessary when a separation had been procured. Dela-

This held to be different a separation had been procured. Delafield v. Brady, 38 Hun, 404, affd., 108 N. Y. 524.

The statute provided "nor shall any estate of any such married woman, pass, by any conveyance not so acknowledged." 1 R. S. 758, § 10. This provision was enacted as early as 1771. 2 Van Schaick, 611. It was contained in the Law of 26th of February, 1788, 2 Green, 99; and in Law of April 6th, 1801, 1 Web. 478; and 1 R. L. 369.

Her assent might be implied from her not dissenting from questions asked.

Rexford v. Rexford, 7 Lans. 6.

If the statute was substantially complied with, it was sufficient. Sheldon If the statute was substantially complied with, it was sufficient. Sheldon v. Stryker, 42 Barb. 284; Canandaigua Academy v. McKechnie, 19 Hun, 62. So held where the words "private" and "freely" were omitted from a married woman's acknowledgment, and "separate and apart" and "without fear," etc., substituted. Dennis v. Tarpenny, 20 Barb. 371.

So held where the words used were "without any fear, threat or compulsion," in lieu of the statutory words, the word "freely" being omitted. Meriam v. Harsen, 2 Barb. Ch. 232, affg. 4 Ed. 71.

Her acknowledgment cannot be established by parol, by examination of the officer after his term had expired. Elwood v. Klock, 13 Barb. 50.

As to when and how far the acknowledgment of a married woman was necessary to pass title in this State, vide fully, supra, pp. 85–95.

The above provision as to private examination applied only to a married woman residing in the State. Andrews v. Shaffer, 12 How. 441.

woman residing in the State. Andrews v. Shaffer, 12 How. 441.

A contract to convey had also to be acknowledged by her. Knowles v. McCamley, 10 Paige, 342.

But such an acknowledgment was held not to be necessary in executing a power of appointment under a trust. Richardson v. Pulver, 63 Barb. 67.

Not Necessary since Acts of 1848 and 1849.— Since the passage of the Laws of 1848 and 1849 relative to the powers of married women to convey lands, as if single, no private examination or acknowledgment is held necessary relative to property acquired since April 7, 1848. Andrews v. Shaffer, 12 How. 441; Blood v. Humphrey, 17 Barb. 660; Yale v. Dederer, 18 N. Y. 265, 271; Wiles v. Pick, 26 id. 42; Richardson v. Pulver, 63 Barb. 67; Allen v. Reynolds, 36 Super. 297 (holding that the Acts of 1860 and 1862 did not revive the necessity).

Since May 5, 1879, the necessity has been obviated beyond all question by Laws of 1879, Chap. 249; and since May 15, 1880, as to proof by married woman, by Laws of 1880, Chap. 300, which provided that proof shall be

made as in case of femes soles, and repealed all inconsistent acts.

The Real Property Law now provides that the acknowledgment or proof of a conveyance of real property within the State, or of any other written instrument, may be made by a married woman the same as if unmarried.

Real Property Law, L. 1896, Chap. 547, § 251.

Acknowledgments by Married Women out of the State.—The Revised Statutes further provided that "when any married woman. not residing in this State, shall join with her husband, in any conveyance of any real estate, situated within this State, the conveyance shall have the same effect as if she were sole; and the acknowledgment or proof, of the execution of such conveyance by her, may be the same as if she were sole."

1 R. S. 758, § 11. This provision was also contained in the Law of April

6, 1801, and in the Revised Laws of 1813. 1 R. L. 370.

It will be observed that "residence" is necessary. If the woman were a mere sojourner, the acknowledgment as above would doubtless have been insufficient prior to the above Acts.

Powers of attorney by married women out of the State, vide Chap. XIII.

Tit. IV.

See now Real Property Law, § 251.

Acknowledgments by Corporations .- Must be made by the same officer authorized to execute the same by the directors; form prescribed, see Real Property Law, § 258; vide supra, Chap. XXIV, Tit. II; and Second M. E. Church v. Humphrey, 21 N. Y. Supp. 89, affd., 142 N. Y. 137.

Proof of Execution by a Subscribing Witness.—"The proof of the execution of any conveyance, shall be made by a subscribing witness thereto, who shall state his own place of residence, and that he knew the person described in, and who executed such conveyance; and such proof shall not be taken, unless the officer is personally acquainted with such subscribing witness, or has satisfactory evidence that he is the same person, who was a subscribing witness to such instrument."

1 R. S. 758, § 12. This was, in substance, originally in the Laws of 1801. 1 Web. 478; see now Real Property Law, § 253.

As to proof under the former law, vide Jackson v. Osborn, 2 Wend. 555; Jackson v. Gould, 7 id. 364; also Jackson v. Humphrey, 1 Johns. 498, and infra, Tit. IV; also Jackson v. Vickory, 1 Wend. 406.

Oaths and affidavits defined; may be made before officer authorized by law to take acknowledgment of deeds, unless otherwise specified. Statutory

Construction Law, L. 1892, Chap. 667, § 14.

A statement that the officer knew the witness is sufficient. Sheldon v. Stryker, 42 Barb. 284; Jackson v. Gumaer, 2 Cow. 552; Jackson v. Osborn, 2 Wend. 555.

When Witnesses Dead .- Where the witnesses are dead, then the conveyance may be proved before any officer authorized to take the proof and acknowledgment of deeds, except commissioners of deeds and county judges not of the degree of counsel in the supreme court, by proof of the decease of said witnesses, and of the handwriting of one of them, and of the grantor. The evidence and the names and residences of the witnesses are to be set forth in the certificate. The conveyance may then be recorded, if the original is left on deposit, and the record becomes constructive notice. But neither the conveyance nor the record is made exidence.

1 R. S. 761, 762, §§ 30-33; Real Property Law, § 263.

Vide 20 Barb, 404.

See also as to proof when the witness is deceased, Borst v. Empie, 5 N. Y. 33: Brown v. Kimball, 25 Wend. 259, revg. 19 id. 437.

The grantee himself called as witness cannot prove the execution by the

grantor. Goodhue v. Berrien, 2 Sandf. Ch. 630.

As to what makes a subscribing witness, vide Hollenbeck v. Fleming, 6 Hill, 303; Norman v. Wells, 17 Wend. 136; 7 N. Y. Supp. 939, and supra, p. 578.

As to when it is necessary to call a subscribing witness in proving an instrument, vide Laws of 1883, Chap. 195, and Simmons v. Havens, 101

N. Y. 427, tried before the passage of the Act of 1883.

Failure to state the witness' residence in the officer's certificate is vital.

Irving v. Campbell, 121 N. Y. 353.

Subscribing witness must sign at the time of execution. Earley v. St. Pat. Ch. Soc., 81 Hun, 369.

He need not be present at actual moment of execution; if called in immediately afterward and requested by parties to attest the execution, and his act of subscribing will be regarded as parts of the same transaction. Hollenbeck v. Fleming, 6 Hill, 303.

As to proof by parol that deed was actually made and delivered, see Irving v. Campbell, 121 N. Y. 353.

Certificate to be Indorsed.—"Every officer who shall take the acknowledgment or proof, of any conveyance, shall indorse a certificate thereof, signed by himself, on the conveyance; and in such certificate, shall set forth the matters hereinbefore required to be done, known, or proved, on such acknowledgment or proof, together with the names of the witnesses examined before such officer, and their places of residence, and the substance of the evidence by them given."

1 R. S. 759, § 15; Real Property Law, § 255 (substantially the same). The certificate is made only presumptive proof, and may be rebutted and contested, and the witness shown to be interested and incompetent. 1 R. S. 759, § 17. This section was repealed by Laws of 1877, Chap. 417. A similar provision is contained in Code Civ. Proc., § 936. See also Clark v. Nixon, 5 Hill, 36; 3 Duer, 95.

The words "and their places of residence," were introduced by the Revised Statutes into the previous law. Held that the residence of the subscribing witness is to be set forth when he is examined, but not necessarily that of other witnesses examined. Dibble v. Rogers, 13 Wend. 536.

The identity of the grantor need not be proved by the subscribing witness, when the grantor acknowledges it, but may be by any third person. Id.

when the grantor acknowledges it, but may be by any third person. Id.

It will be observed that the certificate is to be indorsed on the conveyance, and not merely annexed; but if the certificate is subjoined, it has been held sufficient. Thurman v. Cameron, 24 Wend. 87.

The certificate should state that the subscribing witnesses were present at the execution. Norman v. Wells, 17 Wend. 136.

It is not necessary that the precise words of the statute should be used. Sheldon v. Stryker, 42 Barb. 484; Iron Co. v. Reyment, 45 N. Y. 703.

When official character of officer appears in the body of the certificate, it need not be expected to the subscription. Second M. E. Church v. Humphy and the convented to the subscription.

it need not be appended to the subscription. Second M. E. Church v. Humphrey, 142 N. Y. 137.

Certificate — What to State as to Time and Locality.— The certificate of the officer taking acknowledgments out of the State must state the day and city, town and county, within which the acknowledgment or oath was taken; and the commissioner must take the proof of acknowledgment within the city or county for which he was appointed, otherwise it is void. L. 1850, Chap. 270, § 5; Real Property Law, § 256. The Law of 1850 and amendments provides for an official seal for the commissioners delegated and what their certificates must state. Laws of 1850, Chap. 270; Act of 1857, Chap. 788; Act of 1859, Chap. 222; L. 1876, Chap. 58; L. 1880, Chap. 115.

The certificate should state, when the acknowledgment is taken out of the State, all that is required by the statutes, without recourse to extrinsic proof.

People v. Register of N. Y., 6 Abb. 180.

Certificate of Secretary of State. Where the acknowledgment is before a commissioner appointed for this State residing in another State, his certificate must be authenticated by a certificate of the Secretary of this State. Laws of 1850, Chap. 270; Laws 1858, Chap. 308, repealed and reregulated; Laws 1875, Chap. 136; Laws 1891, Chap. 100. See now Real Property Law. § 260 (as amended by L. 1905, Chap. 329). See also Tit. II.

Conveyance recorded thirty years .- Any conveyance heretofore or hereafter recorded is deemed duly acknowledged or proved and properly authenticated when thirty years since recording have elapsed; saving the rights of purchasers in good faith for value from the same grantor of the same property whose conveyance has been recorded before the thirty year period has elapsed or before this provision.

Real Property Law, § 255, as amd. by L. 1905, Chap. 450.

Conveyances so Acknowledged or Proved to be Recorded.— "Every conveyance, acknowledged, or proved, and certified in the manner above prescribed, by any of the officers before named, may be read in evidence, without further proof thereof, and shall be entitled to be recorded."

Laws of April 6, 1801; 1 Wend. 478; 1 R. L. 369. This was repealed by Laws of 1877, Chap. 417, but the provision is re-enacted in Code Civ. Proc., § 935, with the exception of the provision for record.

Certificates on Conveyances to be Recorded in Another County .- Conveyances to be recorded in another county than where the commissioner or county judge, unless a counselor, resided who took the acknowledgment, must be authenticated by the county clerk of the county where the officer resided. Law of 1818, 44; 1 R. S. 759, \$ 18; Real Property Law, \$ 259; Campbell v. Hoyt, 23 Barb. 55, as modified by the Laws of 1867, 1515. Conveyances executed by the agents of the Holland Land Company or Poultney estate are excepted. 1 R. S. 759, § 19; Real Property Law, § 259. County judges' certificates, since 1847, do not have to be authenticated by the county clerk. People v. Hurlburt, 44 Barb. 126; Laws of 1847, Vol. 2, 643. As to its being requisite before that time, vide Wood v. Weiant, 1 N. Y. 77. See as to recording such certificates, infra, Tit. III.

As to omission of names, dates and seals not invalidating. See Thorn

v. Mayer, 12 Misc. 487.

Reacknowledgment.- If a deed which is void for want of a proper acknowledgment is reacknowledged, it is made good. Doe v. Howland, 8 Cow. 277; Osterhout v. Shoemaker, 3 Hill, 513.

Defective Acknowledgment.—The defective acknowledgment of deeds may be made good by statute. Watson v. Mercer, 8 Pet. 88; 3 McLean, 383; id.

Or by proper reacknowledgment. Doe v. Howland, 8 Cow. 277; Osterhout v. Shoemaker, 3 Hill, 513.

The Term "Real Estate" Defined .- The term "real estate," as regards the proof and record of deeds, is to be construed as coextensive in meaning with "lands, tenements and hereditaments; and as embracing all chattels real except leases for a term not exceeding three years." 1 R. S. 762, § 36; Real Property Law, § 240.

This held to include "growing timber." Vorebock v. Roe, 50 Barb. 302; Warren v. Leland, 2 Barb. 613; Goodyear v. Vosburgh, 57 id. 243.

Ancient Deeds.— A deed appearing to be of the age of thirty years proves itself, and is allowed in evidence as presumptive before the courts, provided possession has accompanied it, or there are corroborating proofs. Jackson v. Thompson, 6 Cow. 178; Wilson v. Betts, 4 Den. 201; Staring v. Bowen, 6 Barb. 109; Troup v. Hurlburt, 10 id. 354; Clark v. Owens, 18 N. Y. 434; Real Property Law, § 255, as amd. by L. 1905, Chap. 540.

And it is evidence of the facts recited as to authority, etc. Ensign v. McKinney, 30 Hun, 249; Hoopes v. Auburn, etc., Co., 37 id. 568.

By Laws of 1886, Chap. 637, a sheriff's deed which has been recorded twenty years is presumptive evidence of the facts recited.

And so with wills. Staring v. Bowen, 6 Barb, 100

And so with wills. Staring v. Bowen, 6 Barb. 109. Possession is not essential. Ensign v. McKinney, 30 Hun, 249; s. c., 12 Abb. N. C. 463.

TITLE II. BEFORE WHAT OFFICERS INSTRUMENTS MAY BE AC-KNOWLEDGED OR PROVED.

By the statutes now in force the acknowledgment and proof may be before the officers enumerated below.

See U. S. R. S., § 1778, the Federal Enabling Act as to notaries public appointed in any State, district or territory and commissioners of the circuit courts.

Oaths and Affidavits defined and before what officers same may be made. Statutory Construction Law, L. 1892, Chap. 667, § 14.

I. When Taken Within the State.—Before a justice of the Supreme Court; or within the district wherein such officer is authorized to perform official duties, before a judge, clerk, deputy clerk, or special deputy clerk of a court, a notary public, or the mayor or recorder of a city, a justice of the peace, surrogate, special surrogate, special county judge or commissioner of deeds.

Real Property Law, § 248.

See the following for those authorized by earlier statutes: 1 R. S. 756, § 4; Laws of 1840, Chap. 238; Laws of 1859, Chap. 360; and of 1863, Chap. 508; and 1864, Chap. 29, as to notaries; also L. 1892, Chap. 683. And probably justices of the New York Superior Court as Supreme Court commissioners. See 1 R. S. 754, § 4; Laws of 1847, Chap. 255, § 7; Renaud v. Hargous, 13 N. Y. 259, affg. s. c., 2 Duer, 540. The office of Supreme Court commissioner was abolished by the Constitution of 1846. Vide The People v. Hurlburt, 44 Borb, 196. Hurlburt, 44 Barb. 126. As to powers of surrogates to take acknowledgments and affidavits, Laws of 1884, Chap. 309.

Commissioners of Deeds and Justices of the Peace.—As to early acts appointing commissioners of deeds, vide Laws of 1818, Chap. 55. This act rendered Masters in Chancery incompetent. Repealed in 1828. See also as to commissioners of deeds, Acts of 1823, 243; 1829, Chap. 52; 1883, Chaps. 28, 100, 101; Laws 1892, Chap. 683; Laws 1894, Chap. 88. Various local acts also created commissioners for certain towns, Laws 1837, Chap. 439; 1846, Chap. 35; 1848, Chap. 158; 1851, Chap. 516; also 1 R. S. 100, 110, and cities.

By Act of 1840, Chap. 238, the office of commissioners of deeds of the towns in the State was abolished; and their duties were to be executed by the justices of the peace of the towns. Commissioners of deeds are local officers, and are confined in the execution of their duties to the county for which they are appointed. 1 R. S. 100; Law of 1854, Chap. 92. By Law of 1848, Chap. 75, they are to be appointed by the common councils of the cities of the State and vacancies so filled; amd. Laws 1848, Chap. 158; 1848, Chap. 161; 1892, Chap. 683; 1894, Chap. 88. By 1 R. S. 756, no county judge or commissioner of deeds shall take any proof or acknowledgment of deeds out of the county or city for which he was appointed.

Notaries Public were given power by Laws of 1859, Chap. 360, among other things, to take proof or acknowledgment of deeds for use and record. See also Law 1863, Chap. 508, confirming them. See L. 1907, Chap. 207, requiring filing of autograph signature by notaries with registers. Amd. L. 1907.

Chap. 559.

Jurisdiction of the Officer.—The notary formerly could not act out of his county. 33 How. Pr. 312. Nor can a judge out of his State. Jackson v. Humphreys, 1 Johns. 498. Acts of notaries, since April 15, 1859, were confirmed by the Laws of 1860, Chap. 443; 1861, Chap. 246; 1863, Chap. 508; 1881, Chaps. 44 and 553; 1882, Chap. 16; 1883, Chaps. 29 and 230; 1884, Chap. 304; 1885, Chap. 63; 1886, Chap. 448. The officer will be presumed to have acted within the limits of his jurisdiction. People v. Snyder, 41 N. Y. 397; Carpenter v. Dexter, 8 Wall. 513. By Laws of 1884, Chap. 270, amd. by Laws of 1885, Chap. 61, and Laws 1894, Chap. 88, a notary may also act in any adjoining county upon filing a certificate and his signature there. Executive Law, Gen. Laws, Chap. IX, L. 1892, Chap. 683, § 82. See infra, p. 701, as to notaries in New York, Kings and other counties. As to justices of the peace, see confirmatory acts, Laws of 1886, Chaps. 210 and 461. All former acts of justices of the peace failing to take oath or give bond, validated. Laws 1893, Chap. 277.

Authority Statutory. See Tully v. Lewitz, 50 Misc. 350, 355.

- II. In Other States.—Before either of the following officers acting within his jurisdiction, or of the court to which he belongs:
- 1. A judge of the Supreme Court of the Circuit Court of Appeals, of the Circuit Court, or of the District Court of the United States.
 - 2. A judge of the Supreme, Superior, or Circuit Court of a State.
 - 3. A mayor of a city.
- 4. A commissioner appointed for the purpose by the Governor of the State.
- 5. Any officer of the State in which the acknowledgment is taken authorized by the laws thereof to take the acknowledgment or proof of deeds to be recorded therein, of which the certificate required by section two hundred and sixty-two shall be evidence.

Real Property Law, § 249 (amd. L. 1903, Chap. 419).

- III. In Porto Rico, Philippine Islands, Cuba, Etc.—Before the following:
- r. A judge or clerk of a Court of Record thereof, acting within his jurisdiction.

- 2. A mayor or other chief officer of a city, acting in such city.
- 3. A commissioner appointed for the purpose by the Governor of this State and acting within his jurisdiction.
- 4. An officer of the United States Regular Army or volunteer service of the rank of captain or higher, or an officer of the United States Navy of the rank of lieutenant or higher, while on duty at the place where such party or parties are or reside.

Authentication is required by seal of the court or officer, or if no seal a statement to that effect; and in case of United States officer by the Secretary of War or the Secretary of the Navy.

Real Property Law, § 249a (L. 1901, Chap. 84, amd. L. 1906, Chap. 398).

IV. In Foreign Countries.— Before either of the following officers:

- 1. An ambassador, a minister plenipotentiary, minister extraordinary, minister resident, or chargé d'affairs of the United States, residing and accredited within the country.
- 2. A consul-general, vice-consul-general, deputy consul-general, vice-consul or deputy consul, a consular or vice-consular agent, a consul or commercial or vice-commercial agent of the United States residing within the country; or a secretary of legation at the post, port, place or within the limits of his legation.
- 3. A commissioner appointed for the purpose by the Governor, and acting within his own jurisdiction.
- 4. A person specially authorized for the purpose by a commission, under the seal of the Supreme Court, issued to a reputable person, residing in or going to the country where the acknowledgment or proof is to be taken.
- 5. If within the Dominion of Canada, it may also be made before any judge of a court of record; or before any officer of such dominion authorized by the laws thereof to take the acknowledgment or proof of deeds to be recorded therein.
- 6. If within the United Kingdom of Great Britain and Ireland and the dominions thereunto belonging, it may also be made before the mayor, provost or other chief magistrate of a city or town therein, under his hand and the seal of such city or town.
- 7. All acts of ambassadors, etc., in taking acknowledgment or proof confirmed, if certificate in form required by law.
- 8. If within the States comprising the Empire of Germany it may also be made before a judge of a court of record under the

seal of such court or before a notary public under the seal of his office and the seal of the city or town in which the notary resides.

Real Property Law, § 250, amd. L. 1903, Chap. 98; 1904, Chaps. 528, 690; 1908, Chap. 98.

In any State or Kingdom in Europe or in North or South America, the same may be acknowledged or proved before any ambassador, minister plenipotentiary, or any minister extraordinary, or any chargé d'affairs, of the United States, resident and accredited within such State or Kingdom. If in France, before the consul of the United States appointed to reside at Paris; if in Russia, before the consul of the United States appointed to reside at Saint Petersburg.

1 R. S. 757, § 5, as amd. L. 1895, Chap. 793. For a form held sufficient, see Jordan v. Underhill, 91 App. Div. 124.

See the following for authorized officers under earlier statutes:

When taken without the State but within the United States, or in Canada. Before a judge of the United States Supreme or District Courts, or of the Supreme, Superior or Circuit Court of a State or Territory, or before a judge of the United States Circuit Court in the District of Columbia; but such acknowledgment must be taken at a place within the jurisdiction of such officer. 1 R. S. 757, § 4, subd. 2. Or before the mayor of any city. L. 1845, Chap. 109. Or a New York commissioner. L. 1840, Chap. 290; 1850, Chap. 270. The certificate of a New York commissioner must be accompanied by the certificate of the Secretary of State of the State of New York, attesting the existence of the officer, and the genuineness of his signature; and such commissioner can only act within the city or county in which he resided at the time of his appointment. 1 R. S. 757, § 4, subd. 2; Laws of 1845, Chap. 109; Laws of 1850, Chap. 270; amd., Laws of 1857, Chap. 788; Laws of 1858, Chap. 308, repealed, Laws of 1875, Chap. 136; Laws of 1891, Chap. 100. The certificate of a New York commissioner, residing out of the State, must be under his seal of office and is wholly void unless it specify the day on which, and the city or town in which it was taken. Laws of 1850, Chap. 270, amd. by Laws of 1876, Chap. 58, and 1880, Chap. 115. This act repealed the Law of May 13, 1840, and gave power to take affidavits to said commissioners, and was repealed as to so much thereof as allows the appointment of commissioner for Canada by Laws of 1875, Chap. 136. See also Act of 1859, Chap. 222, amdg. Act of 1850. When made by any person residing out of the State, and within the United States, it might be made also before any officer of the State or Territory where made, authorized by its laws to take proofs or acknowledgments; Laws of 1848, Chap. 195. L. 1892, Chap. 208, extends it to any person within the United States, but out of the State, and L. 1893, Chap. 123, to persons in Canada. But no such acknowledgment is valid, unless the officer taking the same knows or has satisfactory evidence that the person making it is the individual described in and who executed the instrument. Laws of 1848, Chap. 195. And there must be attached or subjoined to the certificate of proof or acknowledgment, a certificate under the name and official seal of the clerk, register, recorder, or prothonotary of the county in which such officer resides, or the clerk of any court thereof having a seal, specifying that such officer was, at the time of taking such proof or acknowledgment, duly authorized to take the same, and that such clerk, register, recorder, or prothonotary is well acquainted with the handwriting of such officer, and verily believes his signature genuine. Laws of 1848, Chap. 195, as amd. by Laws of 1856, Chap. 61, repealing Law of 1853, Chap. 303; 1867, Chap. 557. In re Wilcox's Est., 21 N. Y. Supp. 780. Laws of 1892, Chap. 208, removed the restriction as to residence without the State, and Laws of 1893, Chap. 123, extended the jurisdictional locus to include the Dominion of Canada.

When taken without the United States.—When the party is in other parts of North or South America, or Europe, before a minister plenipotentiary, or minister extraordinary, or chargé d'affairs, of the United States, resident and accredited there; or before any United States Consul, resident in any port or country; or before a judge of the highest court in Upper or Lower Canada (1829, Chap. 222; and by Law of 1870, Chap. 208), before the judge of any court of record, or the mayor of any city therein, to be certified in a certain way. In France before a consul of the United States residing at Paris. In Russia, before the consul at St. Petersburg. 1 R. S. 757, § 5. Now also before ambassadors, etc. Laws of 1895, Chap. 793. In the British dominions, before the Lord Mayor of London, or Chief Magistrate of Dublin, Edinburgh or Liverpool. Laws of 1829, 348, Chap. 222; 1 R. L. 370; 1817, 58; 1854, Chap. 206. Extended to vice and deputy consuls and consular agents, and commercial and vice-commercial agents. Laws of 1863, Chap. 246; 1865, Chap. 421. Extended to mayor, provost, or chief magistrate of any city or town in said dominions or before any consul of the United States appointed to reside at any place in said dominions. Laws of 1883, Chap. 80. Their previous acts are confirmed if in form. Id. Acknowledgment may be also made before a person specially authorized by the Supreme Court of the State, by a commission issued for the purpose. 1 R. S. 757, § 8; Law of March 8, 1817. The Governor of New York was also authorized to appoint commissioners of deeds, not exceeding three in each, for the following cities: London, Liverpool, Glasgow, Paris and Marseilles. Laws of 1858, Chap. 293; and the Governor in his discretion might appoint a commissioner for any other foreign State. Id. They might take affidavits and give certain certificates. See amendment as to that. Law of 1865, Chap. 421; Law of 1893, Chap. 248.

See amendment as to that. Law of 1865, Chap. 421; Law of 1892, Unap. 080; Law of 1893, Chap. 248.

The Act of 1858, Chap. 308, and all acts amendatory thereof, were repealed by Laws of 1875, Chap. 136, which, however, continued in office for the term of their appointment all commissioners appointed under the acts, repealed. This Act of 1875 regulated the appointment of foreign commissioners in general terms, and thus superseded the acts repealed. The number of commissioners was increased by Laws of 1883, Chap. 233. By Law of 1888, Chap. 246, acknowledgments, etc., could be taken before consuls-general, consuls, deputy consuls, consular agents, vice-consular agents, commercial agents or vice-commercial agents of the United States, resident in any foreign port or country. By Law of 1895, Chap. 793, the authority is given to United States ambassadors, ministers, chargés in Europe or North or South America; in France the consul at Paris, in Russia the consul at St. Petersburg. The whole subject was later regulated by Laws 1892, Chap. 683; Laws 1893, Chap. 248, as regards the state officers, their powers and duties, both within and without the State. These and the earlier acts all prescribed forms of certificate and of authentication similar to those mentioned above in cases of acknowledgment and proof without the State but within the United States. These Laws

of 1892 and 1893 were called the "Executive Law."

Persons in Military Service.—By Laws of 1862, Chap. 471, it was provided that persons in the actual volunteer military service of the State or of the United States, might make an acknowledgment before a colonel or higher officer and also before a commissioned officer in said service, being a counselorat-law of this State, if such officer is out of the State. This act was repealed by Laws of 1877, Chap. 417.

During the War in Mexico before Officers of the Army.— Acknowledgments by soldiers or officers of the army of the United States. Laws of 1847, Chap. 170.

Relationship to Parties.—Relationship to parties does not invalidate the acknowledgment. Lynch v. Livingston, 6 N. Y. 422; Remington Paper Co. v. O'Dougherty, 81 N. Y. 474, modifying 16 Hun, 594.

Authentication Necessary.—Seal.—The certificates of acknowledgment or proof made by a commissioner appointed by the Governor, or by the mayor, etc., of cities or towns without the United States, or by minister, etc., must be under his seal of office or of the consulate or legation.

Real Property Law, § 257, amd. L. 1904, Chap. 528.

County Clerk's Authentication.— In case of notaries, etc., when conveyance is to be recorded in county other than that in which officer resides.

Real Property Law, § 259. Certain instruments validated, L. 1905, Chap. 377.

Other Authentication.—A certificate of acknowledgment or proof is not entitled to be read in evidence or recorded unless authenticated by the following officers, respectively:

- 1. Where made by a commissioner appointed by the Governor, by the Secretary of State.
- 2. Where made by a Judge of a Court of Record in Canada, by the clerk of the court.
- 3. Where made by an authorized officer of a state of the United States or Canada, by the Secretary of State of the State, or the clerk, register, recorder or prothonotary of the county in which the officer making the certificate resided when the certificate was made or in which such acknowledgment or proof was taken, or by the clerk of any court of that county having by law a seal, the word county including the district of Columbia.

Real Property Law, § 260 (amd. L. 1908, Chap. 136).

Contents of Certificate of Authentication.— See same fully set out. Real Property Law, § 261.

Recording Certificates.— Certificate of acknowledgment or proof and the authenticating certificate must be recorded, if required.

Real Property Law, § 267.

Recording of conveyances acknowledged or proved without the State, where parties and certifying officer are dead.

See Real Property Law, § 262.

See also the following for earlier provisions:

Laws of 1891, Chap. 100, amdg. Laws of 1848, Chap. 195, as amd. by Laws of 1867, Chap. 557, extends authentication to Secretary of the State in which

the officer resides. As to necessity for Secretary of State's certificate on New York commissioner's acknowledgment, see Williamson v. Banning, 86 Hun, 203. Powers of Deputy Secretary of State. Vide Laws of 1895, Chap. 107; Keyser v. Hitz, 133 N. Y. 145. When taken without the State, where the grantor is dead, vide Laws of 1858, Chap. 259. Vide Laws of 1883, Chap. 233, increasing the number of commissioners; also Laws of 1894, Chap. 729.

Certificates by Deputies.- Keyser v. Hitz, 133 U. S. 145.

Notaries in Adjoining Counties. -- Notaries in New York and Kings counties authorized to perform official acts in both counties. Law of 1872, Chap. 703. See also Law 1873, Chap. 807, as to Richmond, Queens, Westchester, Rockland, Kings and New York. Amended by Laws of 1875, Chap. 458, and 1880, Chap. 234. See also, L. 1905, Chap. 377.

The same provision is contained in Laws of 1882, Chap. 410 (New York

City Consolidation Act of 1882), §§ 1712, 1713.

Also further see Laws of 1884, Chap. 270, amd. Laws of 1885, Chap. 61; allowing a notary to act in any adjoining county and in his own county for

allowing a notary to act in any adjoining county and in his own county for the adjoining county, with the same powers as in his own county.

This subject is now regulated by Laws 1892, Chap. 683, § 82, repealing Laws 1880, Chap. 234; amd. Laws 1893, Chap. 248; amd. Laws 1894, Chap. 88, permitting notaries of Kings, Queens, Richmond, Westchester, Putnam, Suffolk, Rockland, Orange, Dutchess and New York counties to act in adjoining counties, upon filing autograph signature and a certificate of appointment from the county clerk of the county where appointed. See amdt. L. 1901,

Filing of certificate in the other county need not be recited. Estate of King, 2 C. P. R. 71. See also Schiff v. Leipsiger Bank, 65 App. Div. 33.

Powers and Duties of Notary Public.—See Laws 1892, Chap. 683, § 85, as amd. Laws 1894, Chap. 88.

Acts of Notaries Validated .- L. 1907, Chap. 589; 1908, Chap. 92.

TITLE III. RECORDING OF INSTRUMENTS.

Every grant is conclusive as against subsequent purchasers or incumbrancers from a grantor or from his heirs claiming as such, except a subsequent purchaser or incumbrancer in good faith, and for a valuable consideration, who acquires a superior title by a conveyance that has been first duly recorded.

Real Property Law, § 210; see also 1 R. S. 739, § 144 (without the word incumbrancer).

For most of the statutes now in force relative to the record of instruments. see 1 R. S. 756 et sea.

Conveyances to be Recorded or to be Void, etc.—A conveyance of real property within the State on being acknowledged or proved. and such acknowledgment or proof duly certified when required may be recorded in the office of the clerk of the county where such real estate shall be situated; and every such conveyance not so recorded is void as against any subsequent purchaser in good faith and for a valuable consideration, from the same vendor, his heirs or devisees, of the same real property or any portion thereof, whose conveyance is first duly recorded.

Real Property Law, § 241; 1 R. S. 756, § 1; Trombly v. Turner, 116 App. Div. 74.

The statute protects none but innocent and bona fide purchasers. v. Burgott, 10 Johns. 457; Van Rensselaer v. Clark, 17 Wend. 25; Schutt v. Large, 6 Barb. 373; Harris v. Norton, 16 id. 264; Westbrook v. Gleason, 79 N. Y. 23; Delancey v. Stearns, 66 id. 157; Ward v. Isbill, 73 Hun, 550.

A deed inoperative for want of a seal is within the act.

Hernandez, 29 Hun, 399.

Where a purchaser of property is protected by the Recording Act against a mortgage given before and recorded subsequently to his deed, his grantees are entitled to such protection, notwithstanding the fact that they purchased from him with notice of the mortgage. Ward v. Isbill, 73 Hun, 550.

The provision does not apply to building contracts. Davidson v. Fox, 65

App. Div. 262. See also Matthews v. Damainville, 100 App. Div. 311.

Compelling Record .- One of several grantees may maintain an action against a cograntee in possession to compel him to record the deed. Smith v. Cole, 39 Hun, 248, affd., 109 N. Y. 436. The law applies to easements. Snell v. Leavitt, 39 Hun, 227, affd., 110 N. Y. 595.

Who are Bona Fide Purchasers .- A conveyance in payment of a pre-existing debt held not to have a preference over a prior unrecorded mortgage. Coddington v. Bay, 20 Johns. 637; 2 Barb. 493; Dickerson v. Tillinghast, 4 Paige, 215; 17 Barb. 446. There must be a new consideration at the time of the purchase, or the relinquishment of some security. Jessup v. Hulse, 29 Barb. 539, revd. on another point, 21 N. Y. 168. See O'Brien v. Fleckenstein, 180 N. Y. 350.

Those who take for a precedent debt are not so considered except to the extent of the value they part with. Dickerson v. Tillinghast, 4 Paige, 215; Evertsen v. Evertsen, 5 id. 644; Woodburn v. Chamberlin, 17 Barb. 446; Merrit v. N. R. R., 12 id. 605; Pickett v. Baron, 29 id. 505; Cary v. White, 52 N. Y. 138 (distinguished as not passing on the sufficiency of the consideration in Union Dime Savings Inst. v. Duryea, 67 id. 84, 87; Mutual Life Ins. Co. v. Smith, 23 Hun, 535, 540); De Lancey v. Stearns, 66 N. Y. 157.

Where a deed expresses a valuable consideration and acknowledges its payment, that is prima facie evidence that the grantee is a purchaser in good

faith, and the burden is upon one claiming the contrary to rebut the presumption arising therefrom. Ward v. Isbill, 73 Hun, 550.

As to a purchaser from heirs, Strong v. Wilder, 119 N. Y. 530.

But a judgment creditor purchasing at execution sale is a bona fide purchaser, if he pay the purchase money into court. Barto v. Tompkins Co. Nat. Bank, 15 Hun, 11. Even at sale under his own judgment. Creegan v. Robertson, 74 Hun, 22.

The want of record does not avoid the deed as between the parties or those having actual notice. See also *infra*, Tit. V; Jackson v. Chamberlain, 8 Wend. 620; Jackson v. Post, 9 Cow. 120; Jackson v. Bargott, 10 Johns. 457; Jackson

v. West, id. 466.

"Subsequent purchasers" means those from the same vendor. Raynor v. Wilson, 6 Hill, 469. Contra Wood v. Chapin, 13 N. Y. 509; Ward v. Isbill, 73

Hun, 550,

The purchaser must also be one in good faith, and not one merely whose rights lie in executory contract. Ring v. Steele, 3 Keyes, 450; Villa v. Rodriguez, 12 Wall, 323.

Ten dollars and other considerations held not a valuable consideration. Ten Eyck v. Witbeck, 135 N. Y. 40, revg. 15 N. Y. Supp. 418.

The statement in deed of a valuable consideration and acknowledgment of its receipt puts the burden of evidence on the party attacking. Ward v. Isbill, 73 Hun, 550. See also as to bona fide purchaser. Moelle v. Sherwood, 148 U. S. 21; U. S. v. Cal. Land Co. id. 31.

A creditor who gives a valid extension of a pre-existing debt and takes a mortgage as security for the same is a bona fide purchaser under this provision, and takes precedence over a prior mortgagee whose mortgage is not recorded until after the second mortgage. O'Brien v. Fleckenstein, 180 N. Y. 350, affg. 86 App. Div. 140.

Where two mortgages were given at the same time, the one in payment of a debt, the other as collateral, held the former, though recorded after the latter,

should have priority. Wilcox v. Drought, 71 App. Div. 402.

The assignee of a mortgage which had been released, the release not being recorded, held to have the superior rights. Gibson v. Thomas, 85 App. Div. 243, affd., 180 N. Y. 483. See Syracuse Savings Bank v. Merrick, 96 App.

The provision extends to all that was realty when the security was acepted.

McMillan v. Seaman, 101 App. Div. 436.
Recording is constructive notice. Stolts v. Tuska, 76 App. Div. 137.

An Unrecorded Conveyance, however, divests the owner of any interest, so that a subsequent sale on execution against him passes nothing. Jackson v. Town, 4 Cow. 509; Jackson v. Post, 9 id. 120. But compare Hetzel v. Barber, 69 N. Y. 1. Nor has he any interest liable to attachment. Wilson v. Kelly, 31 Hun, 75. Otherwise as to mortgages. See *infra*, this title, as to preference over judgments.

Books to be Provided .- Different sets of books must be provided by the recording officer of each county, for deeds and mortgages, one for conveyances absolute, and the other for mortgages or conveyances intended to operate as such, or as securities. Real Property Law, § 264; 1 R. S. 756, § 2.

Indices.— See as to form of index, Laws of April 18, 1843, Chap. 199. to indices in the city of New York, vide Laws of 1882, Chap. 410 ("Consolidation Act"), § 1752.

Laws 1888, Chap. 321; Laws 1889, Chap. 349, amd. Laws 1890, Chap. 166;

Laws 1892, Chap. 412; Laws 1893, Chap. 536.

As to indices in Kings County, Laws 1895, Chap. 71, amdg. L. 1894, Chap. 365.

This is now regulated generally by the Real Property Law, § 265.

Order of Reading.— See Real Property Law, § 266. Neglect or corruptly abstracting a paper from the files and records of the office does not render an instrument an unrecorded instrument. Reid v. Town of Long Lake, 44 Misc. 370.

New York County .- By Act of 1893, Chap. 536, there is full provision made for new index books known as the block index, in the offices of the register, county clerk and comptroller of the county of New York. In the comptroller's. office provision is made as to reindexing all arrears of taxes, etc. Statutory notices of liens and claims upon land are also to be indexed. The comptroller is also to index arrears of taxes, assessments, etc., and unredeemed sales, leases, etc.

The provisions in regard to recording and indexing instruments affecting real property in New York city, according to city blocks or other limited areas are not affected by the Real Property Law provisions as to recording.

Real Property Law, § 275.

Certain Deeds Deemed Mortgages.—"A deed conveying real property which, by any other written instrument, appears to be intended only as a security in the nature of a mortgage, although an absolute conveyance in terms, must be considered a mortgage; and the person for whose benefit such deed is made, derives no advantage from the recording thereof, unless every writing, operating as a defeasance of the same, or explanatory of its being desired to have the effect only of a mortgage, or conditional deed, recorded therewith. and at the same time."

Real Property Law, § 269; see for the similar provision in the Revised Statutes, 1 R. S. 756, § 3. Vide also Grimstone v. Carter, 3 Paige, 421; also supra, Chap. XXIII, Tit. I, p. 610.

-As to records of maps, surveys, etc., in N. Y. County, see Code Maps, etc.-Civ. Proc., § 955; L. 1892, Chap. 522, amd. L. 1904, Chap. 444.

Deeds Proved in Another State. Deeds acknowledged or proved in another State or Territory in accordance with the laws thereof may be recorded in this State, when the officer and grantor are both deceased and proof is made of such death by affidavit and the required statutory formalities complied with. Laws of 1858, Chap. 259, now Real Property Law, § 262.
Copies of records may be recorded, with the same effect as if the original

were recorded.

Real Property Law, § 247; L. 1843, Chap. 210, § 5, amd. L. 1887, Chap. 539, and L. 1893, Chap. 182.

Certificates to be Recorded.—All certificates of acknowledgments and proof and any certificates required of the authentication of any officer, must be recorded with the conveyance. Unless so done, neither the record nor transcript thereof can be read in evidence.

Real Property Law, § 267; 1 R. S. 759, § 20.

Former Conveyances. — Conveyances proved or acknowledged under laws in force before the Revised Statutes of 1830 may also be recorded and read in evidence. Those not acknowledged shall have the like effect, when acknowledged shall have the like effect edged and recorded, as those acknowledged and recorded under the present law. 1 R. S. 760, §§ 22, 23; Real Property Law, § 243.

Order of Recording .- Conveyances are to be recorded in the order, and as of the time of delivery to the recording officer, who must make an entry in the record after the copy recorded by him of the hour, day, month and year when it was recorded, and must indorse on such instrument a certificate stating the time, as aforesaid, when and the book and page where the same was recorded.

Real Property Law, §§ 266, 268; 1 R. S. 760, §§ 24, 25.

U. S. Loan Commissioners' Records, See L. 1837, Chap. 150, amd. L. 1893, Chap. 672.

Record to be Evidence.—As to this, vide 1 R. S. 759 to 761; Real Property Law, § 247, and supra, pp. 694, 695, as to present regulation by the Code. Code Civ. Proc., §§ 935, 936.

Instruments in Secretary of State's Office, Relating to Real Estate. - A copy certified in manner to entitle it to be read in evidence may be recorded with such certificate in the office of any recording officer within the State. L. 1839, Chap. 295; Real Property Law, § 246.

When Witnesses are Deceased .- Conveyances proved under these circumstances, and deposited for record, shall be constructive notice from the time of record and deposit. They may be proved before officers authorized to take proof and acknowledgments other than commissioners of deeds, notaries public and justices of the peace.

Real Property Law, § 263; 1 R. S. 761, §§ 30, 33.

No Instrument to be Recorded unless duly Acknowledged, or Proved and Certified, under a penalty as for a misdemeanor. Penal Code, § 164; 1 R. S. 762, § 34,

Held a deed executed by an officer who is himself authorized to take acknowledgments need not be acknowledged to be recorded. Chamberlain v. Taylor, 36 Hun, 24.

To be Recorded in the Proper Book .- Care must be taken that the instrument be recorded in liber of deeds or mortgages, according to its tenor and effect. If recorded in the wrong book the record is not notice. Gillig v. Mass, 28 N. Y. 191; also infra, this title.

Held, however, it need not be indexed properly - the indexing is no part of the recording. Mutual Life Ins. Co. v. Dake, 1 Abb. N. C. 381, affd., 87 N. Y.

As to mistakes in recording and their effect, see Simonson v. Falihee, 25 Hun, 570; Mut. Life Ins. Co. v. Dake, 87 N. Y. 257; 10 Alb. L. J. 210; Peck v. Mallams, 10 N. Y. 509.

Not every conveyance of land upon condition is to be recorded as a mortgage, nor does every condition in a grant make it a mortgage. Macaulay v. Porter, 71 N. Y. 173.

The term "purchaser" includes every person to whom any estate or interest in real property is conveyed for a valuable consideration, and every assignee of a mortgage, lease or other conditional estate. Real Property Law, § 240; 1 R. S. 762, § 37.

Loan commissioners' mortgages are held to be within the recording acts, when properly entered on their books, and they then become notice. Tefft v.

Munson, 63 Barb. 31, affd., 57 N. Y. 97.

The term "conveyance" includes every written instrument, by which any estate or interest in real property is created, transferred, mortgaged or assigned, or by which the title to any real property may be affected, including an instrument in execution of a power and although the power be one of revocation only; except a will, a lease for a term not exceeding three years, an executory contract for the sale and purchase of lands and an instrument containing a power to convey real property as the agent or attorney for the owner of such property. Real Property Law, § 240; 1 R. S. 762, §§ 38, 39.

A covenant passing an equitable title may be recorded. Hunt v. Johnson,

To entitle a document to be recorded, it must directly operate on the land and affect the title. Ludlow v. Van Ness, 1 Bosw. 178; Gillig v. Maas, 28 N. Y. 191.

The right of the lessor to rent under the lease is a mere chose in action

and not real estate. Riley v. Sexton, 32 Hun, 245.

Record of an executory contract for the sale of lands is not, it seems, constructive notice to purchasers. Boyd v. Schlesinger, 59 N. Y. 301.

But the record of a deed which is inoperative for want of a seal is notice

But the record of a deed which is inoperative for want of a seal is notice of the equitable rights of the grantee. Grandin v. Hernandez, 29 Hun, 399; Todd v. Union Dime Svgs. Inst., 118 N. Y. 337.

Sheriff's certificates must be recorded to be effectual against an innocent purchaser. Bowers v. Arnoux, 33 Super. Ct. 530.

Easements and restrictions. Bradley v. Walker, 138 N. Y. 291.

When the deed to the grantor is not recorded, recording by his grantee of the deed to him is not notice to a subsequent grantee of the original grantor. Page v. Waring, 76 N. Y. 463.

Compare, however, Goelet v. McManus, 1 Hun, 306, affd., 59 N. Y. 634.

Ouit-claim deeds are conveyances within the Recording Act. Wilhelm v.

Quit-claim deeds are conveyances within the Recording Act. Wilhelm v.

Wilkin, 75 Hun, 552.

rights of parties under it.

Building contracts are not within the term "conveyance." Davidson v.

Fox, 65 App. Div. 262; See also Matthews v. DeMainville, 100 id. 311.

As to Contracts, vide Chap. XIX, Tit. II, supra, and 5 Lans. 160, and Merithew v. Andrews, 44 Barb. 201, showing that when a purchaser had actual or constructive notice of such a contract, he takes subject to the

Instruments Improperly or Incorrectly Recorded, are not available as constructive notice; and there must be actual notice by the record to make it notice: Shepherd v. Burkhalter, 13 Geo. 443; Brown v. Lunt, 37 Maine, 423; Johnson v. Slater, 11 Gratt. 321; James v. Morey, 2 Cow. 246; Frost v. Beekman, 1 Johns. Ch. 288, 300; Cook v. Travis, 22 Barb. 338; 20 N. Y. 400; Gillig v. Maas, 28 id. 191; Fryer v. Rockfeller, 63 id. 268. But a correct index is not necessary to make the record notice. Mutual Life Ins. Co. v. Dake, 87 N. Y. 257. And an error in the first name of a party or failure to index will not be material. Bedford v. Tupper, 30 Hun, 174. See also infra, Tit. V. See an act to amend records of instruments claimed to be invalid. Laws 1880, Chap. 530; now Real Property Law, § 276; see Davidson v. Fox, 65 App. Div. 262.

For definition of "conveyance" and "purchaser" within the meaning

of the recording act, see Bank for Savings, etc., v. Frank, 45 Super. 404, and

supra, pp. 704, 705.A mortgage to secure future advances may be recorded. Ackerman v.

Hunsicker, 85 N. Y. 43.

Record of unsealed instrument held not notice of the conveyance of the legal title, but simply represents and is notice of a conveyance of the equitable title. Todd v. Union Dime Sav. Inst., 118 N. Y. 337. See also, Grandin v. Hernandez, 29 Hun, 399.

The Above Provisions as to Mortgages.—Mortgages, satisfactions, and assignments of mortgages are embraced in the word "conveyance" in the registry acts now in force. The clerks of the respective counties are required to keep distinct books for the record of mortgages and securities in the nature of mortgages.

The record of a mortgage is not indispensable, except to secure its prior lien. Berry v. Mutual Ins. Co., 2 Johns. Ch. 603; Thompson v. Rose, 8 Cow. 266; 28 Barb. 42. Its record becomes notice, to all subsequent mortgagees and purchasers of the lien created. Vide supra.

Priority Notice and Recording .- A deed for a valuable consideration has preference over a mortgage for a pre-existent debt made and recorded after the contract of sale in pursuance of which the deed was made, but before the deed. Young v. Guy, 23 Hun, 1, affd., 87 N. Y. 457. On foreclosure of such mortgage the vendee is entitled to be credited with sums paid by him in cash, but not the amount of a purchase money mortgage made by him and paid to the assignee. Id.

Where one without title makes a mortgage, title afterward acquired enures to the benefit of the mortgagee, and the mortgage is notice to a

bona fide purchaser, though it was recorded before the mortgage acquired title. Tefft v. Munson, 57 N. Y. 87.

But it will be postponed to a purchase money mortgage. Dusenbury v. Hulbert, 59 N. Y. 541.

Simultaneous mortgages are concurrent. Granger v. Crouch, 86 N. Y. 494. As to assignee of one of them. Collier v. Miller, 137 N. Y. 332.

Possession under a contract is notice of title to an intending mortgagee. Westbrook v. Gleason, 79 N. Y. 23.

A defective mortgage or an agreement to mortgage to secure an antecedent debt takes precedence of a judgment recovered before the mortgage is perfected or legally carried into effect. Natl. Bk. of Norwalk v. Lanier, 7 Hun, 623.

Assignments and releases of mortgage both held to be conveyances within the Recording Act. Briggs v. Thompson, 86 Hun, 607.

Record in Different Counties .- If the mortgage is on property in different counties, it must be recorded in each county. 47 Barb. 416.

Requirements as to Old Mortgages .- L. 1890, Chap. 282, requiring statements to be recorded of amounts still due on old mortgages was repealed, L. 1891, Chap. 155, before ever taking effect.

See a similar provision in the law providing for the taxation of mortgages, L. 1905, Chap. 729, § 295, repealed L. 1896, Chap. 532, 7.

Conveyance and Defeasance.—It has been seen (supra, p. 613), that any conveyance and the separate instrument of defeasance constituting a mortgage, must be recorded together as a mortgage. Otherwise it has no more effect than an unrecorded mortgage, and subsequent bona fide purchasers from effect than an unrecorded mortgage, and subsequent bona hae purchasers from the mortgagor are protected against it. Real Property Law, § 269. 1 R. S. 756, § 3; Brown v. Dean, 3 Wend. 208; White v. Moore, 1 Paige, 551; Dey v. Dunham, 2 Johns. Ch. 182; Phillips v. Thompson, Id. 417; James v. Morey, 2 Cow. 248; Holmes v. Grant, 8 id. 243; Williams v. Thorn, 11 Paige, 459.

A deed by way of security, recorded without defeasance, may, by circumstances, become valid as a deed absolute. Warner v. Winslow, 1 Sandf. Ch. 430; see also as to the effect of failure to record a defeasance. Mills v. Comstock 5 Lohns Ch. 214. Stoddart v. Botton, 5 Boow, 278

stock, 5 Johns. Ch. 214; Stoddart v. Rotton, 5 Bosw. 378.

Notice.—If the mortgage is recorded improperly or in the wrong place, it is no notice. Gillig v. Maas, 28 N. Y. 191. If satisfied by a fiduciary on his own premises, it is notice to see if really paid. Kirsch v. Tozier, 143 N. Y. 390.

A mortgage by a married woman containing a general clause binding her other separate estate for its payment, though recorded, will not affect a bona fide purchaser for value of such other separate estate. Murphy, 12 Abb. N. C. 402.

Indexing is no part of the record. Mutual Life Ins. Co. v. Dake, 87

N. Y. 257; Bedford v. Tupper, 30 Hun, 174.

Preference of Unrecorded Mortgage .- An unrecorded mortgage has preference over a subsequent general assignment, though the latter is first recorded (Wyckoff v. Remsen, 11 Paige, 564), and over a subsequent grantee or mortgagee with notice (16 How. Pr. 119; Fort v. Burch, 5 Den. 187; 6 Barb. 373; Thompson v. Rose, 8 Cow. 266), even though the latter may first register his deed, etc. Butler v. Viele, 44 Barb. 166.

And over a subsequent mortgage taken to secure an obligation already due. But if the mortgage supersedes the former obligation, the mortgagee, if without notice, is protected by first recording. Durkee v. Nat. Bk. of

Ft. Edward, 36 Hun. 565.

If improperly discharged by a mortgagee or his administrator after he has assigned it, a subsequent recorded deed takes preference. Ely v. Schofield, 35 Barb. 330.

A prior unregistered mortgage is superior to a subsequent unregistered

deed, even, if the latter was taken bona fide and for value.

If one purchase land bona fide for value, a prior unregistered mortgage cannot be enforced against him. Jackson v. McChesney, 7 Cow. 360 (1824); Jackson v. Campbell, 19 Johns. 281 (1822); Delancey v. Stearns, 66 N. Y. 157; Westbrook v. Gleason, 89 N. Y. 641; s. c., 79 N. Y. 23. As to what would be notice, etc., in such case. Wheat v. Lord, 72 Hun, 447.

Extension of time for payment makes a new consideration and the mort-

gagee a purchaser for value, but when he takes the mortgage merely as collateral security the mortgagee is not a purchaser for value. Cary v. White, 52 N. Y. 138, revg. 7 Lans. 1; O'Brien v. Fleckenstein, 180 N. Y. 350, affg. 86 App. Div. 140.

Deed when entitled to priority over prior mortgage subsequently recorded.

Ward v. Isbill, 73 Hun, 550.

Junior Mortgagee. - A junior mortgagee, with notice of a prior unrecorded mortgage, cannot gain priority by recording his mortgage, nor can a bona fide assignee of such a mortgage without notice, unless his assignment be recorded before the prior mortgage. Fort v. Burch, 5 Den. 187; DeLancey v. Stearns, 66 N. Y. 157; Westbrook v. Gleason, 79 id. 23; further decision, 89

A mortgage to secure an antecedent debt is not given for value so as to get a preference over a prior mortgage by being first recorded. Constant v. Am. Bapt., etc., Soc., 53 Super. 170.

As to the time when a junior mortgage would take effect as against a prior

one, vide Strong v. Dollner, 2 Sandf. 444.

The lien of a first mortgage will be presumptively lost in favor of a second mortgage first recorded, unless it can be overcome in the manner sanctioned by law. Peabody v. Roberts, 47 Barb. 91; Van Keuren v. Corkins, 66 N. Y. 77, distinguished, 13 Hun, 474, 480.

Releases by Mortgagee. - A mortgagee releasing part of mortgaged premises, is not bound to take notice of alienations by the mortgagor, unless he have notice to put him on inquiry. How. Ins. Co. v. Halsey, 4 Sandf. 565, affd., 8 N. Y. 271; Stuyvesant v. Hone, 1 Sandf. Ch. 419, affd., 2 id. 151. See also supra, "Mortgages," Chap. XXIII.

Preference over Judgment.—A mortgage, though unrecorded, has preference over a subsequent docketed judgment. Schmidt v. Hoyt, 1 Ed. 652; 30

Barb. 268; 9 N. Y. Supp. 573; Salls v. Salls, 19 id. 246.

So of a deed. Schroeder v. Gurney, 73 N. Y. 430; Trenton, etc., Co. v. Duncan, 86 id. 221; Russell v. Wales, 119 App. Div. 536. See for modifications of this rule, Hulett v. Whipple, 58 Barb. 224; Dwight v. Newell, 3 N. Y. 185.

But, should the land be sold by the sheriff under the judgment, prior to the registry of the mortgage, a bona fide purchaser would be protected. Jackson v. Dubois, 4 Johns. 216; Jackson v. Terry, 13 id. 471; Jackson v. Town, 4 Cow. 599; Schmidt v. Hoyt, 1 Ed. 652; Ledyard v. Butler, 9 Paige, 132; and infra, Chap. XXXVIII. The rule is otherwise, as to an unrecorded deed. See supra, this title, as to unrecorded conveyances.

Nor is it necessary to record an agreement by a judgment creditor that a subsequent mortgage shall be a prior lien, to protect the mortgagee against a subsequent sale under the judgment, the purchaser taking only the title of

the judgment creditor. Frost v. Yonkers Savings Bk., 70 N. Y. 553.

Consideration Money Mortgages. - Mortgages for consideration money also have preference over prior judgments against the mortgagor. Code Civ. Proc., § 1254, following 1 R. S. 749, § 5, which was repealed by Laws of 1877, Chap. 417. Spring v. Short, 90 N. Y. 538.

Even if the mortgage is given to a third person who advances the con-

sideration. Jackson v. Austin, 15 Johns. 477, and supra, p. 641.

As to priorities of first and second consideration money mortgages as between themselves, see Dusenbury v. Hulbert, 59 N. Y. 541; Boies v. Benham, 127 N. Y. 620.

A mortgage for subsequent advances takes priority of a judgment obtained intermediate the mortgage and the date when the advances became due. Robinson v. Williams, 22 N. Y. 380. See also Tallman v. Farley, 1 Barb. 280;

Haywood v. Nooney, 3 id. 643.

A mortgage made partly for purchase money and partly for prior debt, and recorded the same day deed was given, held to have priority as to the amount of purchase money only, as against a judgment recovered before the date of conveyance. Ray v. Adams, 4 Hun, 332.

Mortgage Given Before a Deed Taken .-- A mortgage by purchaser before he receives a deed is merely an equitable lien, and recording it before the date of the deed is not constructive notice to subsequent purchasers. Farmers' Loan Co. v. Maltby, 8 Paige, 361. Contra, Tefft v. Munson, 57 N. Y. 97. Nor will it prevail over a purchase money mortgage given on acquiring the title, even if prior in record. Dusenbury v. Hulbert, 59 N. Y. 541. Tefft v. Munson, supra distinguished in Oliphant v. Burns, 146 N. Y. 218, as to contracts.

Two Mortgages Recorded Simultaneously .- When two mortgages are recorded simultaneously, the intention of the parties at the time governs. Jones v. Phelps, 2 Barb. Ch. 440.

Or neither has the preference. Rhoades v. Canfield, 8 Paige, 545; Granger

v. Crouch, 86 N. Y. 494; Boies v. Benham, 127 id. 620.

As to priority of assignment thereof, see Greene v. Warnick, 64 N. Y. 220, distinguished, 83 id. 215, 221; Collier v. Miller, 137 id. 332, and supra, p. 622.

Otherwise the priority must be determined by equitable rules. Stafford v. Van Rensselaer, 9 Cow. 316; Greene v. Warnick, 64 N. Y. 220, revg. Greene v. Deal, 4 Hun, 703; also, White v. Leslie, 54 How. Pr. 394; 17 Hun, 148.

An agreement between mortgagees for postponment of one to the other is not entitled to record and, if recorded, is not notice. Bank for Savings, etc., v. Frank, 45 Super. 404.

Deed with Covenant of Assumption. - Record of a deed by which grantee assumes payment of a mortgage is not notice of the assumption to an

assignee of the mortgage. Mead v. Parker, 29 Hun, 62.

Vide as to assumption, by a grantee, of a mortgage on an undivided portion of premises, another undivided portion of which is conveyed to him; constructive notice to the grantee's incumbrancers and grantees; vendor's lien for the purchase price of land. Binghamton Bk. v. Binghamton T. Co., 85 Hun, 75.

Mortgage by a Vendor. - Where a contract of sale is prior to a mortgage given to one who had knowledge of the contract, the assignee of the contract it seems is not bound by a prior recorded assignment of the mortgage by an assignee who took without notice, such assignee merely succeeding to the

rights of the mortgagee. Trustees of Union College v. Wheeler, 61 N. Y. 88.

Nor is the vendee. Young v. Guy, 12 Hun, 325.

But where the vendee gave back a purchase money mortgage upon taking title the vendor's mortgage was held valid to the extent of the vendee's mortgage and when, after service in foreclosure upon the grantee, he paid his mortgage to his grantor's assignee, the first mortgagee was allowed to foreclose. Id., and Macauley v. Smith, 132 N. Y. 524.

In so far as a purchase money mortgage remains unpaid, the grantee giving same is not a bona fide purchaser for value, and will not be protected. Macauley v. Smith, 132 N. Y. 524.

Vendor's Lien .- See Chap. XIX, Tit. II.

Married Woman's Mortgage. A clause in a married woman's mortgage that she "hereby makes a payment of the moneys hereby secured a charge upon her other sole and separate estate" is too indefinite to create a lien on her other property as against a bona fide holder, and is not notice under the recording act. Rourk v. Murphy, 12 Abb. N. C. 402.

Record of Assignments of Mortgages.— Under the earlier laws it was held the recording acts did not apply to assignments of mortgages; and no notice of the assignment was necessary to protect the assignee of the mortgage against a subsequent assignee or persons claiming under him.

James v. Mowrey, 2 Cow. 246.

The recording statutes now apply to assignments of mortgages. They should be recorded in order to operate as notice to all persons except the mortgagor and his representatives.

1 R. S. 763, § 41; Real Property Law, § 271.

Decker v. Boice, 83 N. Y. 215; Purdy v. Huntington, 46 Barb. 389, revd., 42
N. Y. 334; Vanderkemp v. Shelton, 11 Paige, 28, 38; Hoyt v. Hoyt, 8 Bosw.
577; explained in Belden v. Meeker, 2 Lans. 471, affd., 47 N. Y. 307; N. Y.
Life Ins. Co. v. Smith, 2 Barb. Ch. 82; The Trustees, etc. v. Wheeler, 59
Barb. 585, partly affirmed and partly reversed, 61 N. Y. 88; Gillig v. Maas,
28 id. 191; Fryer v. Rockefeller, 63 id. 268; Smyth v. Knickerbocker Life Ins.
Co., 84 id. 589; Heilbrunn v. Hammond, 13 Hun, 474; Bacon v. Van Schoonhoven, 87 N. Y. 446; Larned v. Donovan, 84 Hun, 533.

It was formerly said that the effect of recording an assignment of mortgage was merely to protect the assignee against a subsequent sale of the
same mortgage. Crane v. Turner, 67 N. Y. 437; Greene v. Warnick, 64
id. 220, 226; Westbrook v. Gleason, 79 id. 23, 32; Viele v. Judson, 82 id. 32.

In Viele v. Judson, 82 N. Y. 32, it was held that the record is notice to all
persons claiming under the mortgage by assignment or otherwise. (Belden v.

persons claiming under the mortgage by assignment or otherwise. (Belden v. Meeker, 47 N. Y. 307); but not to subsequent purchasers or incumbrancers who derive title in good faith from the mortgagor, and the old rule was criticized as too narrow. This case also held that noting the assignment in the margin of the record of the mortgage was unnecessary.

The dicta of the above cases were, however, overruled by Decker v. Boice, 83 N. Y. 215, which held that the record of the assignment was notice to all persons and would give an assignee without notice preference over a prior unrecorded mortgage or conveyance even though his assignor had notice and

so could not have obtained such preference.

The case of Brewster v. Carnes, 103 N. Y. 556, holds that the record is notice to a subsequent purchaser of the equity of redemption.

The mortgagor is not bound by subsequent records and payments made by him to the mortgagee after assignment and record thereof are protected, Kelly v. Bruce, 17 Wkly. Dig. 39; Pettus v. McGowan, 37 Hun, 409; Van Keuren v. Corkins, 66 N. Y. 77; O'Callaghan v. Barrett, 21 N. Y. Supp. 368. But a purchaser of the equity of redemption after record of the assignment of mortgage is bound by the record. Brewster v. Carnes, 103 N. Y. 556.

The case of Purdy v. Huntington, 42 N. Y. 334, exemplifies the necessity of not relying on the doctrine of merger, in the case of outstanding mort-The court there holds that the assignee of a recorded mortgage on lands which were conveyed by the mortgagor to the mortgagee after the assignment, had a valid lien thereon as against a purchaser from such mortgagee who purchased without knowledge of the assignment, although the conveyances, both from the mortgagor to the mortgagee and from him to the purchaser, were recorded prior to the recording of the assignment; the court holding that the conveyance to the mortgagee, after assignment, was not a merger of the mortgage. To the same effect is Miller v. Lindsey, 19 Hun, 207.

As against an assignee of a mortgage, a subsequent conveyance by mortgagor to mortgagee operates no merger of the mortgage. A record of the assignment of a mortgage is not necessary for the protection of the assignee as against a purchaser of the mortgaged property. Curtis v. Moore, 10 Misc.

341; compare Brewster v. Carnes, 103 N. Y. 556.

A subsequent innocent assignee for value, whose assignment is first recorded, obtains thereby preference over a prior assignment not recorded. Greene v. Warnick, 64 N. Y. 220.

The record is not sufficient notice to the mortgagor so as to invalidate payments made by him to the mortgagee. 1 R. S. 763, § 41; The N. Y. Life Ins. Co. v. Smith, 2 Barb. Ch. 82; Reed v. Marble, 10 Paige, 409; Vanderkemp v. Shelton, 11 Paige, 28; James v. Morey, 2 Cow. 246; 35 Barb. 334. When fraudulent assignment of mortgage will be sustained as to inno-

cent purchaser. Roosevelt v. L. & R. Imp. Co., 11 Misc. 595.

As to Priorities, of purchasers with notice and purchasers without. v. McNeil, 114 N. Y. 287.

If a junior mortgagee with notice assign to one without notice, who records his assignment before the prior mortgage, he is entitled to a preference.

Forth v. Burch, 5 Den. 187.

If a junior mortgagee in a recorded mortgage, without notice of a prior mortgage unrecorded, assign to another with notice, the assignee will have preference. A purchaser of a mortgage is a "purchaser" of real estate within the meaning of the recording act, and a subsequent assignee of a mortgage, who records his assignment, obtains a valid title against a prior unrecorded assignment of the same mortgage. Decker v. Boice, 83 N. Y. 215; Trustees v. Wheeler, 59 Barb. 585, partly affd. and partly revd., 61 N. Y. 88; Campbell v. Vedder, 1 Abb. App. Cas. 275, overruling Hoyt v. Hoyt, 8 Bosw. 511; distinguished in Belden v. Meeker, 47 N. Y. 307; Greene v. Warnick, 64 N. Y. 220; Seymour v. McKinstry, 21 Wkly. Dig. 77; 106 N. Y. 230.

Where the assignment of a mortgage is recorded, the record is notice to all the world, except the mortgagor and his representatives. Ely v. Scofield,

35 Barb. 330.

To them it is no notice whatever; but see Decker v. Boice, 83 N. Y. 215;

Pettus v. McGowan, 37 Hun, 409.

And if the assignee (whose assignment is recorded) of a junior mortgage is not made a party to a forclosure, he is not bound by a sale under the decree. Vanderkemp v. Shelton, 11 Paige, 28.

The record of the assignment is notice to the grantee of the mortgagor that the mortgagee cannot release the mortgage. Belden v. Meeker, 47

N. Y. 307.

The assignee, to protect himself, must see that the assignment is definite, or else he must give actual notice to the mortgagor. More v. Sloan, 50 Barb. 442. See Van Keuren v. Corkins, 66 N. Y. 77; Viele v. Judson, 82 id. 32, as to present law.

An unrecorded agreement to release will not bind an assignee of the mortgage. St. John v. Spaulding, 1 Supm. 483.

An unrecorded assignment is not valid as against a subsequent recorded mortgage, the mortgagee relying upon a satisfaction of the prior mortgage executed by the assignor. Bacon v. Van Schoonhoven, 87 N. Y. 446.

As to the rights of an assignee who first records, over an unrecorded assignment, vide Clark v. Mackin, 30 Hun, 411, modified, 95 N. Y. 346.

As to his rights over an unrecorded deed or mortgage, see Decker v. Boice, 83 N. Y. 215; Westbrook v. Gleason, 79 id. 23.

A recorded assignment of a mortgage without mention of the bond is notice if, in fact, the bond were assigned. Yates Co. Nat. Bk. v. Baldwin, 43 Hun, 136.

An unauthorized satisfaction of a mortgage will not protect a bona fide purchaser of the property from foreclosure. McPherson v. Rollins, 21 Wkly. Dig. 254, affd., 107 N. Y. 316.

An assignment of mortgage not entitled to record by reason of lack of official certification as to the notary will operate as notice if actually recorded. Heilbrunn v. Hammond, 13 Hun, 474.

As to what an assignment should contain to entitle it to record, see Viele v. Judson, 82 N. Y. 32. There is no necessity of noting assignments of mortgage on the margin of the record. *Id.*

See also supra, p. 623, for a full consideration of the effect of assign-

ments of mortgages, outside the Recording Act.

General Assignment.—A general assignment for the benefit of creditors must be recorded as a conveyance, if it affect real estate. Wagner v. Hodge, 34 Hun, 524.

Easements.—The Recording Act applies to easements and an unrecorded release of an easement is void as against a bona fide purchaser of the dominant estate without notice. Snell v. Leavitt, 39 Hun, 227, revd. on other grounds, 110 N. Y. 595. See 1 R. S. 762, § 38; Id. 756, § 1; Real Property Law, §§ 240, 241.

Other Instruments to be Recorded.—The copy of a record or a recorded deed, if lost. Laws of 1843, Chap. 210. This was amended to cover any recorded instruments without requiring proof of loss by Laws of 1887, Chap. 539; see L. 1893, Chap. 182. For the present law, see Real Property Law, § 247.

Patents for lands. L. 1845, Chap. 110; Real Property Law, § 245. Wills of real estate, vide supra, p. 456. Judgments in partition. Code Civ. Proc., § 1595, replacing Laws of May 11, 1846; Chap. 182, L. 1851, Chap. 277, which were repealed by Laws of 1880, Chap. 245. Assignments by the comptroller. Laws 1841, Chap. 319, repealed by Laws of 1882, Chap. 402; State Finance Law, L. 1897, Chap. 413, § 33. Assignments by the superintendent of insurance. L. 1859, Chap. 366; 1868, Chap. 732; 1892, Chap. 690, § 4. Assignments for creditors. L. 1860, Chap. 348; 1877, Chap. 466, which also repealed the Act of 1860, see amendments L. 1888, Chap. 294, etc. Of insolvent debtors. 2 R. S. 38, repealed by Laws of 1880, Chap. 245; Code Civ. Proc., §§ 2175, 2211.

Agreements as to leases, when not binding on bona fide purchaser. Henck v. Barnes, 84 Hun, 546.

Letters Patent.—May be recorded the same as a conveyance, if under the great seal of the State. Real Property Law, § 245; L. 1845, Chap. 110.

Treasurer of Connecticut.— As to instruments by, vide Laws of 1825; 35; 1 R. S. 760; Real Property Law, § 272.

Holland Land Co.— As to records thereof and title papers, vide Laws of 1839, Chap. 295; Real Property Law, § 259; Bissing v. Smith, 85 Hun, 564.

Montgomery and Hamilton Counties.— As to records therein, vide Laws of 1840, Chap. 4. See also as to records in various other counties. L. 1836, Chap. 77, § 12; L. 1838, Chap. 332, § 12.

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Other Written Instruments except Promissory Notes and Bills of Exchange and Wills.— Such instruments may be acknowledged or proved and read in evidence. Code Civ. Proc., § 937, replacing Laws of 1833, Chap. 271, which was repealed by Laws of 1880, Chap. 245; see Wood v. Weiant, 1 N. Y. 77; 23 Barb. 558; 17 id. 599.

Leases in Certain Counties.— The provisions as to the acknowledgment and record of deeds do not apply to leases for life or lives or years previously made, of lands in the counties of Albany, Ulster, Sullivan, Herkimer, Dutchess, Columbia, Delaware and Schenectady. Laws of 1823, § 413; 1 R. S. 763, § 42; Real Property Law, § 240.

TITLE IV. OF THE ACKNOWLEDGMENT AND RECORD OF INSTRU-MENTS BEFORE THE REVISED STATUTES.

Under the Dutch rule in this State records of transfers of real estate were kept in books for that purpose, both patents from the government and transfers between individuals. There are three books of such records in the office of the Secretary of State at Albany translated into English.

The records of letters patent, during the English Colonial period, commence in October, 1664, and terminate in February, 1776. They are contained in about twenty volumes, including three of Colonial military grants, and are in charge of the Secretary of State. The record of letters patent was continued by this State, after independence, the first land patent issued by the State bearing date October 26, 1784, and the Board of Commissioners of the Land Office was created in that year. There are, also, with the Secretary of State forty-three record books of deeds, mortgages, etc., between individuals, under the English rule, and many maps and field books of property in New York city.

By Act of 1839, Chap. 295, provision is made for the recording in county clerks' and registers' offices, of deeds or other instruments in writing relating to or affecting the title to any real estate, which had, at any time, been recorded in the office of the Secretary of State; Chap. 110 of the Laws of 1845 also made similar provisions. This provision was re-enacted in the Real Property Law, § 245.

The Hon. Diedrich Willers, Jr., formerly Secretary of State, has compiled an interesting and valuable treatise on the various records at Albany.

Under the Dutch Government .- The practice of acknowledging and recording conveyances existed. The deed was acknowledged or proved in the presence of some public officer. Cf. Fowler Real Property Law (2d ed.), 750.

The Colonial Government.-Under the Duke's Laws of 1665, acknowledgments were to be made before a justice of the peace or superior officer of the government. By the charter of liberties and privileges granted by the

Duke of York in October, 1683, femes coverts were required to make a separate acknowledgment in some court of record and to be privately examined whether they acted without fear or compulsion of their husbands. was, however, disallowed by the Crown. Fowler's Real Property Law (2d ed.), was, nowever, disallowed by the Crown. Fowler's Real Property Law (2d ed.), 782. By the Laws of 1665, the clerks of the Courts of Sessions were to "enter" all deeds and mortgages specifying the date and estate granted. Records from the North and West Riding (Long Island) of wills and of conveyances above £30 were to be at New York. By an Act of 1683, records of deeds, etc., were ordered to be made in the county where the land lay and with the Secretary of State. An Act of October 30, 1710, provided to be greatly also an Act of December 12, 1763. Print a the Act of 1710 the same effect; also an Act of December 12, 1753. Prior to the Act of 1710, there was a usage or common law of the Colony sanctioning the record of deeds upon proof by a subscribing witness, as well as upon acknowledgment by the grantor. Van Cortlandt v. Tozer, 20 Wend. 423; Hunt v. Johnson, 19 N. Y. 279. The first act under the English colonial government was passed October 30, 1710. Under this act conveyances might be recorded in the Secretary of State's office, or in the county records, and the practice continued of recording in either office until the year 1811. Under the colonial administration there was no prescribed form for the certificates. It was the practice to acknowledge or prove deeds before a member of the council (Act of December 12, 1753; Act of February 10, 1771; 2 Van Schaick, 611), a judge of the Supreme Court, or a judge of a Court of Common Pleas where the land lay, mayors of cities or masters in chancery; and femes coverts were required to make a separate acknowledgment. The certificate was to be indorsed on the deed. Law of February 16, 1771; 2 Van Schaick, 611, 765. This act provided no form of the acknowledgment, but to entitle the deed to be recorded in any of the public offices, it had to be duly acknowledged by the grantor before one of the council, a judge of the Supreme Court, a master in chancery, or judge of the County Court, not a Mayor's Court, or proved by one of the subscribing witnesses or if deceased by proof of the bandwriting. As to right subscribing witnesses, or if deceased, by proof of the handwriting. As to right of members of the council to take acknowledgments, vide Hunt v. Johnson, 19 N. Y. 279. Previous to the Act of 1771, any judge of a Court of Common Pleas might take acknowledgments, even if the land was not situated in his county. Van Cortlandt v. Tozer, 17 Wend. 338; Priest v. Cummings, 20 id. 338. As to acknowledgments by married women before the Act of 1771, vide supra, p. 85. Their acknowledgment then and subsequently became necessary to pass title. Vide supra, p. 85 seq.

The custom of acknowledgment of deeds under the colonial government is

discussed in Fowler's Real Property Law (2d ed.), 595, 782, 783.

Act of 1787.—By the Law of March 1, 1787; 2 Jones & Varick, 92; 1 Greenl. 325, an act was passed making effectual and valid all conveyances executed after July 9, 1776, and prior to November 25, 1783, and acknowledged before persons acting under authority of the King of Great Britain, as usual in cases of like nature, when the State was a colony.

Persons Abroad. By Law of March 8, 1773, 2 Van Schaick, 765, provision was made as to the acknowledgment of deeds by persons abroad, and as to the acknowledgment of deeds by married women abroad, for which see supra, p. 85.

Act of 1788.—By Law of February 26, 1788; 2 Jones & Varick, 266; 2 Greenl, 99, to entitle them to be recorded in the office of Secretary of State or clerk of the county, instruments had to be acknowledged, etc., before a justice of the Supreme Court, Master in Chancery, or judge of the Supreme Court or of the United States (Law of April 6, 1792, and of 1813), or a judge of the Court of Common Pleas of the county where the lands were, or the mayor of New York, Albany or Hudson (subsequently Schenectady also), if lands therein situated. A similar law was passed on the same day relative to mortgages (2 Greenl. 100), to have priority according to date of registry; and no mortgage or deed in the nature thereof, made since March 19, 1774, should affect bona fide purchasers, unless registered with the clerk of the county. This act also required the separate examination of married women to pass title.

Act of March 9, 1793.—By this act acknowledgments might be taken before the mayor of London.

Law of 1797.— By Law of February 11, 1797, 3 Greenl. 218, provision was made as to acknowledgments and proof, and as to form of certificate. This seems to be the first act that prescribed the form of the acknowledgment or contents of the certificate. Previous to the act it was unnecessary for the certificate to state that the officer knew the witness or the witness the grantor. Bradstreet v. Clark, 12 Wend. 607, 673; Hunt v. Johnson, 19 N. Y. 279.

Act of 1801.—A further act was passed on April 6, 1801, 3 Greenl. 328, enacting the same provisions as the above Act of 1797, as to the knowledge of the party, proof and certificate, and as to the acknowledgments of married women; and re-enacting the above provisions of the Act of April 3, 1798. It also repeals so much of the Act of January 8, 1794, as makes any provision for the acknowledgment, etc., of deeds different from those of the act. This Act of 1801 was amended by Law of 1806, 4 Web. 615, allowing acknowledgments, etc., to be taken before any judge of a Court of Common Pleas of the State. It was also provided that deeds theretofore duly acknowledged, etc., might be recorded, except those relating to bounty lands. Under this Law of 1801 the words "to me known," are held sufficient without the words "to be the person described in and who executed," etc. Jackson v. Gumaer, 2 Cow. 552; Thurman v. Cameron, 24 Wend. 87. As also, the words "known to be the persons described in," etc., were held sufficient. Hunt v. Johnson, 19 N. Y. 279. A similar act was passed, also, April 6, 1801, relative to mortgages (1 Web. 480), requiring them to be registered with the clerks of counties. By Act of January 29, 1811, judges of territories might take acknowledgments the same as judges of the Supreme Court. By Act of April 9, 1811, a judge of the Supreme or Superior Court of any State. This Act of 1811, also allowed a conveyance or record of any conveyance, executed before July 4, 1776, and acknowledged, etc., according to law, to be read in evidence, or a sworn copy thereof; also Act of March 8, 1817, Chap. 69, as to lands out of the State.

Law of 1813.—A further act was passed April 12, 1813, entitled an act "Concerning deeds," 1 R. L. 369, re-enacting the above Acts of 1801 and 1806. Deeds might also be acknowledged before a first judge of the District of Columbia, or any judge of a Court of Common Pleas; also mayor of London, and United States Minister there; or the mayor or recorder of the cities of New York, Albany or Hudson, or mayor of Schenectady. Any United States minister in Europe, by Law of April 12, 1816; also the recorder of Troy. Law of March 8, 1817. Deeds not duly acknowledged were not to be recorded, and deeds duly proved before April 6, 1801, might be recorded, excluding those relating to bounty lands. Law of April 6, 1801. By Laws of 1812, this section, as far as it relates to certain bounty lands, was repealed. See also as to Bounty Lands, Act of 1794, 3 Web. 45; April 3, 1798; April 4, 1820; Crowder v. Hopkins, 10 Paige, 183; Jackson v. Chamberlain, 8 Wend. 620. Under the Act of 1813, a certificate has also been held good where the words "to me known to be the parties who executed the deed" were omitted. Hunt v. Jackson, 19 N. Y. 279. Under this act also, the certificate need not state that the officers personally knew the witness. Jackson "Harrow, 11 Johns. 434; Jackson v. Vickory, 1 Wend. 406. The words "described in" were first introduced in the revision of 1830. The certificate before that did not state that the grantor was known to the witness "to be the person described in and who executed," etc., but merely "that such witness knows the person who executed the same." Thurman v. Cameron, 24 Wend. 87. See also as to proof by a witness under the Law of 1813, Gillet v. Stanley, 1 Hill, 121; Jackson v. Gould, 7 Wend. 364.

Record of Deed Made Notice.—It was not until the act of April 3, 1798, that deeds were in any case required to be recorded under the penalty of being adjudged void as against subsequent purchasers or mortgagees. This act was confined to the western counties, but was subsequently extended to other counties. As early as the Laws of December 17, 1753, however, mortgages

were required to be registered with the clerks of counties. The act making deeds void as to subsequent purchasers, etc., unless recorded in the county clerk's office, was passed as to Steuben, Tioga, Herkimer, Oneida, Chenango and Otsego counties, April 3, 1798; 3 Greenl. 403; as to Rensselaer county, April 13, 1819, Chap. 207; as to Green, Clinton, Franklin, Delaware, Herkimer, parts of Onondaga and Cayuga counties, on March 23, 1821, Chap. 136; as to Saratoga, Kings and Sullivan, April 17, 1822, Chap. 284; repealed general repealing act, as to Ulster and all other counties in the State, by Law of April 23, 1823, Chap. 263, excepting certain leases in certain counties. The act relating to the city of New York was passed March 30, 1811. 6 Web. 484; repealing Act of April 5, 1810. By Law of 1823, the provisions of the existing registry acts were stated not to apply to leases for life or years, in the counties of Albany, Sullivan, Ulster, Herkimer, Dutchess, Columbia, Delaware and Schenectady. A general recording act was passed in 1813. 2 R. L. 45. See as to the effect of the Statutes of 1813, on prior deeds. Varick v. Briggs, 22 Wend. 543, affg. 6 Paige 323; Beal v. Miller, I Hun, 564.

Early Acts as to Record of Mortgages.—The early statutes of the State required the "registry" of mortgages, and of the defeasance thereof, but did not require them to be recorded at length. Under former registry acts, there was a distinction drawn between the registry or record of mortgages and that of other conveyances. By a colonial act, passed December 12, 1753, 2 Smith and L. 19, all mortgages executed after June 1, 1754, were to be registered with the clerk of cities and counties, and to have priority as registered. The Act of February 26, 1788, 2 Greenl. 99, required all mortgages executed after March 16, 1774, or executed after the passage of the act, to be registered, or else they should be ineffectual as against bona fide purchasers. The Act of April 6, 1801, made similar provisions, and gave priority to those first registered, and required defeasances to be registered with the deed. The Act of March 19, 1813, 1 R. L., 372, had similar provisions. An act was passed April 17, 1822, providing for the keeping of books of record of mortgages by clerks of counties, and enacting similar provisions to those in the Law of 1813. The repealing act of December 10, 1828, repeals in terms the previous recording acts relative to both deeds and mortgages. The rules of priority as respects deeds and mortgages under the above statutes prior to 1830 were different. A mortgage not registered was absolutely void as against a subsequent bona fide purchaser, although the mortgage had been subsequently registered before the recording of the conveyance to the purchaser. Jackson v. Campbell, 19 Johns. 282; Jackson v. McCheseney, 7 Cow. 360. But in all cases between two deeds, as well as between two mortgages, the deed or mortgage first registered was entitled to priority. Another distinction was that a mortgage not bona fide, or for value, as to subsequent purchasers, etc., was absolutely void, and an innocent assignee of the mortgage was not protected. 6 Barb. 67. See further Fowler's Real Property Law, 750 et seq.

Effect of the Revised Statutes on Former Unrecorded Instruments.— The general repealing act of December 10, 1828, establishing the provisions of the Revised Statutes, it has been held, did not affect the former acts as regards the order of the priority of prior unrecorded deeds or mortgages. 6 Barb. 60; Jackson v. Town, 4 Cow. 599, 605. But see Blackman v. Riley, 63 Hun, 521, affd., 138 N. Y. 318, as to the early acts and the effect of the destroying very generally by the Revised Statutes of imperfectly acknowledged records as evidence.

TITLE V. THE DOCTRINE OF NOTICE.

The general doctrine is, that whatever is sufficient to put a party fully upon an inquiry, amounts to notice, provided the party is under a legal obligation to inquire, as in the case of purchasers and creditors, and provided the inquiry would lead to a knowledge of the

requisite fact, through ordinary diligence and understanding. The question, however, is not whether the party had the means of obtaining, and might by prudent caution have obtained the knowledge in question, but whether his not obtaining it was an act of gross or culpable negligence. He is bound to make inquiry as to facts brought to his notice affecting the title.

Fraud.— A grantor, in order to establish as against a purchaser for a good consideration from the grantee, a right to the land conveyed, on the ground that the conveyance was induced by fraud, must show actual notice to the purchaser at or prior to his purchase, of the facts upon which his claim is founded, or such facts and circumstances as would put a prudent man upon his guard, and from which actual notice may be inferred and found. Holland v. Brown, 140 N. Y. 344.

Recital of Consideration, as to inadequacy. Anderson v. Blood, 86 Hun, 244, and cases cited.

Recitals of a Mortgage. - It seems that the recital of a mortgage in another deed is no notice of its existence as an outstanding mortgage. Jackson v. Davis, 18 Johns. 7. Compare below, however.

Record of assignment is no notice to the mortgagor or his privies. Pettus v. McGowan, 37 Hun, 409.

v. McGowan, 37 Hun, 409.

A notice which is barely sufficient to put a party on inquiry, or a suspicion of notice, is not enough. Ward v. Isbill, 73 Hun, 550; Griffith v. Griffith, 1 Hoff. Ch. 153, 166; Brush v. Ware, 15 Pet. (U. S.) 93; Wilson v. Wall, 6 Wall. 83; Jackson v. Van Valkenburg, 8 Cow. 260; Fort v. Burch, 6 Barb. 60; Cambridge Bk. v. Delano, 48 N. Y. 327.

Notice of a deed is notice of its contents, and if there is a general notice of the existence of liens, etc., and the circumstances are sufficient to put a prudent man upon inquiry, it would be sufficient notice. Baker v. Bliss, 39 N. Y. 70; Tardy v. Morgan, 3 McLean, 358; Reed v. Gannon, 50 N. Y. 345.

A reservation of a right of way to lands of another is notice of his interest or claim in it. Bridge v. Pierson, 66 Barb. 514.

A purchaser who advances the consideration to one not holding the property or indicia of title, will not be protected. Barnard v. Campbell, 65 Barb. 286, affd., 55 N. Y. 456.

A purchaser who in good faith or in ignorance of the existence of an un-

A purchaser who in good faith or in ignorance of the existence of an unrecorded mortgage advances part of the consideration is protected. Young v. Gray, 12 Hun, 325; 23 id. 1; 87 N. Y. 457.

A purchaser is chargeable with notice of every fact referred to or recited in the deeds forming the claim of his title. Cambridge v. Delano, 48 N. Y. 326; How. Ins. Co. v. Halsey, 8 id. 271, affg. 4 Sandf. 556; Acer v. Westcott, 46 N. Y. 384; McPherson v. Rollins, 107 id. 316, 322. Cf. 3 Hun, 571; Bentley v. Gardner, 45 App. Div. 216; Schwitzer v. Bornstein, 119 id. 47.

An intending purchaser of land is required to search against a former owner only during the time that the record title remained in him.

Mayor, 7 Misc. 250.

He is charged with notice as to the terms of a bond when referred to in the record of the mortgage. 19 N. Y. Supp. 275.

Notice of inadequacy of consideration from records. Anderson v. Blood, 86 Hun. 244.

Of breach of fiduciary relation as to satisfaction piece. Kirsch v. Tozier,

143 N. Y. 390.

Mere notice is not sufficient, if, with due diligence, the purchaser could not discover the prior title. Williamson v. Brown, 15 N. Y. 354.

A deed without seal, if recorded, is notice. Grandin v. Hernandez, 29 Hun,

399.

A paper improperly recorded is not constructive notice. Gillig v. Mass, 28 N. Y. 192, and supra, p. 705.

The legal title of one who took without notice of a prior equity will revail over such equity. Rexford v. Rexford, 7 Lans. 6. Cf. Heilbrun v. prevail over such equity. Hammond, 13 Hun, 474.

As to constructive notice from date of record, vide McPherson v. Smith, 49

Hun, 254.

Recitals of an Execution .- Such recitals in a deed are prima facie evidence of its existence, see L. 1890, Chap. 158.

The following principles have been enunciated by the courts of this State, with respect to the efficacy of the record of an instrument as notice. See also supra, Title III of this chapter.

A Prior Deed, not Acknowledged or Recorded, will not prevail against subsequent deeds acknowledged and recorded. Clark v. Crego, 47 Barb. 599, affd., 51 N. Y. 646; Jackson v. Humphrey, 8 Johns. 137; Barto v. Tompkins Co. Bk., 15 Hun, 11.

Nor will a recorded deed from such grantee prevail against a recorded deed from the original grantor. Page v. Waring, 76 N. Y. 463. Nor will an assignment for the benefit of creditors which has been recorded only in the county clerk's office as an assignment. Wagner v. Hodge, 34 Hun, 524.

Notice is not material to subject a grantee or mortgagee to a prior unrecorded deed, unless he has given up a right or security or done himself a damage. Delancey v. Stearns, 66 N. Y. 157.

And if the grantee had full notice of a prior unrecorded deed, he will not have preference under a prior recorded deed, and the subsequent record of the prior deed before any sale to a purchaser for valuable consideration and without notice is notice to all purchasers under the first recorded deed.

Jackson v. Post, 15 Wend. 588; Van Rensselaer v. Clark, 17 Wend. 25;

Jackson v. Elston, 12 Johns. 452; Ring v. Steel, 3 Keyes, 450; Barnes v.

Camack, 1 Barb. 392; Page v. Waring, supra.

The recording is equal to actual notice. Schutt v. Large, 6 Barb. 373. A prior deed not fully delivered will be postponed to a subsequent mort-

gage. Parmlee v. Simpson, 5 Wall. 81.

It has been held that a purchaser for value will not be protected if, previous to the conveyance to his grantor, the lands were conveyed to a third person and the latter's deed be recorded anterior to the last purchase, although the deed to the purchaser's grantor be first recorded. Jackson v. Post, 15 Wend. 588, supra; Van Rensselaer v. Clark, 17 id. 25, supra. This case of Jackson v. Post, 15 Wend. 588, was explained in Hooker v. Pierce, 2 Hill, 650, where it was held that if one purchase lands unaffected by a prior deed, and record his conveyance, the record will inure to vendees under him, however remote; and no record of a deed subsequent in date to the first will operate to deprive such vendees of the rights of bona fide purchasers.

A purchaser with notice from a purchaser without notice is protected; and a purchaser without notice from a purchaser with notice is equally protected, as if no notice had been given. Jackson v. Van Valkenburg, 8 Cow. 260; 3 Barb. 652; Jackson v. Humphrey, 8 Johns. 137; Varick v. Briggs, 6 Paige, 323, affd., 22 Wend. 543; Wood v. Chapin, 13 N. Y. 509; Wagner v.

Hodge, 34 Hun, 524; Lyon v. Morgan, 143 N. Y. 505.

See, as to the protection of one holding under a contract of sale. Boon v.

Chiles, 10 Pet. 177.

To constitute a purchaser without notice, it is not sufficient that the contract or deed should be made without notice, but that the purchase money should be paid before notice. Wormley v. Wormley, 6 Brockenbrough, 330; Wormley v. Wormley, 8 Wheat. 421; Harris v. Norton, 16 Barb. 265. A mere securing of the purchase money is not sufficient. Spicer v. Waters, 65 Barb. 227; Genet v. Davenport, 66 id. 412, affd., 56 N. Y. 576. See also Barto v. Tompkins Co. Bk., 15 Hun, 11; and supra, p. 702, as to bona fide purchaser. A purchaser with notice, even without value, from a bona fide purchaser

who is protected under the recording acts, has the same benefit as the latter. Webster v. Van Steenbergh, 46 Barb. 211; Ward v. Isbill, 73 Hun 550.

Bona fide purchaser from one who bought at foreclosure not affected by record of deed whereby he was tenant in common before the foreclosure. Streeter v. Shultz, 45 Hun, 406, affd., 127 N. Y. 652. See also Clark v. McNiel, 119 id. 287, as to priorities of purchasers with or without notice.

Filing for Record gives notice. The index is not necessary. Mutual Life Ins. Co. v. Dake, 87 N. Y. 257; compare Gillig v. Maas, 28 N. Y. 196, however, as to record in wrong book not being notice.

A Correct Description by Street Number is not notice when the metes and bounds cover a different lot. Thomson v. Wilcox, 7 Lans. 376. Chap. XX.

Actual Notice .- Priority of record is held of no avail against actual notice of a previous unregistered conveyance. Jackson v. Sharp, 9 Johns. 163; Barnes v. Camack, 1 Barb. 392; Webster v. Van Steenbergh, 46 id. 211; Tuttle v. Jackson, 6 Wend. 213; Jackson v. Burg, 10 Johns. 457; Jackson v. Cowen, 9 Cow. 94; Same v. Post, Id. 120; Butler v. Viele, 44 Barb. 166.

But the proof of notice must be very clear and must show fraud in the party having notice, or what would amount to fraud. Riley v. Hoyt, 29 Hun, 114; and in Wood v. Chapin, 13 N. Y. 509, a bona fide purchaser for value, whose deed is first recorded, is held protected against a prior unrecorded con-

veyance, although his grantor purchased with notice.

It seems this rule will be applied as to an innocent purchaser of a mortgage, as the effect of record of an assignment of mortgage is not merely to protect the assignee against a subsequent sale by the mortgagee of the same mortgage. Decker v. Boice, 83 N. Y. 215, overruling Crane v. Turner, 67 id. 437. Vide fully, supra, Chap. XXIII, Tit. VII.

Actual notice of a vendor's lien for part of the purchase price will prevent

a junior mortgagee from getting priority over a purchase money mortgage by recording first. Ellis v. Horrman, 90 N. Y. 466.

From Notorious Facts.— Notice as to restrictions from notorious facts. Knapp v. Hall, 20 N. Y. Supp. 42. See also Hayward Tract Assoc. v. Miller, 6 Misc. 254; Ward v. Met. El. R. R. Co., 82 Hun, 545.

Record of Deed from one not having Recorded Prior Conveyance.—A purchaser is not bound to take notice of the record of a deed from a person to whom there is no recorded conveyance. Thus, when a deed to a vendor is not recorded, the record of a mortgage given by his vendee is not notice to a subsequent purchaser. Vide Loosey v. Simpson, 3 Stock. (N. J.) 246; Cook v. Travis, 22 Barb. 338, affd., 20 N. Y. 400; Page v. Waring, 76 id. 463.

Assumption Clause .- Record of a deed containing a covenant to assume a mortgage is not notice to an assignee of the mortgage. Mead v. Parker, 29 Hun. 62.

Notice to Agents, Attorneys, etc .- Notice to an agent is notice to a principal while the agent is concerned for the principal. Ingalls v. Morgan, 10 N. Y. 178; Jackson v. Sharp, 9 Johns. 163. So notice to an attorney, who is advancing money of a client on mortgage, of a prior unrecorded mortgage, is notice to the client. Constant v. Am. Bapt., etc., Soc., 53 Super. 170. But only during the continuance of that transaction. Constant v. University, etc., 133 N. Y. 640; Slattery v. Schwannecke, 118 id. 543. See also Anderson v. Blood, 86 Hun, 244; Kountze v. Helmuth, 146 N. Y. 432.

As regards mortgages to secure future advances being notice to subsequent purchasers when recorded, and necessity of giving notice to mortgagee to make no further advances, see Ackerman v. Hunsicker, 85 N. Y. 43.

Sheriffs' Sales. As to purchasers under sheriffs' sales, vide Chap. XXXVIII.

Purchasers of Partnership Lands.— Where a purchaser has notice of lands belonging to a partnership, they will be chargeable in his hands with the

partnership debts, although he had no notice of such debts. Hoxie v. Carr, 1 Sum. 173. But record of a mortgage by one partner of his interest held no notice. Tarbell v. West, 86 N. Y. 280.

Improvements.— A bona fide purchaser for value may enforce a lien against the true owner for improvements put upon the land. Bright v. Boyd, 1 Story C. C. 478; 2 id. 605.

Mistakes in Registry.—A party is only bound by the actual registry in the proper place of the record, in default of other notice. Gillig v. Maas, 28 N. Y. 196; Bank v. Frank, 45 Super. 404.

Military Bounty Lands .- As to the several acts concerning the registry of deeds, etc., relative to such lands, vide Laws, January 8th and March 27th, 1794; April 8, 1813; 1 R. L. 209, 211, 303; February 4, 1814; April 13, 1819; April 14, 1820, Chap. 245; February 4, 1814; April 12, 1818.

Notice not Retrospective. - Notice by the recording acts is not retrospective, so as to affect existing vested rights, and the recording of a deed or mortgage is not notice of its existence to a prior mortgagee. How. Ins. Co. v. Halsey, 8 N. Y. 271, affg., 4 Sandf. 565; Stuyvesant v. Hone, 1 Sandf. Ch. 419; and 2 Barb. Ch. 151. Also Ackerman v. Hunsicker, 85 N. Y. 43.

. A grantee whose deed is not recorded until after the filing of the lis pendens in foreclosure need not be made a party to the action, for he is bound by the

judgment without that. Kindberg v. Freeman, 39 Hun, 466.

Possession as Notice.—The general rule is that possession of land is constructive notice to a purchaser, mortgagee or others, of the occupant's title and equities, and when an estate is in the possession of tenants, the purchaser is chargeable with notice of the extent of their interest as tenants. It is also a rule that the possession of real estate is prima facie evidence of the highest estate in the property, viz., a seizin in fee. Possession, however, to operate as constructive notice, must be by actual, open, visible occupation, or by open and visible improvement, in distinction from mere fencing, pasturing, cutting timber, etc.

Under this head, vide Tuttle v. Jackson, 6 Wend. 213; Moyer v. Hinman, 13 N. Y. 180, 184; Paige v. Waring, 76 id. 463; Ellis v. Horrman, 90 13 N. Y. 180, 184; Paige v. Waring, 76 id. 463; Ellis v. Horrman, 90 id. 466; Rutger's Female College v. Tallman, 82 Hun, 20; Seymour v. Mc-Kinstry, 106 N. Y. 230; Hanover Nat. Bk. v. Am. Dock Co., 75 Hun, 55; Briggs v. Thompson, 86 id. 607; Holland v. Brown, 140 N. Y. 344; Grimstone v. Carter, 3 Paige, 421; Fassett v. Smith, 23 N. Y. 252; Westbrook v. Gleason, 12 Wkly. Dig. 261, affd., 89 N. Y. 641; The Trustees v. Wheeler, 61 N. Y. 88; Lamont v. Cheshire, 65 id. 30; Chesterman v. Gardner, 5 Johns. Ch. 29; Tuttle v. Jackson, 6 Wend. 213, 226; 10 Barb. 47; id. 254; id. 454; 6 Cush. 170: 43 Maine 519: 5 Barb. 53: 2 Stook (N. I.) 410: Leo v. The Polls Cush. 170; 43 Maine, 519; 5 Barb. 53; 2 Stock. (N. J.) 419; Lea v. The Polk County Copper Co., 21 How. (U. S.) 493; Umfreville v. Keeler, 1 Supm. 486, approved Heath v. Hewitt, 127 N. Y. 166; Pope v. Allen, 90 id. 298.

Notice of unrecorded deed. Munsion v. Reid, 46 Hun, 399, affd. as Treadwell v. Inslee, 120 N. Y. 458.

The rule is not universal; the notice is merely inferential, and in some case may not arise, or may be repelled or be restricted to some particular title or claim. Cook v. Travis, 22 Barb. 338, affd., 20 N. Y. 400; Minton v. N. Y. El. R. R. Co., 130 N. Y. 332.

Joint occupation by husband and wife is no notice of conveyance from him to her. Cary v. White, 7 Lans. 1. Father and son. Baldwin v. Goede, 88 Hup. 115

88 Hun, 115.

Possession to operate as notice should be inconsistent with the adverse title sought to be established. Staples v. Fenton, 5 Hun, 172; Pope v. Allen, 90 N. Y. 298; Minton v. N. Y. El. R. R. Co., 130 id. 332.

Constructive possession is not enough. Brown v. Volkening, 64 N. Y. 76. See also Trustees, etc. v. Wheeler, 61 N. Y. 88; Young v. Guy, 12 Hun,

325; 87 N. Y. 457.

Requisites of such possession as notice. Powell v. Jenkins, 14 Misc. 83.

It seems, when a party proposes to purchase the water front of a farm on the shore of navigable waters, which farm is in such an actual and open possession of a third person and is designated by visible boundaries or monuments at or near the shore, the possession is notice of the occupant's rights with respect to the whole farm, including the water front appurtenant thereto and held by him as private property. Holland v. Brown, 140

Such possession to be notice must be inconsistent with the apparent title of record. Brown v. Volkening, 64 N. Y. 76; Phillips v. Owen, 99 App.

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Notice of Charges or Equities .- Persons taking title through instruments creating charges or raising equities are effected with notice of them. Cambridge Valley Bk. v. Delano, 48 N. Y. 326; Salisbury v. Morss, 7 Lans. 359. affd., 55 N. Y. 675.

Notice of Fraud. Vide Holland v. Brown, 140 N. Y. 344.

Continued Possession of Vendor is notice of vendor's lien, Seymour v. McKinstry, 106 N. Y. 230.

See as to vendor's possession of land conveyed by him by mistake. Holland v. Brown, 140 N. Y. 344.

Possession under a Contract of Sale, Tax Lease, Referee's Deed, etc., is notice of the vendee's rights. Williams v. Kinney, 43 Hun, 1, affd., 118 N. Y. 679; Erwin v. Erwin, 17 N. Y. Supp. 442, affd., 139 N. Y. 616. Compare Johnson v. Strong, 20 N. Y. Supp. 392; s. c., 65 Hun, 470.

Possession of two or three rooms sufficient. Bassett v. Wood, 55 Hun, 587. Where the grantee of a party without record title found a tax lessee in possession who attorned to him and gave him a deed, the possession of the tax lessee was held to be no notice of the grantee's rights. Willis v. Sanders,

51 Super. 384.

Where a purchaser at foreclosure bought on an agreement with the owners to hold for them and convey to them on certain terms, their continued possession was held to be notice of their rights. Umfreville v. Keller, 1 Supm. 486, approved Heath v. Hewitt, 127 N. Y. 166.

Elevated R. R. Easements.—Its operation as notice of release. Ward v. Met. El. R. R. Co., 82 Hun, 545.

How far the record of an equitable title is operative as notice. Dana v. Jones, 91 App. Div. 496; Ball v. Ball, 97 id. 347, 351; Tarbell v. West, 86 N. Y. 280; Matthews v. Demainville, 43 Misc. 546, revd., 100 App. Div. 311; Sternfels v. Watson, 139 Fed. Rep. 505; Cf. Title G. & T. Co. v. Fallon, 101 Fed. Rep. 187.

CHAPTER XXVII.

SUCCESSION DUTIES, STAMPING OF INSTRUMENTS AND FOR-FEITURES UNDER THE UNITED STATES REVENUE LAWS, AND NEW YORK STATE LAWS.

Various laws have been passed by Congress, since July 1, 1862, requiring instruments transferring real estate to be stamped as provided, and that in default thereof, they were neither to be recorded nor read in evidence, and also imposing the payment of a duty or tax by those "succeeding" to real or personal property. Such duties or taxes were to be liens on "property" or real estate, in some instances, for five, in others for twenty years, until they were paid. The succession might arise by deed, will or descent.

By Act of July 14, 1870, the earlier of these laws imposing such succession duties were abolished with the reservation of such as had accrued, or might accrue under the repealed acts. Consequently, as in case of future succession they are not applicable, they are not reviewed here.

As regards the provisions requiring the affixing and canceling of revenue stamps on instruments to give them validity, such provisions have also been abolished by United States Act of June 6, 1872, to take effect on the 1st of October, then ensuing.

In 1898, to provide ways and means to meet war expenses and for other purposes, a similar law was passed by Congress, requiring instruments conveying real property to be similarly stamped with the like provision that in default thereof they should not be recorded or admitted or used as evidence; and also imposing a similar duty or tax on legacies and distributive shares of personal property, the same to be a lien and charge upon the decedents' property for twenty years or until the same should within that period be paid.

Act of June 13, 1898, Chap. 448, 30 U. S. St. at L. 448, amd. Act of Mar. 2, 1901, Chap. 806, 31 U. S. St. at L. 938, 946, Act of Apr. 12, 1902, Chap. 500, 32 St. at L. 96.

The special taxes imposed by the Act of 1898 (as amended), were repealed by Act of April 12, 1902, 32 U. S. St. at L. 96, with a reservation as to such succession taxes as had accrued, the provision as to lien of same being amended. See Act of April 12, 1902, § 8.

As in the case of the earlier acts, these provisions are not reviewed here, as being inapplicable to successions since their repeal.

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The question, however, as to the right to record or use in evidence conveyances not stamped under the views of the tribunals of this State is no longer one affecting title to realty. The recent views of courts of this State are substantially to the effect that in no case would the omission to affix a revenue stamp to an instrument requiring a stamp invalidate the instrument, unless there was an intention to defraud the Government of the stamp duty; and that instruments requiring a stamp, might be stamped and used in evidence, in the absence of any such intent. In the case of More v. More, 47 N. Y. 467, the Court of Appeals also determined that it was not within the constitutional power of Congress to prescribe for the States a rule for the transfer of property within them; and that, therefore, no deed would be invalid, as an instrument transferring realty, because it had not been stamped as rerequired by the United States laws. Vorebeck v. Roe, 50 Barb. 302; Frink v. Thompson, 4 Lans. 489; More v. More, 47 N. Y. 467, overruling, Davy v. Morgan, 56 Barb. 218; see also Coppernoll v. Ketcham, 56 Barb. 111; How v. Carpenter, 53 id. 382; People v. Gates, 43 N. Y. 40; Brown v. Goodwin, 75 id. 409.

The Seizure and Sale of Land for Nonpayment of Internal Revenue Taxes.—The Act of July 1, 1862, provided for the *seizure* and *sale* of real estate for nonpayment of taxes. *Vide, § 21. Redemption may be made in a year from record of deed. Taxes were to be a lien on all property. The collector is to keep record of sales of lands. *Vide* also Act of 1864, Chap. 173, § 30; also Act of March 3, 1865, providing that taxes under the internal revenue laws shall be *tiens* on all *property* of the person, etc., assessed; also Act of July 13, 1866, making provision of sale of real estate of party taxed, how deed is to be given, and redemption; also Act of March 2, 1867, § 4; also R. S., U. S., §§ 3196 to 3206 inclusive. These liens do not take precedence of existing liens. Decisions of Commissioner Rollins. By section 106, of Act of 1868, now section 3207 R. S. U. S., provision is made for a bill in equity to enforce the lien against real estate, making all persons having liens parties.

Reference should also be had to amendments.

Confiscation of Land for Violation of Internal Revenue Laws.—The various internal revenue acts and the Revised Statutes have provided for the forfeiture of land used in violation of these laws. Upon default of all parties or upon a verdict for the United States after a trial of the issues a decree of condemnation is made and a writ of venditioni exponas, formerly issued to the marshal under which he sold the property substantially as a sheriff sells under execution. Now no writ issues, but the property is taken charge of by the collector of internal revenue for the district in which it is situated, and its sale is regulated by the commissioner of internal revenue. Forfeiture of real estate may occur under the following acts; those prior to the Revised Statutes of 1873 are no longer in force: Act of July 20, 1868, Chap. 186, § 44 (15 Stats. 142); June 6, 1872, Chap. 315, § 12 (17 Stats. 240); R. S., § 3281; Act of July 20, 1868, Chap. 186, § 92 (15 Stats. 163); R. S., § 3400. These forfeitures, may, however, be remitted by the Secretary of the Treasury, where he is of opinion that they were incurred "without willful negligence or intention of fraud" in the person as to whose interest the remission is sought. R. S. U. S., § 5292.

Reference should also be had to amendments.

State Tax on Legacies and Successions.—By Laws of 1885, Chap. 483, a tax was imposed upon all property passing by will or descent to any person or corporation, with the exception of the parents, children or adopted children, husband, wife, brother, sister, daughter-in-law or son-in-law of the decedent or intestate.

This act was superseded by Chap. 713 of the Laws of 1887, which fully regulated the assessment and collection of the tax. Executors are to have such power of sale to pay the tax as they have to pay debts. If taxable legacies are charged on land, the tax upon them is also to be a lien upon the land until paid. If taxes upon an estate are not paid, payment may be compelled by proceedings before the surrogate, and transcripts of this decree when docketed are to have effect of judgments. The effect and manner of enforcement of the decree are to be as provided in Code Civ. Proc. §§ 2553 and 2554.

After various further amendments the law was codified in 1892. See L. 1892, Chap. 399, and after still further amendments, it became part of the Tax Law, G. L., Chap. XXIV. See Laws of 1896, Chap. 908, §§ 220-243 (as amended).

For some of the amendments from time to time, see L. 1887, Chap. 713; L. 1889, Chaps. 307, 479; L. 1891, Chap. 215; L. 1892, Chaps. 167, 168, 169, 443; L. 1893, Chaps. 199, 704; L. 1897, Chap. 284; L. 1903, Chap. 41; L. 1905, Chap. 368.

The law held constitutional. Matter of McPherson, 104 N. Y. 306, affg. 41

Hun, 645.

As to the lien of the tax upon the property transferred, see Tax Law, L. 1896, Chap. 908, § 224 (as amd., L. 1901, Chap. 173; L. 1905, Chap. 368).

The surrogate may be compelled by mandamus to order appraisal of estates subject to transfer tax. Matter of Kelsey v. Church, 112 App. Div. 408.

As the many provisions of these acts and their amendments, and the cases construing them are too numerous for the scope of this work, reference should be had to some standard work bearing on the subject.

See Fallows' Coll. Int. and Transfer Tax.

As to what transfers are taxable, see Tax Law, 1896, Chap. 908, § 1 (as amd. L. 1897, Chap. 284; L. 1905, Chap. 368).

Exceptions and limitations, Tax Law, § 221 (as amended).

The provisions of the law held applicable to appointments. Chandler v. Kelsey, 205 U. S. 466, sustaining 176 N. Y. 486.

A corporation organized under the Membership Corporations Law, and not under the Policies.

under the Religious Corporations Law, although the purposes stated in its charter would make it a religious corporation, is not within the exception.

Matter of White, 118 App. Div. 869.

Whether the property of nonresidents is taxable is to be determined with respect to the situation of the date of the intestate's death; the tax cannot be avoided by any subsequent division of the assets among heirs, as by applying all the property here to one whose share would not be taxable, thus avoiding the tax as to others whose shares would be taxable. Matter of Ramsdell, 190 N. Y. 492.

CHAPTER XXVIII.

TITLE THROUGH FORECLOSURE OF MORTGAGE.

TITLE I .- JURISDICTION OVER THE ACTION.

II .- PARTIES TO THE ACTION.

III .- Jurisdiction over Defendants.

IV .- JUDGMENT.

V.— SALE.

VI.- RESALE.

VII.— STRICT FORECLOSURE.

VIII .- SALE UNDER A POWER.

IX .- MISCELLANEOUS.

The equity of redemption which exists in the mortgagor after default in payment may be foreclosed by action and sale, whether the mortgage contains a power of sale or not. The object of an action of foreclosure is to enable the mortgagee to have the mortgaged premises sold in order to obtain his money, interest and expenses; and that the mortgagor and all persons claiming under him, be barred of all equity of redemption in the mortgaged premises; the purchaser taking a clear title to the land sold.¹

If the mortgage be to secure unliquidated damages, or if there be no power of sale in the mortgage, it can only be forclosed in a court of equity. Fergu-

son v. Kimball, 3 Barb. Ch. 616; Ferguson v. Ferguson, 2 N. Y. 360, or if the mortgage have to be proved by parol. Hart v. Ten Eyck, 2 Johns. Ch. 62.

The time and manner of enforcing his security rests with the mortgagee. He cannot, however, hold or put it forward unlawfully or inequitably as against a subordinate interest. Adams v. McPartlin, 11 Abb. N. C. 369.

A mortgage containing a covenant for payment and for foreclosure in case of breach, which refers to an agreement whereby the mortgagee collects the rents and applies them on the mortgage, may be foreclosed. It is not a

vivum vadium. O'Neill v. Gray, 39 Hun, 566.

Foreclosure will not be decreed for a technical default in payment of taxes. Ver Planck v. Godfrey, 42 App. Div. 16.

¹Mr. Fowler's Note on "Action to foreclose a mortgage." As the subject is of great interest we may inquire, what was the mortgage's remedy in New York upon a mortgage in fee prior to the American Revolution? for it has been much disputed. Lansing v. Goelet 9 Cow. 347. It is familiar that in English and American equity urisprudence an equity of redemption became at an early day inseparable from a mortgage. Moulton v. Cornish, 138 N. Y. 133, 143; Hughes v. Harlam, 166 N. Y. 427, 432; 2 Story Eq. Juris., § 1023; 4 Kent. Comm. 181; Coote, Mortgages, 19 et seq. In England a strict foreclosure of this equity of redemption and not a decree of sale was the mortgagee's appropriate remedy unless in exceptional cases. 2 Story Eq. Juris., § 1026. But in England at law a mortgage if see was regarded as a sale on condition (Coote, Mortgages, Chap. 2), while in New York State a mortgage in fee has, at least since 1732, been regarded both at law and in equity as a mere security for a debt. Lansing v. Goelet, 9 Cow. 349; Waters v. Stewart, 1 Caines Cas. 47; Jackson, ex dem., etc. v. Willerd, 4 Johns. 41; Hubbell v. Moulson, 53 N. Y. 225; Barson v. Mulligan, 191 id. 306. It is desirable, for a correct understanding of our modern practice, to ascertain how this deviation from the English rule at law came about in New York. It is stated that before the Revolution the English practice generally prevailed in New York, and the mortgagee's usual remedy was by bill in chancery to foreclose the equity of redemption, no sale being decreed. Note to Lansing v. Goelet, 9 Cow. 347. It is claimed that if a sale had been then decreed without a decree of foreclosure and the mortgagee purchased in, the contention would have been open, that the

Right to Foreclose and Limitation.—Lapse of time may bar the action of foreclosure. If the mortgagor has been permitted to hold the land without account, or payment of principal or interest, or claim therefor for twenty years, the mortgage debt is considered extinguished, and a reconveyance from the mortgagee may be presumed. Collins v. Torrey, 7 Johns. 278; Jackson v. Wood, 12 id. 242. See Katz v. Kaiser, 10 App. Div. 137.

years, the mortgage debt is considered extinguished, and a reconveyance from the mortgagee may be presumed. Collins v. Torrey, 7 Johns. 278; Jackson v. Wood, 12 id. 242. See Katz v. Kaiser, 10 App. Div. 137.

equity of redemption was not extinguished. See the statement in Lansing v. Goelet. 9 Cow. 347. Whether this is an accurate supposition concerning the law of supported by any authority cited from the colonial courts, and the known practice of sales of the equity of redemption in courts at law is at variance with the supposition itself. Jackson ex dem., etc. v. Williard, 4 Johns. 41, and see 2 Hofman Ch. Pr. 133, note. Hofman states that saies on foreclosure in chancery were frequent in colonial courts, and Hofman is pretty high authority on such points of the property of the sales of the equity of the sales of the equity had original jurisdiction to decree a sale in a foreclosure suit. This was the question raised and answered affirmatively in Lansing v. Goelet, 9 Cow. 401; see of the equity had original jurisdiction of both the colonial and the State courts of that the nonstatutory jurisdiction of both the colonial and the State courts of cellor may be affirmed as established. Consequently the real question in Lansing v. Goelet was, whether the English court of chancery had an inherent judicial power to decree a sale of the mortgaged property at the instance of a mortgage, and secondly, whether a sale under a decree of sale, without a decree of foreclosus and secondly, whether a sale under a decree of sale, without a decree of foreclosus and secondly, whether a sale under a decree of sale, without a decree of foreclosus of the sales of the mortgaged premises. The early acts are cited by the sales of the sales of the sales of the wortgaged premises. The early acts are cited by Goelet, suppra. That a doubt on such fundamental points existed until such a late date makes an inquiry into the early practice in New York still illustrative, even if no longer important, because of last statutory changes conferring

The presumption, however, may be rebutted. Proceedings of foreclosure commenced will rebut such presumption. Jackson v. De Lancey, 13 Johns. 537; Calkins v. Calkins, 3 Barb. 305; Calkins v. Isbelt, 20 N. Y. 147. See also Jackson v. Wood, 12 Johns. 242, and Minor v. Beekman, 11 Abb. N. S. 147, revd., 50 N. Y. 337. Where after a sale in foreclosure no deed passed and the mortgagor never afterward recognized the mortgage, redemption was presumed after twenty years. Barnard v. Onderdonk, 98 N. Y. 158.

See Mack v. Anderson, 165 N. Y. 529. Payments by grantee of part of

mortgaged premises, assuming the mortgage, do not prevent running of the statute of limitations against the mortgagor and the other parts of the

mortgaged premises. Boughton v. Harder, 46 App. Div. 355.

As the statute of limitations does not, after the prescribed period, discharge the debt, but simply bars a remedy thereon, a mortgage under seal, which by Code Civ. Proc., § 381, is not barred within twenty years, may be foreclosed by action within such time, though the note which it was given to secure is barred, and although the mortgage contains no covenant to pay. Hulbert v. Clark, 128 N. Y. 295, aff'g 11 N. Y. Supp. 417.

While the suit is pending, or after judgment, no other action shall be commenced or maintained for the recovery of the mortgage debt, except by leave of the court in which the former action was brought. Code Civ. Proc., § 1628; see Engle v. Underhill, 3 Edw. 249, and when a judgment has been obtained at law, there can be no foreclosure unless execution is returned at least partly unsatisfied, Code Civ. Proc., § 1630. These sections replace 2 R. S. 191, §§ 153, 156, repealed by Laws of 1880, Chap. 245.

They do not apply to bonds secured by mortgage on land outside this State.

Mut. Life Ins. Co. v. Smith, 54 Super. 400, approved, 125 N. Y. 673.

This does not prevent a junior mortgagee who has filed a claim to surplus, from beginning another action for his debt without leave of court. Wyckoff v. Devlin, 12 Daly, 144.

A pending action to foreclose a prior mortgage is not a bar to an action to

foreclose a subsequent one. Revoir v. Barton, 71 Hun, 457.

Code Civ. Proc., § 1628, does not apply to mortgages on lands without the State. Mutual Life Ins. Co. v. Smith, 19 Abb. N. C. 69; Shufelt v. Shufelt, 8 Paige, 70; Williamson v. Champlin, 9 id. 137.

Code Civ. Proc. § 1630, held to apply to actions to foreclose mechanics'

liens. Barbig v. Kick, 25 C. P. R. 62

As to leave to sue on bond pending foreclosure, see Matter of Byrne, 81 App. Div. 740. See also Matter of Marshall, 53 id. 136.

As to execution for the mortgage debt, vide Chap. XXXVIII.

As to affect of tender in removing the lien and right to foreclose, vide The Farmers', etc., Co. v. Edwards, 26 Wend. 541; Kortright v. Cady, 21 N. Y. 343, and supra, p. 629. The latter case holds, reversing 23 Barb. 430, and overruling Arnot v. Post, 2 Den. 344, that tender of the money due at any time before foreclosure discharges the lien, though made after the law day, and not kept good; and continued readiness to pay need not be shown. See Pizer v. Herzig, 120 App. Div. 102.

A conveyance to the mortgagee in satisfaction after he has assigned the mortgage does not merge nor satisfy it, and it may still be enforced against

his grantee. Miller v. Lindsay, 19 Hun, 207.

A fund paid into court by a city as compensation for a water right taken from the owner under condemnation is not to be regarded as land in such sense as to pass under the foreclosure of a mortgage, but is subject only to whatever deficiency there may be after sale of the remaining land. In re City of Rochester, 136 N. Y. 83.

As to foreclosure by mortgagee in possession, Smith v. Cross, 85 Hun, 58.

Receivers.— Derby v. Brandt, 99 App. Div. 257; N. Y. Bldg. L. Co. v. Begley, 75 App. Div. 308; Grover v. McNeeley, 72 id. 575; owner of equity entitled to notice. Coleman v. Goodman, 37 Misc. 517; Dazian v. Meyer, 66 App. Div. 575; Fletcher v. Krupp, 35 id. 586.
When plaintiff is entitled to rents. Harris v. Taylor, 22 App. Div. 109.

TITLE I. JURISDICTION OF COURTS OVER THE ACTION.

Any judgment rendered by a court that had not obtained jurisdiction of the subject matter to which it relates, and the persons to be bound thereby, is utterly void.

On this head, vide Phelps v. Baker, 60 Barb. 107; and infra, "Judicial Sales," Chap. XXXVIII.

The Supreme Court has now the jurisdiction of the former Court of Chancery, which had power from its institution to decree a sale under foreclosure.

Code Civ. Proc., § 217.

When the court has jurisdiction of the parties and the cause of action, it may decree foreclosure, though part of the lands be in another State. Union Trust Co. v. Olmstead, 102 N. Y. 729; Mead v. Brockner, 82 App. Div. 480.

The Supreme Court, under the Constitution of the State of New York, has general jurisdiction in law and equity, but the exercise of its power is subject to the limitation and resulting the cold of the state of the supremental state.

to the limitations and regulations of the Code of Civil Procedure.

Before jurisdiction can be established, it must appear, not only that the law has given the tribunal capacity to entertain the complaint against the person or thing sought to be charged or affected, but that such complaint has been preferred and that such person or thing has been properly brought before the tribunal to answer the charges therein contained:

The power of the court to render a judgment is limited by § 1207 of the Code of Civil Procedure to the relief demanded in the complaint, or when there is an answer to such as is embraced within the issue made by the pleadings.

Clapp v. McCabe, 84 Hun, 379.

Superior and Common Pleas and Other Courts.—Also jurisdiction in foreclosure cases was conferred on the Superior Court and Court of Common closure cases was conferred on the Superior Court and Court of Common Pleas in New York city, and mayors' and recorders' courts of cities, and county courts, for lands in the city or the county (Constitution of 1846; Code Proc., § 33, § 30, repealed by Laws of 1877, Chap. 417), and the trial should be where the lands are located. Section 123 of the same Code, repealed by the above Act of 1877. See for the similar provision at present, Code Civ. Proc., § 982. See also 3 How. 325; 26 Barb. 197; 16 How. 41. As to the Superior Court, vide Ring v. McCoun, 10 N. Y. 268.

As to County Courts and their jurisdiction, vide Code Civ. Proc., § 340; Hall v. Hall, 30 How. 51; Arnold v. Rees, 18 N. Y. 57; overruling Hall v. Nelson, 23 Barb. 90, and Benson v. Cromwell, 26 id. 218. Held they have also jurisdiction over lands out of the county, if included in a complaint to foreclose lands in the county. Strong v. Eighme, 41 How. 117; see Code Civ. Proc., § 340.

Proc., § 340.

As to City Court of Brooklyn, vide Laws of 1870, Chap. 470; 1871, Chap. 282. See also Law of 1873, Chap. 239, extending jurisdiction of the N. Y. Common Pleas and Superior Courts, Superior Court of Buffalo, and City Court of Brooklyn, to be equal, in civil cases, with the Supreme Court.

The grounds of jurisdiction of an inferior court must appear from the record. Walker v. Turner, 9 Wheat. 541.

The Act of 1873 was held to be unconstitutional in Landers v. Staten Island R. R. Co., 53 N. Y. 450, in so far as it extended the jurisdiction of the local courts.

The "Superior City Courts" had jurisdiction over foreclosures where the property was situate within their respective cities. Code Civ. Proc., § 263. For a definition of "Superior City Courts" in the Code, vide Code Civ. Proc., § 3343.

The Superior Court and Court of Common Pleas of the county of New York were abolished by the Constitution of 1894. Also the Superior Court of Buffalo and the City Court of Brooklyn. Const. 1894, Art. VI, § 5. Their jurisdiction was vested in the Supreme Court. Id.
The County Courts still have jurisdiction. Code Civ. Proc., § 340.

The County Courts cannot in such actions correct or reform mortgages. Thomas v. Harmon, 46 Hun, 75, affd., 122 N. Y. 84.

As to foreclosure of railroad property in United States Courts, see the Railroad Law, L. 1890, Chap, 565, §§ 76, 77, as amended.

Remedy by Ejectment or Execution.— The action of ejectment to recover the mortgaged premises will no longer lie by the mortgagee, his assignee or other representative. Code Civ. Proc., § 1498 (following 2 R. S. 312, § 57, which was repealed by Laws of 1877, Chap. 417); Barson v. Mulligan, 191 N. Y. 306; Carr v. Carr, 4 Lans. 314, affd., 52 N. Y. 251; nor can the equity of redemption be sold on an execution for the mortgage debt. Code Civ. Proc., § 1432 (following 2 R. S. 368, § 31, which was also repealed by Laws of 1880. Chap. 245); Delaplaine v. Hitchcock, 6 Hill, 14.

Lis Pendens. See infra, Chap. XLV. as to notice of lis pendens and their effect; also Code Civ. Proc., §§ 1631 and 1670.

What may be Foreclosed, and When .- Mortgage found among papers of

deceased. Morgan v. Freeborn, 68 Hun, 296.

After failure to pay an installment, held right of foreclosure absolute under the terms of the mortgage. Pizer v. Herzig, 120 App. Div. 102. See also Cole v. Hinck, 120 App. Div. 355; Mead v. Hammond, 107 id. 575.

Foreclosure of Omitted Land .- Sprague v. Cochran, 144 N. Y. 104. Lack Vide Coffin v. Lockhart, 71 Hun, 262. of consideration.

When Barred .- Vide Guilford v. Crandall, 69 Hun, 414; § 1630 of the Code of Civil Procedure.

Condemnation.— Foreclosure is not maintainable after the title passes. Hill v. Wine, 35 App. Div. 520.

TITLE II. PARTIES TO THE ACTION.

Parties Plaintiff.—The party bringing the action should be the mortgagee or his personal representatives; or, if the mortgage has been assigned, the assignees or their personal representatives.

A junior mortgagee may foreclose, although the premises have been sold under foreclosure of a first mortgage, if he were not party thereto. Peabody v. Roberts, 47 Barb. 92; Walsh v. The Rutgers Fire Ins. Co., 13 Abb. 33.

And he may redeem by paying the mortgage debt and interest without the costs of the previous foreclosure. Gage v. Brewster, 31 N. Y. 218, 224.

A mortgagee of premises who takes a conveyance of an undivided half of the same may foreclose as to the other half even after a foreclosure of a subsequent mortgage to which he may redeem the conveyance of a subsequent mortgage. subsequent mortgage to which he was made a party generally. Smith v. Roberts, 91 N. Y. 470, distinguished and limited, 53 Hun, 73.

Mortgage held by administrator and assigned to himself through a third person, can be foreclosed by him, though voidable as to next of kin of the

intestate. Read v. Knell, 143 N. Y. 484.

Where the executor of the mortgagee refused to foreclose, the administrator of the mortgagee's wife, who was entitled to the interest, was allowed to bring foreclosure. Weed v. Hornby, 35 Hun, 580.

Where a trustee under a mortgage refuses to foreclose, the bondholders may do so where it is necessary to protect their interests. Davies v. N. Y. Concert

Co., 41 Hun, 492.

Section 1686 of the Code of Civil Procedure, which provides for bringing Toreclosure, partition by or against an infant in his own name, does not prevent the guardian of an infant assignee of a mortgage from foreclosing it without joining the infant. Bayer v. Philips, 17 Abb. N. C. 425. Though the better practice is to bring the action in the infant's name by the guardian ad litem. Carr v. Huff, 10 N. Y. Supp. 361.

Where a vendor mortgaged to one with knowledge of the contract and then

conveyed, taking a purchase money mortgage, the vendor's mortgage was held

good to the amount of the purchase money mortgage, and the grantee after notice of it, having paid the purchase money mortgage to an assignee thereof, foreclosure of the vendor's mortgage was allowed. Young v. Guy, 12 Hun, 325. See also further decision, 87 N. Y. 457.

The assignce of the mortgage, who is not assignee of the bond, cannot foreclose. 17 Abb. 342.

The transfer of the mortgage does not transfer the bond. Supra, p. 624. If plaintiff die before judgment, no further proceedings can be had until the action is revived. This is not necessary if after judgment, though before sale. 12 How. 118. Nor to procure a writ of assistance. Lynde v. O'Donnell, 12 Abb. 286; 21 How. Pr. 34.

Infants, Executors, etc.—An infant may maintain the action. 2 R. S., 445, § 1. Code Civ. Proc., § 468.

As to appointment of guardian ad litem, see Code Civ. Proc., §§ 469, 470,

472, and supra, p. 679.

As to party plaintiff in representative capacity, see Merritt v. Seaman, 6 N. Y. 168; Stilwell v. Carpenter, 62 id. 639; Thompson v. Witmarsh, 100 id. 35; Litchfield v. Flint, 104 id. 543; use of the word "as" seems to be the test. Farrington v. Am. Loan & Tr. Co., 9 N. Y. Supp. 433.

Foreign executors may not be plaintiffs without taking out letters here. Palmer v. Phænix Ins. Co., 84 N. Y. 63, 67; In re Webb, 11 Hun, 124; Farrington v. Am. Loan & Tr. Co., 9 N. Y. Supp. 433.

Representatives, etc.—Supra, Chap. XVII.

When Barred.—An action to foreclose a mortgage may be barred by the Statute of Limitations, although an action can be maintained upon the bond to which it is collateral, as where the bond and mortgage are made by different parties, the absence of the obligor on the bond from the State will not suspend the operation of the statute as to the mortgage. Fowler v. Wood, 78 Hun, 304.

Recovery on the Bond not allowed when the mortgage was not established. Dudley v. Congregation, etc., of St. Francis, 138 N. Y. 451.

Parties Defendant.—The equity of redemption of those made parties to the action, and those in privity with them only is barred by the judgment. The Code of Civil Procedure provides that under these proceedings, the conveyance on the sale made pursuant to final judgment vests in the purchaser the same estate only that would have vested in the mortgagee, if the equity of redemption had been foreclosed. Such a conveyance is as valid as if executed by the mortgagor and mortgagee, and is an entire bar against each of them and against each party to the action, who was duly summoned, and every person claiming from, through or under a party by title accruing after the filing of the lis pendens, as prescribed.

Code Civ. Proc., § 1627; Laws of 1899, Chap. 528; 1 R. L. 490; 2 R. S. 192, § 158.

Slattery v. Schwannecke, 44 Hun, 75, affd., 118 N. Y. 543; Mygatt v. Coe, 44 Hun, 31, revd., 124 N. Y. 212, distinguished, 142 id. 78. If the party entitled to the equity of redemption, or those having liens thereon, are not made parties and their equity foreclosed, an action for the redemption of the mortgaged premises may be brought by them in equity. Walsh v. Rutgers Fire Ins. Co., 13 Abb. 33; Morris v. Wheeler, 45 N. Y. 708; Holden v. Sackett, 12 Abb. 473; Miner v. Beekman, 50 N. Y. 337. See this case as to the action to redeem.

It has been held that where the prior incumbrancer has been made a party defendant in the foreclosure action, under a complaint in the usual form, alleging that such incumbrancer's interest is subordinate to the mortgage, and containing the usual prayer for judgment, and the usual judgment in foreclosure is rendered, the interest of the incumbrancer is not cut off by the sale under such a judgment. McReynolds v. Munns, 2 Keyes, 214; Lewis v. Smith, 9 N. Y. 502; Emigrants' Industrial Savings Bank v. Goldman, 75 id. 127; Smith v. Roberts, 91 id. 470; Holcomb v. Holcomb, 2 Barb. 20. See as to easement acquired prior to mortgage. Mayer v. Margolies, 47 Misc. 24.

Paramount rights sought to be subordinated must be plainly controverted to be cut off. Roarty v. McDermott, 84 Hun, 527, revd., 146 N. Y. 296, on

another point. Stillwell v. Hart, 40 App. Div. 112.

The judgment is not a bar to the paramount rights of parties to the action, however, which have not been subjected to litigation in the action, either through the form or substance of the pleadings. Lewis v. Smith, 11 Barb.

152, affd., 9 N. Y. 502, note 1; 23 Hun, 134.

Nor does it affect rights prior to the mortgage, even though those claiming such rights are made parties. Emigrant Ind. Savings Bank v. Clute, 33 Hun, 82. Even though arising under an unrecorded deed if there be notice. Brown v. Volkening, 64 N. Y. 76. Or an unindexed (though recorded) mortgage. Mutual L. I. Co. v. Dake, 1 Abb. N. C. 381.

Unless the land is sold free from their liens with their consent and the complaint asks that they be paid off, or it was so understood. Emigrant Ind. Savings Bank v. Goldman, 75 N. Y. 127; Fletcher v. Barber, 82 Hun, 405.

Or to regulate amount due. Guilford v. Jacobie, 69 Hun, 420,

Who are to be Made Parties Defendant.—The owner of the equity of redemption, and all persons materially interested in the mortgage or mortgaged estate, or who have any right to or lien thereon, or who may be Barb. 88; 3 id. 534. This will ordinarily include the heirs of the mortgagor (47 id. 144; Dodd v. Neilson, 90 N. Y. 243), or his devisee or assignee, and also personal representatives, if the mortgage is of a term; the tenants for life, curtesy and dower, reversioners, and remaindermen. Nodine v. Greenfield, 7 Paige, 544, as also all persons having any contingent interest in the equity of redemption; also all persons interested in the proceeds of the estate. 8 Barb. 618.

This does not include legatees, where the legacies are not charged on the realty and the personalty was sufficient. Hebrew Soc. v. Schoen, 60

How. Pr. 185.

Heirs must be parties where there is equitable conversion. Noonan v.

Brenneman, 54 Super. 337.

A trustee joined only individually is not barred as trustee. Rathbone v. Hooney, 58 N. Y. 463; Landon v. Townshend, 112 id. 93. See a waiver by appearing and defending. Graham v. Fountain, 2 N. Y. Supp. 598.

Making cestuis que trustent and remaindermen parties also seems to cure a defect in not making all the trustees of a trust parties. Steinhardt v.

Cunningham, 130 N. Y. 292.

The assignor of the mortgage, where it has been assigned as security, should be made a party. Matter of Gilbert, 104 N. Y. 200. See also Rudolph v. Burton, 85 App. Div. 312.

All grantees of the mortgagor. Watson v. Spence, 20 Wend. 260; Clason v. Corley, 5 Sandf. 447; Reed v. Marble, 10 Paige, 409.

So held where the deed misdescribed the premises, but referred to a deed which contained a proper description. Grandin v. Hernandez, 29 Hun, 399; and where the deed was prior to the mortgage and unrecorded. Brown v. Velkening, 64 N. Y. 76.

His general assignee. Belden v. Slade, 26 Hun, 635.

Semble, that where a second mortgage is given to a party who is therein described, individually only, but the mortgage, by a clause following the description of the mortgaged premises, states that it is given to such party as trustee for certain other persons, the case does not come within the decision of Landon v. Townshend, 112 N. Y. 93; 129 id. 167; and the fact that such party is made a party individually, and not in the capacity of trustee. to an action for the foreclosure of a prior lien on the mortgaged premises, does not operate to prevent the lien of the second mortgage being extinguished by the judgment and sale in such foreclosure suit. McGuckin v. Milbank,

The mere addition of the words "assignee" or "trustee" to the name of the defendant in the title of the complaint does not make the action one against him in a representative character, where the complaint makes no demand against him as such. Draper v. Salisbury, 11 Misc. 573.

As to final judgment and curing defects of this nature, vide, Tit. IV. Also by appearance, vide p. 736 infra.

Though the assignee claims only as such, it is not enough if he be made a party individually. Landon v. Townshend, 112 N. Y. 93; McGuckin v. Milbank, 83 Hun, 473.

Failure to make a general assignee a party was held cured after the lapse of twenty-five years. Kip v. Hirsh, 103 N. Y. 565.

As to the wives of any grantees of the mortgagor. 23 Barb. 125; 8 id.

618; 10 Abb. 154; 11 Barb. 152; 18 id. 564.

Tax title is paramount to a lien of a prior mortgage; and owner under same is not a proper party in a foreclosure action. Erie County Svgs. Bk. v. Schuster, 187 N. Y. 111.

Dower.- See also "Dower," Chap. VII.

The wife of the mortgagor, whether of a purchase money mortgage, or whether the mortgage was executed before coverture or not, or whether she has joined in the mortgage or not, has an inchoate right of dower in the equity, which is not affected by a foreclosure to which she is not a party. Mills v. VanVoorhis, 20 N. Y. 412.

As to service on wife in foreclosure of a purchase money mortgage, held a indoment if obtained without actual service, could be vacated. Vide

the judgment, if obtained without actual service, could be vacated. Vide White v. Coulter, 3 Supm. 609; revd. on another point, 59 N. Y. 629.

Failure to make wife of mortgagor, who has joined in mortgage, a party defendant held ground for demurrer. Franklin v. Beegle, 102 App. Div. 412. Where wife did not join in purchase money mortgage. McMichael v. Russell, 68 App. Div. 104.

Other Parties.—A case, Giles v. Solomon, 10 Abb. Pr. N. S. 97, exemplifies the necessity of caution in making the requisite parties defendants in foreclosure suits. Plaintiff's father died in 1840, leaving a widow and children. In 1841 a foreclosure suit was begun upon a mortgage executed by the father; and the widow and children in esse were made parties. Two days before the decree, in 1841, the plaintiff, a posthumous child of the deceased mortgagor, was born. In 1866 she began her action to redeem. It was held that she was entitled to one-seventh of the premises and back rents on paying one-seventh of the mortgage.

On foreclosure of a mortgage given by one to whom a testamentary trustee had conveyed the property without consideration, under an agreement for an immediate reconveyance, neither the beneficiaries under the will nor the heirs at law of the testator were made parties, which fact was not known to the purchaser at the time of the sale. Held, that this constituted such a defect as to justify the court in relieving the purchaser from his purchase. Phillips v. Wilcox, 12 Misc. 382.

Where there was a fraudulent prior foreclosure and the record of the first foreclosure showed the interests and probable relation of the widow and. children, that was enough to put any one dealing with the title upon notice. Kirsch v. Tozier, 143 N. Y. 390; General Synod v. O'Brien, 13 Misc. 729. See also Roarty v. McDermott, 84 Hun, 527; 146 N. Y. 296.

Those against whom an estoppel is claimed are necessary parties. Lyon

v. Morgan, 143 N. Y. 505.

Trustees of an express trust including guardians of infants may bring foreclosure without the presence of the infant. Bayer v. Phillips, 17 Abb. N. C. 425. Cf. § 1686, Code Civ. Proc.

The subject of parties to foreclosure actions is so fully discussed, with citations in the treatises on mortgages (Witsie, Mortgages; Thomas, Mortgages; Jones, Mortgages; Hilliard, Mortgages; Fiero, Special Actions) that it need not be repeated here.

Who not Necessary.—A person to whom conveyance is to be made, but is

not yet delivered. Hatfield v. Malcolm, 71 Hun, 51.
Former owner when divested of all title. Conn.
Cornwell, 72 Hun, 199. Conn. Mut. Life Ins. Co. v.

Husband of married woman, when action relates to her separate estate. Code Civ. Proc., § 450.

Holder of mortgage recorded after devolution of title into a bona fide

purchaser for value. Abraham v. Mayer, 7 Misc. 250.

A judgment creditor whose judgment was recovered prior to the execution of the mortgage is not a necessary or proper party to an action to foreclose it, and is not affected by the decree therein. Summer v. Skinner, 80 Hun, 201.

A grantee of land whose deed was not recorded until after a deed of the same premises given by his grantor to another, and then only in the book of mortgages, is not a necessary party to an action to foreclose a mortgage given by his grantor, to which the subsequent grantee was made a party. Abraham v. Mayer, 7 Misc. 250.

Subsequent grantee in possession under an unrecorded deed; character

of possession necessary for notice. Powell v. Jenkins, 14 Misc. 83.

Remaindermen subject to vested estate of inheritance are not necessary parties. N. Y. S. & T. Co. v. Schoenberg, 87 App. Div. 262.

Where an Executor Bought Land Without Express Authority .- The beneficiaries did not acquire any direct estate or interest in the property so purchased with the trust funds, and it was not subject to any of the trusts in the will, and therefore, in an action to foreclose the mortgage executed by the executor, it was not necessary to make any parties defendant except such executor. McLean v. Ladd, 21 N. Y. Supp. 196.

Other Defendants .- Failure to make the wife of the owner of the equity a party only leaves her right of redemption unforeclosed and does not make the proceedings invalid as to the parties served. Candee v. Burke, 1 Hun, 546.

Making her a party in chancery practice is sufficient. Feitner v. Lewis,

119 N. Y. 131.

Husband cannot enter appearance for her. Taggart v. Rogers, 49 Hun, 265. The dower right of the wife of a mortgagor is not cut off by a foreclosure of a purchase money mortgage in an action to which she was not a party, and as against the mortgagee who purchased on the sale she has a right to redeem. Campbell v. Ellwanger, 81 Hun, 259.

One who claims dower by title paramount to the mortgage cannot be made to set up or defend her right and is not affected by the judgment, though made a party. Merchants Bk. v. Thomson, 55 N. Y. 7; Nelson v. Brown, made a party. 144 N. Y. 384.

See as to when the dower must yield to the superior title of a mortgagee

in possession under foreclosure, Smith v. Gardner, 42 Barb. 356.

Where husband and wife are tenants by the entirety, a conveyance by her of one-half of the premises gives no title, and her grantee need not be made a party to the foreclosure of a subsequent mortgage. Bram v. Bram, 34 Hun, 487.

One who has an interest in land, the deed of the whole of which was made to another, may be made a party if he desire. Johnston v. Donovan, 106 N. Y. 269.

Also any person in possession, for possession is notice to all purchasers and mortgagees, and if not made parties, their prior equity is not cut off. De Ruyter v. Trustees of St. Peter's Church, 2 Barb. Ch. 555.

Where the executors of a mortgagee have bought in the property at foreclosure, his devisees and legatees are not necessary parties to the foreclosure of a prior mortgage. Lockman v. Reilly, 95 N. Y. 64.

Also all judgment-creditors whose rights of redemption are not otherwise foreclosed. Morris v. Wheeler, 45 N. Y. 708; Brainerd v. Cooper, 10 id. 356. Between May, 1840, and May, 1844, it was not necessary to make judg-

ment creditors parties. Laws of 1840, Chap. 342; Laws of 1844, Chap. 340.

Junior mortgagees (3 Barb. 534) and their assignees. Vanderkemp v. Shelton, 11 Paige, 28.

Failure to make such parties; their remedy. Bigelow v. Davol, 69 Hun, 74. Also tenants for years, whose title becomes divested by the foreclosure. 52 Barb, 377.

An assignee in bankruptcy. Winslow v. Clark, 47 N. Y. 261. See also Cleveland v. Boerum, 24 id. 613, holding notice sufficient as to such an assignee though not made a party nor intervening in the suit.

If the mortgagor's equity of redemption has been sold on execution, he must be made a party if his right of redemption on the sheriff's sale is still in force. Halleck v. Smith, 4 Johns. Ch. 649.

The mortgagor need not be a party on foreclosure against his grantee who

has assumed the mortgage. Van Nest v. Latson, 19 Barb. 604.

Any person liable to the plaintiff for the payment of the debt may be a party and a judgment for deficiency may be rendered against him. Civ. Proc., § 1627.

Eexecutors of the mortgagor may be made parties. Glacius v. Fogel, 88

So may an assignor who has guaranteed the mortgage. Vanderbilt v. Schreyer, 91 N. Y. 392.

Making a deceased mortgagor a nominal defendant is a harmless error, which can be corrected at any time. Ocumpaugh v. Wing, 2 Wkly. Dig. 566. The heir of the mortgagor has a right to come in and defend. Zundel v. Tacke, 47 Hun, 239.

Only persons having or claiming to have acquired rights subsequent to the mortgage need be made parties. Emigrant Ind. Savings Bk. v. Goldman, 75 N. Y. 127.

Heirs must be parties where a will makes an equitable conversion. Noonan

v. Brenneman, 54 Super. 337.

Title acquired prior to the mortgage can neither be contested nor defeated. Emigrant Ind. Savings Bk. v. Clute, 33 Hun, 82.

Holders of such titles need not be made parties. Fifth Ave. Bk. v. Cudliff,

1 App. Div. 524.

As to the title of a purchaser at foreclosure, where the owner of the

equity is not a party, vide infra.

The purchaser in such case acquires all the rights of the original mortgagee and may bring action to foreclose. Green v. Mussey, 76 App. Div. 174.

Beneficiaries of an express trust are necessary parties. Story's Equity While this is the rule as to express trusts, it is otherwise as to trusts implied by law; Lockman v. Reilly, 95 N. Y. 64, 69; Williamson v. Field, 2 Sandf. Ch. 533.

Remaindermen and Reversioners. - Remaindermen and reversioners are not necessary parties when the particular estate is a vested estate of inheritance. In an ordinary foreclosure action it is sufficient to have as parties defendant the first person in being who has a vested estate of inheritance, together with those claiming prior interests. New York Security & T. Co. v. Schoenberg, 87 App Div. 262.

Persons Having Future and Contingent Interests, and Those not In Esse .-

Vide infra, Chap. XXX.

Also Nodine v. Greenfield, 7 Paige, 544; Townsend v. Frommer, 125 N. Y. 446; U. S. Trust Co. v. Roche, 116 vd. 120, 130, holding that a contingent remainderman in being, not having a vested legal estate, or lien upon the mortgaged premises, or their avails when converted into money, is not a necessary party. See also Williamson v. Field, 2 Sandf. Ch. 533; Eschman v. Alt, 4 Misc. 305. Vested remaindermen under a will are necessary parties to an action to foreclose a mortgage given by the testator. Levy v. Levy, 79 Hun, 290.

Remote cestuis que trustent not in esse need not be joined with their trustees. Williamson v. Field, 2 Sandf. Ch. 533.

Junior Incumbrancers need not appear and answer, in order to save their rights, if they are truly stated in the complaint. Union Ins. Co. v. Van Rensselaer, 4 Paige, 85; Benjamin v. Elmira, etc., R. R. Co., 49 Barb. 441.

They may redeem if not made parties (Haines v. Beach, 3 Johns. Ch. 459; 47 Barb. 91), and foreclose their own mortgage. *Id.*; and *supra*, p. 728.

They must assert their claims if not stated in the complaint, in order

to protect themselves. Benjamin v. Elmira, etc., R. R., 49 Barb. 441.

11 not made parties, the foreclosure is void as to them. Reynolds v. Park,

A purchaser at a tax sale is not barred unless made a party. Becker v. Howard, 66 N. Y. 5; Chard v. Holt, 136 id, 30.

Hence, such a purchaser who took after the mortgage is a proper party. Roosevelt Hospital v. Dowley, 57 How. Pr. 489.

Prior Incumbrancers are not necessary parties, as the land may be sold subject to their liens; but they may be made parties, to have the amount due them liquidated. 2 Barb. 20. Vide also 10 How. Pr. 367; Metropolitan Trust Co. v. Tonawanda, etc., R. R. Co., 18 Abb. N. C. 368; s. c., 43 Hun, 521, affd., 106 N. Y. 673.

But they cannot be compelled to litigate their claims. Nelson v. Brown, 20 N. Y. Supp. 978; Merchants' Bk. v. Thomson, 55 N. Y. 7. If, however, they do litigate or if, the complaint stating facts to charge them, they default, they are bound. Goebel v. Iffla, 111 N. Y. 170.

Prior incumbrancers are not necessary parties and if joined in general are not affected. Doctor v. Smith, 16 Hun, 245; Goebel v. Iffla, 111 N. Y. 170; Ruyter v. Read, 121 id. 498; Cf. Met. Trust Co. v. Dolgeville El. L. & P. Co., 34 Misc. 354. But if they are joined and complaint demands that they Le paid out of proceeds of sale, it seems they are cut off. Emigrant Indus. Sav. Bk. v. Goldman, 75 N. Y. 127; Becker v. Howard, 66 id. 5; Bache v. Doscher, 67 id. 429; Burchell v. Osborne, 119 id. 486; Met. Trust Co. v. Dolgeville El. L. & P. Co., 34 Misc. 354.

A junior mortgagee may make a prior mortgagee a party, without offering to redeem from a previous foreclosure to which he was not a party. Vanderkemp v. Shelton, 11 Paige, 28; and a decree may be made for sale of the equity of redemption subject to the prior mortgage. Western Ins. Co. v. Eagle Fire Ins. Co., 1 Paige, 284.

Where priority is disputed, it has been held error as against an incumbrancer who has not answered, to adjudicate it and order a sale subject to the liens. The proper course is to dismiss the complaint as to them. Payn

v. Grant, 23 Hun, 134.

In Goebel v. Iffla, 48 Hun, 21, affd., 111 N. Y. 170, however, it is held that where such facts are stated as will, if admitted, subject defendant's title to plaintiff's mortgage, and such defendant defaults or answers and judgment goes against him, he will be estopped from afterward setting up his interest as against the judgment, though not a proper party to the action.

TITLE III. JURISDICTION OVER DEFENDANTS.

It is necessary to ascertain that all the defendants are legally before the court, before their interests can be foreclosed by the judgment. No principle of law is better settled than that a judgment rendered without jurisdiction of the persons to be bound thereby is utterly void as to them.

There must be proper appearance or service of the process on all parties before their rights are barred by the decree. The manner in which parties are served and default or appear and litigate before judgment entered is matter of legal practice, and will not be reviewed here. See also Chap, XXX.

Jurisdictional Facts.—The court cannot amend any proceeding to confer jurisdiction (13 How. Pr. 43; 14 id. 380), or acquire jurisdiction by proof of the necessary facts nunc pro tunc. 17 Abb. 67.

Jurisdictional facts must be set forth (41 Barb. 549), and must exist (33 id. 71), and the judge's order is not conclusive. From the time of service of summons, the court is deemed to have acquired jurisdiction, and to have control of all the subsequent proceedings. Voluntary appearance is equivalent to personal service. Code Civ. Proc., § 139; repealed by Laws of 1877. Chap. 417. Code Civ. Proc., § 424 1877, Chap. 417; Code Civ. Proc., § 424.

Summons Giving Wrong Christian Name Invalid .-- Fischer v. Hetherington, 11 Misc. 573.

Service of Summons .- This must be carefully carried out unless there is an appearance.

See also Chap. XXX.

Substituted Service .- This in certain cases is provided for by Code Civ. Proc., § 435; held constitutional. Continental Bk. v. Thurber, 74 Hun, 632.

By Publication .- Where there has been service by publication, all the statutory provisions and terms of the order must be strictly complied with to confer jurisdiction. Vide Code Civ. Proc., §§ 134 to 137; repealed by

Laws of 1877, Chap. 417; Code Civ. Proc., §§ 438-445.

The requirements of the statutes must be strictly complied with to confer jurisdiction. 13 How. Pr. 43; 14 id. 380; 34 Barb. 95; 12 Abb. 359. Where there is a total absence of proof as to the facts necessary to confer jurisdiction, the order of publication and all proceedings founded on it are void; and the facts must appear from the papers on which the order is founded. Towsley v. McDonald, 32 Barb. 604; Waffle v. Goble, 53 id. 517; Carleton v. Carleton, 85 N. Y. 313, distinguished in Kennedy v. N. Y. L. I., etc., Co., 101 id. 487; Seiler v. Wilson, 43 Hun, 629; Crosby v. Thedford, 13 Daly, 150; Walter v. DeGraf, 19 Abb. N. C. 406. See those cases as to the requisites of service by publication. Also Jerome v. Flagg, 48 Hun, 351; Hatfield v. Malcolm, 71 Hun, 51; Orr v. Currie, 14 Misc. 74; Young v. Fowler, 73 Hun, 179; Paget v. Stevens, 143 N. Y. 172; Cortland Svgs. Bk. v. Lighthall, 53 Misc. 426.

Infant Defendants.— These must appear through a guardian ad litem, duly appointed. See fully, as to such guardians, infra, Chap. XXX.

All statutory requisitions as to service on infant defendants must be strictly

followed. Ingersoll v. Mangam, 84 N. Y. 622, affg. 24 Hun, 202.

The appointment of a guardian ad litem before service of summons upon the infant is a fatal defect in foreclosure, though held allowable in partition. Id.; Croghan v. Livingston, 17 N. Y. 218.

As to appointment of guardian ad litem, vide Code Civ. Proc., §§ 471-473. Presumption of service on infant from allegations thereof in papers on appointment of guardian ad litem. Murphy v. Shea, 143 N. Y. 78; Sloane v. Martin, 77 Hun, 249.

Guardian having adverse interest, when fatal. Roarty v. McDermott, 84 Hun, 527, revd. 146 N. Y. 296.

Where in foreclosure, an infant is served with process, but no guardian is appointed and judgment is taken by default, it is not void, but voidable. Mc-Murray v. McMurray, 66 N. Y. 175.

In general judgment is irregular, where no appointment is made. Kellog v.

Klock, 2 Code Rep. 28.

Appearance.-An appearance (even unauthorized) by an attorney for a defendant, who was neither served with process nor had notice of the suit. cannot be attacked collaterally, and is binding on the defendant. Brown v. Nichols, 42 N. Y. 26. But relief may be sought by direct application in the

But anything that would invalidate the notice of appearance, e. g., that it was a forgery, may be set up even in a collateral proceeding. Ferguson v. Crawford, 70 N. Y. 253.

Appearance by a party cures any irregularity in giving him notice, or any defects in the process, and confers jurisdiction of the person. See Reed v. Chilson, 142 N. Y. 152.

As to appearance being a substitute for service, vide Washbon v. Cope. 144

Assignee in bankruptcy is bound by proceedings in a court in which he appears and answers. Ludeling v. Chaffee, 143 U. S. 301.

Unknown Parties.—As to unknown parties having interests, vide Code Proc., § 135, repealed by Laws of 1877, Chap. 417; Code Civ. Proc., § 451, amd. L. 1879, Chap. 542; Wheeler v. Scully, 50 N. Y. 667.

Death.— Where the plaintiff or defendant dies pending publication jurisdiction is not acquired. Barron v. So. Brooklyn Saw Mill, etc., Co., 18 Abb. N. C. 352; Ridly v. Hart, 130 N. Y. 625; Howell v. Leavitt, 95 N. Y. 615.

Where mortgagor dies after sale there can neither be substitution nor

further proceedings against him. Lecke v. Bundy, 48 Hun, 208.

Where one of the defendants, who owns an undivided interest in the property, dies pending the foreclosure of a mortgage, and her heirs or devisees are brought in as parties, the entry of a judgment against her is wholly without authority, and her interest is not affected thereby. Stevens v. Humphreys. 73 Hun, 199 affd., 141 N. Y. 586.

Discontinuance.— A discontinuance before sale renders all proceedings null and adjudication binding on no one. Loeb v. Willis, 100 N. Y. 231.

TITLE IV. THE JUDGMENT.

Judgment of sale in foreclosure suits is obtained generally, on a referee's report of facts, on due notice to all parties who have appeared.

Final Judgment; What to Contain.—In an action to foreclose a mortgage upon real property, if the plaintiff becomes entitled to final judgment, it must direct the sale of the property mortgaged, or of such part thereof as is sufficient to discharge the mortgage debt, the expenses of the sale, and the cost of the action.

Code Civ. Proc., § 1626.

Judgments of foreclosure are granted to enforce the payment of the mortgages foreclosed. They are solely for the benefit of the plaintiff, and not for that of any of the defendants. The statute prescribes the rights and remedies of judgment creditors, and such creditors have no claims to any other or more desirable remedies than the statute or law gives. De Forest v. Peck, 84 Hun, 299.

A defendant in an action, who has made default therein, is not concluded by the judgment rendered therein in favor of a codefendant, if he has not been served with a copy of the codefendant's answer pursuant to the provisions of

Code Civ. Proc., § 521. McGuckin v. Milbank, 83 Hun, 473.

As to a merger and superseding of the decree of sale by contract of the

parties, vide 13 How. Pr. 16.

If part only is payable, the action is to be dismissed without costs against plaintiff upon payment into court by the defendant before judgment of the amount due, principal, interest and costs. 2 R. S. 191, § 161 (repealed, with the succeeding provisions by Laws of 1880, Chap. 245); Code Civ. Proc., § 1634; Ferguson v. Ferguson, 2 N. Y. 360; 4 Abb. 279. See also Malcolm v. Allen, 49 N. Y. 448.

After decree in such case, there may also be a stay of judgment. 2 R. S. 191, § 162; Code Civ. Proc., § 1635.

When sale cannot be postponed by judgment, which is practically a perpetual

stay. Breed v. Ruoff, 173 N. Y. 340.

The court must decree a sale of sufficient to discharge the amount due, expenses of sale and costs of suit. 2 R. S. 191; Code Civ. Proc., § 1636.

When junior incumbrances are brought to the court's attention it may order

enough sold to pay them too. Andrews v. O'Mahoney, 112 N. Y. 567.

As to when and against whom there may be judgment for a residue of the debt due, vide Code of Procedure, § 167; Code Civ. Proc., § 1627.

A mistake in the description contained only in the judgment may be

amended, even after sale. Wood v. Martin, 66 Barb. 241.

Where some of the lands are without the State, the judgment may direct the mortgagor to convey such lands to the purchaser, and it may be amended

in this regard, even after sale. Union Trust Co. v. Olmstead, 102 N. Y. 729.

A recital in the judgment that parties were all duly served, held prima facie evidence of service. Fuchs v. Develin, 12 N. Y. Supp. 574; Bosworth v. Vandewalker, 53 N. Y. 597; Pringle v. Woolworth, 90 N. Y. 508; Berkowitz v.

Brown, 3 Misc. 1. See Brown v. Nichols, 42 N. Y. 26.

The judgment is not a bar to paramount rights not put in issue. Lewis v. Smith, 11 Barb. 152, affd., 9 N. Y. 502, note 1; Merchants' Bank v. Thomson, 55 id. 7; 23 Hun, 134; Emigrant Industrial Savings Bank v. Clute, 33 id. 82; Brown v. Volkening, 64 N. Y. 76; Mut. Life Ins. Co. v. Dake, 1 Abb. N. C. 381.

If a mortgagee of a half interest pay tax on the whole, he can have judg-

ment for only one-half. Weed v. Hornby, 35 Hun, 280.

The judgment may direct subrogation in a proper case. Clark v. Mackin, 95 N. Y. 346.

It does not merge the debt. Barnard v. Onderdonk, 98 N. Y. 158.

It is not within Code Civ. Proc., § 376, raising presumption of payment in twenty years, not does it prevent the presumption from arising as to the mortgage. Id.

The purchaser cannot complain of any provision of the judgment except that which affects his title. Gaskin v. Anderson, 55 Barb. 257; 42 N. Y. 186. Liability of a purchaser, 74 App. Div. 492.

As to staying judgment on appeal, vide Grow v. Garlock, 29 Hun, 598.

That the name of the mortgagor who died before suit appears as a defendant in the title of the judgment, does no harm. Ocumpaugh v. Wing, 12 Wkly.

The court has ample power to make such corrections in a judgment of foreclosure as changed conditions may render necessary. Mutual Life Ins. Co.

v. Newell, 78 Hun, 293.

Defects in original papers as to official capacity, etc., cured by judgment, to which all who could object are made parties. Roarty v. McDermott, 146 N. Y. 296; Matter of Stilwell, 139 N. Y. 337.

Mortgage foreclosed is not merged in the judgment entirely. Bernstein v.

Nealis, 144 N. Y. 347.

Reversal.—As to its effect, see U. S. T. G. & I. Co. v Donohue, 113 App. Div. 882.

Vacating.— Laches operative against. Atlantic Trust Co. v. N. Y. City S. W. Co., 75 App. Div. 354.

TITLE V. THE SALE.

The sale of mortgaged premises is directed in the judgment, which must particularly describe them. Real property adjudged to be sold, must be sold in the county where it or part of it lies, by the sheriff of the county, or a referee appointed by the court for that purpose

(formerly a Master in Chancery), unless otherwise directed by law: the sale must be made at public auction and to the highest bidder: and thereupon the sheriff or referee executes a conveyance to the purchaser.

2 R. S. 192, § 157; repealed by Laws of 1880, Chap. 245; Code Civ. Proc., § 1242; Supreme Court Rule 61.

The sale will be made so as to protect parties having equities. Livingston

v. Mildrum, 19 N. Y. 440.

By Law of 1869, Chap. 569, in the city of New York, the sale had to be made by the sheriff. The law, however, was declared unconstitutional. Gaskin v. Meek, 42 N. Y. 186, affg. 55 Barb. 357.

As to sales in Kings Co., see Laws 1876, Chap. 439; amd. Laws 1889, Chap. 167; Dickinson v. Dickley, 14 Hun, 617; Abbott v. Curran, 98 N. Y. 665.

Publication of Notice of Sale .- This is provided for by § 1678 of the Code of Civil Procedure, and also Supreme Court Rules, 62.

See also Code Civ. Proc., § 2388.

Publication in all the editions of the newspaper, in which the notice was published, issued upon the day of publication, is not essential. Everson v. Johnson, 22 Hun, 115.

Publication of a notice of adjournment formerly not essential. Stearns v. Welsch, 7 Hun, 676; Bechstein v. Schultz, 120 N. Y. 168.

See Code Civ. Proc., § 1678, requiring publication of notice of adjournment, on postponement by attorney for plaintiff.

How Lands are to be Sold.—A sale by a referee is not to be regarded as a contract requisite to be signed by him. 26 How. Pr. 325. Andrews v. O'Mahoney, 112 N. Y. 567.

Where a sale is made by a referee, he must be personally present. Heyer v.

Deaves, 2 Johns. Chan. 154; Code Civ. Proc., § 1678.

If the premises consist of several parcels, they must, unless otherwise ordered, be sold severally. 23 How. 385; 2 R. S. 192, repealed by Laws of 1880, Chap. 245; Code Civ. Proc., § 1678; L. 1881, Chap. 682, amending this section, fully regulated sales and validated prior sales which would be lawfully by its terms. As to the effect of this latter provision, vide Wallace v. Feely, 10 Daly, 31, affd., 88 N. Y. 646.

It is no ground for a resale that the premises were not sold in parcels where there was no request to the referee to do so, and he decided upon investigation that it was not advisable. McLaughlin v. Teasdale, 9 Daly, 23.

On foreclosure of a purchase money mortgage on lands which the mortgagor had cut up into streets and lots, it was held that the sale need not be made according to such division into parcels. Lane v. Conger, 10 Hun, 1.

Omitting to sell in parcels does not make the sale void, and the irregularity

may be waived by act of the party, or by time. 7 Abb. 183; 17 id. 137.

As to requisites of referee's report respecting manner of sale, vide Selkirk

v. Ascough, 16 Alb. L. J. 151.

If only an installment be due, a part only may be sold. Code Civ. Proc., § 1636; or if the court think it better for all parties, the whole may be sold and either the debt be discounted and paid or a sum invested to pay it as it falls due. Code Civ. Proc., § 1637.

Owner if present should object seasonably, if more than is necessary is sold.

McBride v. Lewisohn, 17 Hun, 524.

Sales made in such manner as to confuse purchasers may be set aside. Roosevelt v. Schile, 95 App. Div. 524.

Upon application in writing of all parties the court may order the sale of all the property, even though a part would pay the debt. Barnes v. Stoughton, 10 Hun, 14.

Sales may be made at further times to meet future installments due, by order on the foot of the decree. Brinckerhoof v. Thalhimer, 2 Johns. Ch. 486; Lyman v. Sale, 2 id. 487; Code Civ. Proc., § 1636.

The sale may be on election day. 35 How, 23.

It seems the title cannot be objected to by a purchaser on the ground that the sale is made by the wrong officer. 7 Abb. N. S. 4; Abbott v. Curran, 98 N. Y. 665.

After a judgment, a mortgagor, if a party, has no right of redemption. How. Pr. 310.

A tenant in possession, who was made party to the action, must attorn to the purchaser, or be removed by writ of assistance, although claiming under an expired lease previous to the mortgage. 9 How. 220.

A purchaser will not be protected, unless he act in good faith. Bonacker v.

Weyrick, 48 Misc. 189.

Inverse Order of Alienation .- As to order in which the lands should be sold to meet the different equities of parties, vide Breese v. Busby, 12 How. 485; Nat. Bank v. Hibbard, 45 How. Pr. 289; Bowne v. Lynde, 91 N. Y. 92; Bernhardt v. Lymburner, 85 N. Y. 172; Quackenbush v. O'Hare, 61 Hun, 388, affd., 129 N. Y. 485; Jenks v. Quinn, 16 N. Y. Supp. 33; s. c., 61 Hun, 427, affd., 137 N. Y. 223, and supra, Chap. XXIII, Tit. X.

Inverse order of alienation is applicable to sale under a prior blanket mortgage covering several pieces of land separately mortgaged. Denton v. Ontario

Co. Bank, 77 Hun, 83.

Leasehold .- The sale of a leasehold on foreclosure does not impair the covenant to pay rent, which will bind the purchaser. Pardee v. Steward, 37 Hun, 259.

The Deed .- Before a deed is executed, the mortgage must be filed or recorded, if acknowledged. Supreme Court Rule 63.

The deed passes the title, and confirmation of the sale relates back to the

date of the deed. 6 Barb. 60; Fuller v. Van Geesen, 4 Hill, 171.

A deed for premises not embraced in the sale, will not pass title, though the premises were embraced in the decree. Laverty v. Moore, 33 N. Y. 658.

The purchaser takes the same estate, and no other, that would have vested in the mortgagee if the equity of redemption were foreclosed. 2 R. S. 191, § 158, repealed by Law of 1880, Chap. 245; Code Civ. Proc., § 1632. See, however, Caccia v. Brooklyn Un. El. R. R. Co., 98 App. Div. 294, saving the rights of purchaser without notice of release of easements.

The deed is as valid as if executed by the mortgagor and mortgagee; and shall be a bar against them, and the parties to the suit, and their heirs, and those claiming under them. *Id.*; Short v. Bacon, 99 N. Y. 275.

Executors and Fiduciaries .- Title may be taken in name of an executor officially or individually to protect mortgage; and subsequent sale to another enforced. Matter of Butler, 1 Conn. Surr. Repts., 58; Valentine v. Belden, 20 Hun, 537; Lockman v. Reilly, 95 N. Y. 64, 71; Haberman v. Baker, 128 N. Y. 253; Kahn v. Chapin, 84 Hun, 542.

Executor purchasing mortgaged property may convey or mortgage in his own name. Yonkers Savings Bank v. Kinsley, 78 Hun, 186.

Where an executor buys at a sale, under the foreclosure of a mortgage owned by the estate of which he is the executor, and does not pay any consideration therefor, the legal title to the land is in the executor; but as between him and the legatees, next of kin and creditors of his testator, it is personal estate; as he is the representative of the deceased. It is immaterial whether the deed to the property is taken in the name of the executor as such, or in his individual name and the heirs or devisees of the testator cannot question the title of a purchaser from the executor under such circumstances. Duane v. Paige, 82 Hun, 139.

Where an attorney who has the conduct of a sale becomes the purchaser, it is optional with his client to repudiate or affirm the contract of sale, irrespective of any proof of actual fraud. Yeoman v. Townshend, 74 Hun,

The confirmation of the report of sale is not necessary to pass the title to the purchaser. The title passes by the referee's deed. Fuller v. Van Geesen, 4 Hill, 171; 6 Barb. 60.

The purchaser or his grantee takes the title the mortgagor had before the

mortgage. Butler v. Viele, 44 Barb. 166.

One who buys for the owners of the equity on a verbal agreement to reconvey to them on being reimbursed is only a mortgagee in possession. Umfreville v. Keeler, 1 Supm. 486.

Bona fide purchasers will be protected under a judicial sale, even though the sale be set aside. James v. Dodd, 2 Paige, 99; Tripp v. Cook, 26 Wend. 143. See also infra, Chap. XXXVIII, "Sales on Execution."

As to Proper Form of Deed .- Vide Randell v. Van Ellert, 12 Hun, 577, and note; Code Civ. Proc., § 1244.

The deed must be sufficient to make the best title possible from the referee

to the purchaser. Easton v. Pickersgill, 55 N. Y. 310.

Where no deed is made and the mortgagor does not thereafter recognize the mortgage, redemption will be presumed after twenty years. Barnard v. Onderdonk, 98 N. Y. 158.

When Excused from Completing.— The purchaser will not be excused from completing on account of irregularities in the proceedings that may be corrected (5 Abb. 451; 4 id. 193; 11 id. 440), or where the provisions of the judgment as to which he complains do not affect his title. Gaskin v. Anderson, 55 Barb. 257; Gaskin v. Meek, 42 N. Y. 186; nor even where an appeal has been taken from the judgment; nor if action is instituted to cancel the mortgage (12 Abb. 473); nor because an assignment of the mortgage was not recorded. Fryer v. Rockefeller, 63 N. Y. 268; nor because of an error in the diagram attached to the public notice of sale. Francis v. Watkins, 72 App. Div. 15. Otherwise as to a misdescription. Kingsland v. Fuller, 31 App. Div. 313.

He must complete, if the mortgagor had a good title by adverse possession.

Grady v. Ward, 20 Barb. 543.

But will not be compelled to take a worthless or incumbered title. McGown

v. Wilkins, 1 Paige, 120.

That an order for service by publication of the summons in the foreclosure action was made by the court instead of a judge, is a valid objection, and is not cured by a later judge's order made nunc pro tunc. Schumaker v. Crossman, 12 Wkly. Dig. 99. See Code Civ. Proc., § 440.

So if the affidavit to obtain an order for service by publication upon a lienor

was insufficient. Argall v. Bachrach, 18 Wkly. Dig. 267.

The purchaser, on being relieved from completing, is entitled to a return of his deposit and interest, the expenses of examining title and costs of motion.

31 Barb. 394; Raynor v. Selmes, 52 N. Y. 579.

The order relieving him cannot be reviewed on appeal. Crocker v. Gollner,

135 N. Y. 662.

The purchaser is entitled to a perfect title in law and equity. Jackson v. Edwards, 22 Wend. 498; Coster v. Clarke, 3 Edw. 428; Mason v. Scott, 50 App. Div. 463; otherwise he may refuse to complete purchase. 5 Abb. Pr. 451; unless the title can be made good immediately. Jackson v. Edwards, 22 Wend. 498; 20 Barb. 543.

An obsolete mortgage of record is no objection. Dunham v. Minard, 4

Paige, 441.

Nor are incumbrances, the amount of which is by the terms of the sale to be deducted from the purchase price. Lenihan v. Hamann, 14 Abb. N. S. 274, affd., without opinion, in 55 N. Y. 652.

But the purchaser need not take a doubtful nor seriously clouded title.

Argall v. Raynor, 20 Hun, 267.

A mistake in description occurring in the judgment alone will not excuse completion, for it may be amended nunc pro tunc. Wood v. Martin, 66 Barb. 241. See also Mishkind Feinberg Realty Co. v. Sidorsky, 111 App. Div. 578.

Making an assignee defendant individually instead of in his representative

capacity. Wagner v. Hodge, 34 Hun, 524; see also supra, Title II.

It is a well-settled rule that a purchaser at a mortgage foreclosure sale will not be relieved on account of apparent defects in the property, or of defects

in the title of which he had notice, and in reference to which he made his bid. Stephens v. Humphreys, 73 Hun, 199.

Notice to the agent of the purchaser, who attended the sale and made the bid, is notice to his principal. Id.

That the sale was made in Kings county by a referee instead of the sheriff; that the lands were insufficiently described in the complaint, where it appeared that they could be sufficiently identified by the description; that the bond and mortgage were not produced before the referee where execution, delivery and nonpayment were proved and nonproduction was accounted for; are all held insufficient to excuse a purchaser. Abbott v. Curran, 20 Wkly. Dig. 344, affd., 98 N. Y. 665.

As to fees on sale in Kings Co., see L. 1876, Chap. 439, amd. L. 1889, Chap. 167; Dickinson v. Dickley, 14 Hun, 617; Abbott v. Curran, 98 N. Y. 665. L. 1889, Chap. 167, held constitutional. Sproule v. Davies, 69 App. Div. 502.

As to same in New York. Laws of 1882, Chap. 410, § 1088.

These special provisions appear to be still in force, notwithstanding the later city charters.

Parties Estopped.— Persons made parties to the suit are estopped from disputing the purchaser's title (47 Barb. 179); and a purchaser is estopped from denying the validity of a mortgage, subject to which he purchased on an execution. Horton v. Davis, 26 N. Y. 495.

A creditor who redeemed at a sheriff's sale, and, being made a party to the foreclosure of a prior mortgage, received part of the surplus, is estopped to question the title of the purchaser in foreclosure. Siegel v. Anger, 13

Abb., N. C. 362.

Only the owner of the equity can object that more land was sold than was necessary, and he is estopped by allowing proceedings as to the surplus to go on. McBride v. Lewisohn, 17 Hun, 524.

Where the Owner of the Equity is not a Party.— In Shriver v. Shriver. 86 N. Y. 575, it was held that a purchaser at foreclosure sale in an action to which the owner of the equity of redemption was not made a party, acquired no rights, but was a mere stranger whose title would not become complete until after twenty years occupation. But this case has been distinguished, and it is held that such a purchaser has the rights of a mortgagee in possession, viz.:

A purchaser at a real estate mortgage foreclosure sale, defective and void as against the owner of the equity of redemption, because he was not made a party to the foreclosure, becomes assignee of the mortgage, and if he lawfully enters into possession of the land purchased, he becomes a mortgagee in possession. Townshend v. Thomson, 139 N. Y. 152; Wing v. Field, 35

Hun, 617; Moulton v. Cornish, 138 N. Y. 133.

When the Title Vests. The bid, its acceptance and payment of a deposit. makes no change in the title, even in equity. It is not until payment of the balance and delivery of the deed that the purchaser acquires a right to rents, and the title to the lands. Strong v. Dollner, 2 Sandf 444; Clark v. Corley, 5 id. 447; Brown v. Frost, 10 Paige, 243, 247; Cheney v. Woodruff, 45 N. Y. 98; Blanco v. Foote, 32 Barb. 535; Whitwell v. Bartlett, 52 id. 319.

Rents intermediate the sale and delivery do not belong to the purchaser.

Mitchell v. Bartlett, 51 N. Y. 447.

A loss intermediate sale and delivery falls on mortgagor or mortgagee. The purchaser may refuse to complete. Aspinwall v. Balch, 4 Abb. N. C. 193; Mutual, etc., Co. v. Balch, 4 Abb. N. C. 200.

The mortgagee, though he bid in the property on foreclosure, has merely

a lien until formal conveyance by the referee vests him with title, and is entitled to insurance until that time, under the insurance provision. Uhlfelder v. Palatine Ins. Co., Ltd., 111 App. Div. 57.

Possession under the Deed .- The court may enforce the sale by compelling possession to be given to the purchaser, formerly by a writ of assistance. Kershaw v. Thompson, 4 Johns. Ch. 609; 2 R. S. 191, § 152 (repealed by

Laws of 1880, Chap. 245); Code Civ. Proc., § 1675. Bowery Svgs. Bk. v.

Foster, 11 Weekly Dig. 493.

As to limitation of court's power with respect to lease executed before foreclosure procedings, lessee not being a party to action. Davidson v. Weed, 21 App. Div. 579. See Sprague Nat. Bk. v. Erie R. R., 22 App. Div. 526; Meiggs v. Willis, 8 C. P. R. 125.

Parties Holding Over may be removed by summary proceedings. Laws of 1874, Chap. 208, amending 2 R. S. 513, § 28, and repealed with that section, by Laws of 1880, Chap. 245. The case is now provided for by § 2232, Code Civ. Proc.

See also Chap. XXXVIII, Tit. IV; and Chap. XXX, Tit. II.

TITLE VI. RESALE, ETC.

The court will not order a resale for a mere inadequacy of price. but will where there has been fraud, accident or mistake, misrepresentation or surprise, or where the price is very inadequate,

Kellogg v. Howell, 62 Barb. 280; Burchell v. Voorhis, 49 How. Pr. 247; 22 Barb. 167; 24 How. 440; 25 How. 403; King v. Platt, 37 N. Y. 155; State Realty & Mortgage Co. v. Villaume, 121 App. Div. 793; Barnard v. Jersey, 39 Misc. 212.

The Court of Appeals will never interfere on the ground of inadequacy

of price. White v. Coulter, 59 N. Y. 629.

Until confirmation of sale, any person may apply to vacate it. Brown v. Frost, 10 Paige, 243; Fuller v. Brown, 35 Hun, 163.

Excusable accident or mistake may be a ground. 2 Abb. Pr. 296.

Vacating the sale and opening the judgment, tolls the title of the purchaser and his grantee. 15 Abb. 468; Crane v. Stiger, 2 Supm. 577; 58 N. Y. 625.

Action to set aside sale not allowed for inadequacy of price. McEwen v.

Butts, 20 N. Y. Supp. 503; Housman v. Wright, 50 App. Div. 606.

The purchaser may appeal (17 Abb. 229), but not to the Court of Appeals. White v. Coulter, 59 N. Y. 629. See also Lents v. Craig, 13 How. 72, as to the purchaser's rights.

Without some legal reason the sale will not be set aside. McCotter v. Jay, 30 N. Y. 80; Hotchkiss v. The Clifton Air-cure, 4 Keyes, 170. Frazier v. Swimm, 79 N. Y. 53.

A resale formerly ordered if the lands were not sold in parcels as directed, unless under the Rule 61, to the contrary. Wolcott v. Schenck, 23 How. Pr. 385.

Or if the judgment is irregular. Raynor v. Selmes, 7 Lans. 440.

As to costs on resale for irregularities in the conduct of the action, and the remedies of a purchaser, vide Raynor v. Selmes, 52 N. Y. 579; Riggs

v. Pursell, 66 N. Y. 193.

It is no ground for resale that the plaintiff had previously agreed to take a mortgage on the property from the purchaser. McLaughlin v. Teasdale, 9 Daly. 23; nor that the property was not sold in separate parcels, where the referee was not requested so to sell, and it was not advisable to do so. 1d.

But it is ground for a resale that the purchaser was required to take subject to a second mortgage held by the plaintiff, which was not mentioned in the complaint. Homeopathic Mut. Life Ins. Co. v. Sixbury, 17 Hun, 424.

So if the price was inadequate and the conduct of the purchaser's agent tended to make it so. Abingdon Sq. Savings Bk. v. Cassidy, 5 Weekly Dig. 83.

One not a party to the action but injured by proceedings at the sale may apply for a resale, and is not limited to one year in applying under Code Civ. Proc., § 724. Matter of Fuller, 35 Hun, 162.

A resale ordered on the application of a judgment creditor of the mort-

gagor, who mistook hour of sale. Corwith v. Barry, 69 Hun, 113.

Mere inadequacy of price is no ground for setting aside a judicial sale, unless it be so great as to shock the conscience of the court and raise an inference of unfairness or fraud, or unless there be circumstances showing State Realty and Mortgage Co. v. Villaume, 121 mistake or surprise. App. Div. 793. See Abingdor Sq. Svgs. Bk. v. Cassidy, 5 Weekly Dig. 83.

Purchaser Refusing to Complete. If the purchaser refuses to complete, application may be made to the court to compel him, or for a resale of the property at his expense. Cazet v. Hubbell, 36 N. Y. 677; Miller v. Collyer, 36 Barb. 250.

Deficiency Judgment.—Prior to the Revised Statutes no decree for deficiency could be rendered in a foreclosure suit. Dunkley v. Van Buren, 3 Johns Ch. 330; Glacius v. Fogel, 88 N. Y. 434; Frank v. Davis, 135 id. 275. The Revised Statutes especially provided for a deficiency judgment, 2 R. S. 191, § 152; and the provision has been continued in Code Civ. Proc., § 1627; Equitable Life Ins. Co. v. Stevens, 63 N. Y. 341. But no deficiency judgment can be rendered in such action; if the plaintiff fail to establish the mortgage. Dudley v. Congregation of St. Francis, 138 N. Y. 451.

That a judgment may also be rendered for any deficiency, and execution issue thereon, see 2 R. S. 191 (repealed by Laws of 1880, Chap. 245); Code Civ. Proc., § 1627; Hawley v. Whalen, 19 N. Y. Supp. 521; s. c., 64 Hun, 550; Morre v. Shaw, 15 Hun, 428, affd., 77 N. Y. 512; Taylor v. Derrick,

19 N. Y. Supp. 785.

Judgment may be against executors of a deceased mortgagor. v. Fogel, 88 N. Y. 434.

Or an assignor who has guaranteed the mortgage. Vanderbilt v. Schreyer, 91 N. Y. 392.

A grantee who assumes is not liable unless his immediate grantor were so. Carter v. Holahan, 92 N. Y. 498.

A mortgagor who gave no bond, and whose mortgage contains no express covenant to pay, is not liable for deficiency. Spencer v. Spencer, 95 N. Y. 353; Mack v. Austin, Id. 513.

A mortgagee seeking to recover judgment for a deficiency against a grantee who assumed the mortgage, must show acceptance of the deed. Gifford v. McClosky, 38 Hun, 350. See Smith v. Cornell, 111 N. Y. 554.

But the invalidity of the conveyance is no defense to such grantee. Id. An entire failure of consideration due to a breach by the mortgagor of the agreement under which the assumption was made is a defense. Willis, 100 N. Y. 231.

As to a guarantor, vide Pa. Coal Co. v. Blake, 85 N. Y. 226.

A guarantee is not bound to diligence until after request by the guarantor.

Humphrey v. Hayes, 94 N. Y. 594.

Where mortgagor dies after sale there can neither be substitution nor further proceedings against her. Lecke v. Bundy, 48 Hun, 208.

Referees Fees Regulated .- Code Civ. Proc. § 3291; Caryl v. Stafford, 69 Hun, 318.

Surplus Moneys are to be brought into court for those entitled thereto, subject to the order of the court. 2 R. S. 191 (repealed by Laws of 1880, Chap. 245); Code Civ. Proc., § 1633; also Dixon v. Stilwell, 68 Hun, 406, affd., 139 N. Y. 337, as to payment and distribution, through the Surrogate's Court.

As to those belonging to the estate of a deceased person, vide supra, p. 478; Fliess v. Buckley, 22 Hun, 551; Code Civ. Proc., § 2799 (as amended), replac-

ing Law 1867, Chap. 658, which was repealed by Law 1880, Chap. 245.
Persons not parties to the suit might make application for surplus. 1840, Chap. 342, repealed Law 1880, Chap. 245. As to rights of tenants to surplus, vide Burr v. Stenton, 52 Barb. 377, affd., 43 N. Y. 462; Clarkson v. Skidmore, 46 N. Y. 297; Larkin v. Misland, 100 N. Y. 212.

Surplus money stands in place of the land and only those who have a lien

upon the land can share in it. Albro v. Blume, 5 App. Div. 309; see Matthews v. Duryee, 45 Barb. 69; Nutt v. Cuming. 155 N. Y. 309.

As to Distribution. - Code Civ. Proc. § 1633; 6 N. Y. Supp. 863; vide Orleans Co. Nat. Bk. v. Moore, 112 N. Y. 543. A junior mortgagee must pursue the surplus in the action; he cannot maintain a separate action. Fliess v. Buckley, 90 N. Y. 286.

A purchaser at foreclosure sale has in no case any intrest in surplus. Day v. New Lots, etc., 107 N. Y. 148.

The surplus goes to the heirs instead of the administrator. Dunning v. Ocean Nat. Bk., 61 N. Y. 497.

TITLE VII. STRICT FORECLOSURE.

The object of a bill for strict foreclosure is to obtain a decree for the payment of the mortgage debt, etc., within a short period after judgment, to be fixed by the court, or that in default thereof, the mortagor and all persons claiming under him, may be barred and foreclosed of all rights, interests, and equity of redemption, in the mortgaged premises, and their title be extinguished and vested in the mortgagee, without a sale. This action is often brought to foreclose parties having a right of redemption, who may have omitted in a prior foreclosure; or where a former court had no jurisdiction; or where the mortgagee is in possession, and he wishes to bar the redemption of the mortgagor. It has been doubted whether strict foreclosure is now lawful under the language of § 1626 of the Code of Civil Procedure, but the question has never been fully determined.

A judgment of sale in forclosure is now a final judgment and not an interlocutory one. Throop's note to Code Civ. Proc., § 1626; Morris v. Morange, 38 N. Y. 172. In all ordinary cases of foreclosure a sale must now be decreed

by express direction.

Indeed, whether a strict foreclosure is any longer allowable, has been doubted. I Fiero, Special Action, 339; I Wiltsie, Mortg. Foreclosure, 6. But it is difficult to perceive how the Legislature can deprive a court of general constitutional jurisdiction of any equitable powers conferred by the Constitution. Alexander v. Bennett, 60 N. Y. 204; cf. Matter of Estate of Stilwell, 136 N. Y. 337. And in a proper case, no doubt, a strict foreclosure may still be the appropriate remedy to supplement defects. Bolles v. Duff, 43 N. Y. 469; Moulton v. Cornish, 138 id. 133; Denton v. Ontario Bank, 150 id. 126.

In the action of Moulton v. Cornish, 138 N. Y. 133 (1893), this class of action has been recognized, indirectly, in the case of a prior mortgagee, who purchased at the foreclosure of his mortgage with knowledge of defective parties, and sought this remedy to cut them off later. But the court held that the action, if allowable, was not a usual one; and if proper at all, was only so under circumstances differing from those before it. This action also being one of an equitable nature, it may fairly be considered that the court in equity would maintain it under proper circumstances.

Thomas on Mortgages, § 1078. See a full discussion as to whether strict foreclosure is still possible. N. Y. Daily Reg. March 10. 1888. As to strict foreclosure in general, vide Ross v. Boardman, 22 Hun, 527.

The action will lie for lands without State,, where the parties are within the jurisdiction and the summons is personally served within the State. House v. Lockwood, 40 Hun, 532.

Parties.— The parties to a bill for strict foreclosure, are in general the same as to a bill for foreclosure and sale. The complaint should bring before the court all persons who have a right to redeem the premises, and all persons claiming any interest.

The Judgment.— The judgments in these cases will have to be particularly examined, as there may be inserted in them special provisions with reference to the redemption by infants or other defendants. The decree generally is, that the amount be paid in six months from confirmation of the report, or the parties be foreclosed. This time may be enlarged. Infant heirs are often allowed to a certain day in court to show cause against the decree. It is said that there can be no valid strict foreclosure against an infant heir of the mortgagor. Mills v. Dennis, 3 Johns. Ch. 67. The judgment must find the amount due, and allow a time for payment and redemption; otherwise it will be void, unless authorized by special law. After the expiration of the time the lands become the property of the mortgagee. Clark v. Reyburn, 8 Wall. (U. S.) 318; Bolles v. Duff, 43 N. Y. 469; Mills v. Dennis, 3 Johns. Ch. 67.

Final Judgment.—If the mortgage money is not paid as directed by the court, the plaintiff takes final judgment that the defendants be absolutely debarred and forclosed of all right, title, and equity of redemption to the mortgaged lands. For form of proceedings and judgment on the strict foreclosure of a mortgage, vide Kendall v. Treadwell, reported in 5 Abb. 16; 14 How. 165; Bell v. The Mayor, 10 Paige, 49; Benedict v. Gilman, 4 id. 58; Ruckman v. Astor, 9 id. 517; Bolles v. Trimble, 43 N. Y. 469.

Extinguishment of the Debt.— The debt secured is not extinguished except as to the value of the land foreclosed. De Grant v. Graham, 1 N. Y. L. Ob. 75; Spencer v. Harford, 4 Wend. 381, 384; Morgan v. Plumb, 9 Wend. 287; Lansing v. Goelet, 9 Cow. 346; Globe Ins. Co. v. Lansing, 5 Cow. 380.

TITLE VIII. SALE UNDER A POWER.

The mortgagee also may sell under a power inserted in the mortgage. In this State a sale under a power is made the subject of a statutory provision. The sale under a power, if regularly made, according to the direction of the statute, is a final and conclusive bar to the equity of redemption, even as to infant heirs. When title is made under the statutes, the proceedings will have to be strictly examined, for if they are not in every respect conformable to the statutes, they are *void*; and they are not like proceedings in a court, where the court has certain amendatory powers to supply omissions and remedy defects.

The former statutory proceedings to foreclose under a power are to be found in the Revised Statutes, as amended by the laws hereinafter noted, being chiefly the Acts of 1842, Chap. 277; 1844, Chap. 346; 1857, Chap. 308. These proceedings were continued in force by Code Civ. Proc., § 471, repealed by Laws of 1880, Chap. 245, and are now regulated by Code Civ. Proc., §§ 2387 to 2409.

The mortgage may provide that foreclosure shall be by advertisement only. Farmers' Loan, etc., Co. v. Bankers, etc., Co., 44 Hun, 400; Van Vleck v. Enos, 88 id. 348; Dwight v. Phillips, 48 Barb. 116; 9 id. 278; 11 id. 191; 16 id. 9; 20 id. 18; 9 Abb. 66.

Foreclosure by Advertisement.—Where a mortgage contains a power of sale for the benefit of the mortgage, it is not necessary to resort to an action to foreclose the mortgage, for by express provision of the statute the grantee of the power may foreclose by advertisement. Code Civ. Proc., §§ 2387, 2409; formerly 2 R. S. 545, §§ 1-15 as amended. While courts do not assume to interfere with the rights of parties to provide for the execution of this power of sale in any way they choose, yet if the equity of redemption is to be extinguished by a sale and the mortgagee, being grantee of the power, desires to purchase in, in default of other and higher bidders, the sale must proceed under the statute and not be a private sale. Elliott v. Wood, 45 N. Y. 71. Before the statute the mortgagee could not purchase in at such sale. Mowry v. Sanborn, 68 N. Y. 153, 160.

Earlier Provisions.— The principal provisions of the act above referred to were passed February 26, 1788. 2 Greenl. 99; see also 1 R. L. 373. By the Law of 1788, sales under powers in a mortgage were held good, and barred the redemption, provided the person giving the power was of the age of twenty-five years, and the power acknowledged and recorded. These provisions were re-enacted by Law of April 6, 1801. Sales were to be by public auction, on six months' published notice. 1 Webster, 450. See also provisions of Act of March 19, 1813, as to these proceedings. 1 R. L. 372; Burnet v. Denniston, 5 Johns. Ch. 35; Doolittle v. Lewis, 7 id. 45. The above provisions were superseded by the provisions of the Revised Statutes. See also Act of 1822, 262.

Provisions of the Revised Statutes and the Code of Civil Procedure.—The Revised Statutes provided as follows: § 1. "Any mortgage of real estate, heretofore executed by any person being at the time more than twenty-five years of age, or hereafter executed by any person over the age of twenty-one years, containing therein a power to the mortgagee or any other person, to sell the mortgaged premises, upon default being made in any condition of such mortgage, may be foreclosed by advertisement, in the cases and in the manner hereinafter specified." 2 R. S. 545, § 1, repealed by Laws of 1880, Chap. 245. See now Code Civ. Proc., § 2387. No such restriction as to age now exists. Id.

A mortgage to secure payment of outstanding commercial paper and judgments to a specified amount is not given to secure unliquidated damages, and may be foreclosed by advertisement. Lewis v. Duane, 141 N. Y. 302; Mowry

v. Šanborn, 68 N. Y. 153.

Parties may contract as they please, as to the power and its exercise. Elliott v. Wood, 45 N. Y. 71; Doolittle v. Lewis, 7 Johns. Ch. 45. The power passed by any assignment of the mortgage. Slee v. Manhattan Co., 1 Paige, 48; vide supra, 618. A sale under the power, after due tender of the mortgage debt by one entitled to redeem, is void, and so held where the purchaser had notice. Barnet v. Denniston, 5 Johns. Ch. 35. Payment of a mortgage extinguishes the power of sale. Cameron v. Irwin, 5 Hill, 272; Warner v. Blakeman, 4 Keyes, 487. And if a statute foreclosure afterward took place, even a bona fide purchaser acquired no title. Id. But if the sale were illegal, the mortgage and power remained in force. Stackpole v. Robbins, 47 Barb. 212. A bona fide purchaser would be protected, if the mortgage had not been satisfied of record. Warner v. Blakeman, 36 Barb. 501, affd., 4 Keyes, 487. The damages or amount must be liquidated, or there could be no foreclosure under these proceedings. Jacks v. Turner, 7 Wend. 458; Ferguson v. Kimball, 3 Barb. Ch. 616, 619, modified in Ferguson v. Ferguson, 2 N. Y. 364; and supra, p. 724. See also Mowry v. Sanborn, 68 N. Y. 153.

The statute applies only to lands within the State. Elliott v. Wood, 45 N. Y. 71. A married woman might execute a valid power to sell in a mortgage of her separate property for her husband's debts. Demarest v. Wynkoop, 3 Johns. Ch. 129. A surviving executor may foreclose. Id. So the foreign administrator of a nonresident mortgagee. Doolittle v. Lewis, 7 Johns. Ch. 46. Parties may agree upon the terms of sale contained in mortgage, though those terms differ from those prescribed by statute. Elliott v. Wood, 45 N. Y. 71.

Notice to be given .- Section 2 provided that to entitle any party to give the notice thereinafter specified and to make such foreclosure. 1. Some default must have occurred, by which the power to sell had become operative. 2. There must have been no then existing suit to recover the mortgage debt, or an execution thereon must have been returned unsatisfied in whole or part. 3. The power of sale must have been duly registered, or the mortgage containing the same have been duly recorded. 2 R. S. 545, § 2.

The omission to record the power did not affect the validity of the sale before the Revised Statutes. Bergen v. Bennett, 1 Caines Cas. 1; Wilson v.

Troup, 2 Cow. 195; Jackson v. Colden, 4 id. 266.

The rule under the Revised Statutes seems peremptory. It must have been recorded in all the counties where the lands were. Wells v. Wells, 47 Barb. 416.

Substantially the same provision is found in the Code Civ. Proc., § 2387.

Notice; How Given.— Notice that such mortgage will be foreclosed by a sale was to be given by publication and affixing of notice; 2 R. S. 545, § 3; and service; id., as amended by Laws of 1842, Chap. 277; 1844, Chap, 346, and 1857, Chap. 308. This is now covered by Code Civ. Proc., § 2388; the Law of 1880, Chap. 245, having repealed the prior laws.

Notice published in each of the twelve weeks held sufficient. Hatch, 29 Barb. 297; partially overruled in Bryan v. Butts, 28 How. 582,

sustaining 27 Barb. 503; also George v. Arthur, 4 Supm. 635.

It must have been at least eighty-four days, exclusive of day of publication. Bunce v. Reed, 16 Barb. 347; Howard v. Hatch, 29 id. 297; see Cole v. Moffit, 20 id. 18.

All three modes must be taken, or foreclosure is utterly void. Van Slyke

v. Shelden, 9 Barb. 278.

Affixing once seems to satisfy the statute. Hornby v. Cramer, 12 How. 490. Must be in each county, etc. Wells v. Wells, 47 Barb. 416.

On whom notice should be served, see Bond v. Bond, 51 Hun, 507; Decker v. Boice, 19 id. 152, affd., 83 N. Y. 215; Kellogg v. Dennis, 38 Misc. 82.

Service.—As to method of service of notice, see Code Civ. Proc., § 2389; Stanton v. Kline, 11 N. Y. 196.

Service in manner prescribed is essential. Mowry v. Sanborn, 65 N. Y. 581. If not served as required, the sale was void. St. John v. Bumpstead, 17 Barb. 100; Dwight v. Phillips, 48 id. 116; Cole v. Moffit, 20 id. 18.

The holder of a judgment entered between the first publication and the sale must have been served. Groff v. Morehouse, 51 N. Y. 503.

Actual notice was enough to require diligence in one not served. Dewey, 2 Supm. 515.

The twenty-eight days counted from the time of deposit. Hornby v. Cramer,

12 How. Pr. 490.

A wife of a mortgagor surviving the husband held entitled to notice; but

not his heirs. King v. Duntz, 11 Barb. 191.
"Personal representatives" meant executors or administrators, and not

heirs or devisees. Anderson v. Austin, 34 Barb. 319.

A junior mortgagee (or his assignee of a mortgage recorded) held entitled to notice. As to his rights, vide Hornby v. Cramer, 12 How. 490; Winslow v. McCall, 32 Barb. 241; Wetmore v. Roberts, 10 How. Pr. 51.

If the mortgagor was dead, service was dispensed with, if he left no personal representatives. Cole v. Moffit, 20 Barb. 18, Anderson v. Austin, 34 id. 319, supra, disapproved in Mackenzie v. Alster, 12 Abb. N. C. 210, disapproved 51 Hun, 507, 510, holding that if there be no executor or administrator there could be no foreclosure in this way. See also Van Schaak v. Sanders 32 Hun, 515. But compare Stanley v. Freckalton, 65 Hun, 138; Pitt v. Amend, 84 Hun, as to service on executors.

Junior mortgagees if not served, might redeem. Wetmore v. Roberts, 10

How. Pr. 51.

Even actual notice to a lienor was held not to dispense with the statutory notice. Root v. Wheeler, 12 Abb. Pr. 294; Mowry v. Sanborn, 65 N. Y. 581;

In the above case of Root v. Wheeler, 12 Abb. Pr. 294, it was held that the street and number of residence, the manner of folding and the kind of stamps for postage, must have been specified. See also Chalmers v. Wright, 5 Robt.

A direction upon an unsealed envelope did not satisfy the statute, although

the notice was within. Rathbone v. Clarke, 9 Abb. 66.

The advertisement must not contain false statements, or the sale will be void. Burnet v. Denniston, 5 Johns. Ch. 35; except where there was mistake. 6 Barb. 347; Klock v. Cronkhite, 1 Hill, 107; Jenks v. Alexander, 11 Paige, 619; 62 Barb. 223.

If the notice was not properly served by mail, the foreclosure was void, 25 N. Y. 320; so if the residence of the mortgagor was not specified. 48 Barb.

116.

No particular post-office was required (4 How. 246), but it should be in

the State. Stanton v. Kline, 11 N. Y. 196.

The notice might be in all cases served through the post-office. Stanton v.

Kline, 11 N. Y. 196, revg. 16 Barb. 9.

If the notice was addressed to a party at a wrong place, the foreclosure would be void as to him (Robinson v. Ryan, 25 N. Y. 320), or if the affidavits disclosed no place of residence when served by mail. Dwight v. Phillips, 48 Barb. 116.

The affidavit must show positively that the place of adress was the residence. Mowry v. Sanborn, 65 N. Y. 581; 68 id. 153.

The sale barred redemption though no affidavits were filed. Osborn v. Merwin, 12 Hun, 332.

The sale might be proved by secondary evidence. Id. Or by any lawful evidence. Mowry v. Sanborn, 68 N. Y. 153.

Contents of Notice Under the Revised Statutes .- The notice formerly was to contain the names of parties to the mortgage and assignees, the date of the mortgage and where recorded, or where the power of sale is registered, the amount claimed to be due thereon at the time of first publication of such notice, and description of the premises as in the mortgage. 2 R. S. 546, § 4.

Any postponement of sale must have been made by inserting notice as soon as possible in the newspapers in which the original advertisement was published until time of sale. 7 How. Pr. 372; Miller v. Hull, 4 Den. 104, 107. The description of the land must be full and correct. 9 Abb. 66.

An overclaim did not vitiate. Mowry v. Sanborn, 62 Barb. 223, reversed on other grounds in 65 N. Y. 581; 68 id. 153; Klock v. Cronkhite, 1 Hill, 108.

Nor erroneous statements which did not mislead, especially if corrected. Hubbell v. Sibley, 5 Lans. 51, affd., 50 N. Y. 468; Jencks v. Alexander, 11 Paige, 619.

The whole amount due must have been claimed. Id.

The notice must have stated that the mortgage was to be foreclosed under a power, and an error in the book of record, or in the amount, might be disregarded if substantial indication was made. Klock v. Cronkhite, 1 Hill, 108; Bunce v. Reed, 16 Barb. 347; Judd v. O'Brien, 21 N. Y. 186; Jencks v. Alexander, 11 Paige, 619, 626.

After sixteen years a mortgagor could not question the regularity of the notice. Demarest v. Wynkoop, 3 Johns. Ch. 129; Bergen v. Bennett, 1 Caines

Cas. 1.

The clerk's office and date of record held sufficient as to statement of record; but the notice must be of a foreclosure and sale. Judd v. O'Brien, 21 N. Y. 186.

Under the Code of Civil Procedure.— The notice must contain practically the same particulars as specified; vide Code Civ. Proc., § 2391.

As to Parties.—Assignee in bankruptcy when. Ostrander v. Hart 130 N. Y. 406; 3 R. S. 847, § 3; Laws 1844, Chap. 346, § 1; Code Civ. Proc., § 2388, requiring service of the notice of sale upon a subsequent grantee, only in case his conveyance was "upon record at the time of the first publication of the notice." Decker v. Boice, 19 Hun, 152; 83 N. Y. 215; Raynor v. Raynor, 21 Hun, 36; 94 N. Y. 248.

See also for other cases as to parties, Bond v. Bond, 51 Hun, 507; King v. Duntz, 11 Barb. 191; Northrup v. Wheeler, 43 How. 122; Winslow v. McCall,

32 Barb. 241; Kellogg v. Dennis, 38 Misc. 82.

Sale, How Made Under the Revised Statutes.—The sale was to be at public auction in the day-time, in separate plots, in the county where the premises, or some part were situated, except that sales on mortgages to the people were to be made at the capital. No more is to be sold than necessary to satisfy the amount due at time of first publication, with interest, costs and expenses allowed by law. 2 R. S. 546, § 6.

A sale on any other than the fixed or adjourned day was void. Miller v.

Hull, 4 Den. 104.

The sale must have been at auction. Lawrence v. Farmers' L. & T. Co., 13 N. Y. 200, unless there were agreement to the contrary. Elliott v. Wood,

45 N. Y. 71; 53 Barb. 285.

The sale must have been for the whole amount secured. Holden v. Gilbert, 7 Paige, 208; Cox v. Wheeler, Id. 248; Tice v. Anin, 2 Johns. Ch. 125; Leonard v. Morris, 9 Paige, 90. When there were future installments, vide Jencks v. Alexander, 11 Paige, 619.

The sale of a farm need not be in parcels. Lamerson v. Marvin, 8 Barb. 9;

Elsworth v. Lockwood, 9 Hun, 548.

The premises might be sold free and clear. Story v. Hamilton, 86 N. Y. 428.

A sale on foreclosure by advertisement should not be allowed to stand, where the notice of sale incorrectly and unfairly stated the amount due on prior incumbrances subject to which the sale was made. Ritter v. Devine, 80 Hun. 303.

The foreclosure might be complete without a deed. Arnot v. McClure, 4 Den. 41; Jackson v. Colden, 4 Cow. 266; Slee v. Manhattan Co., 1 Paige, 48.

As to sale on Sundays, vide Sayles v. Smith, 12 Wend. 57; and as to post-ponement from such a day, Westgate v. Handling, 7 How. 372.

Under the Code of Civil Procedure.— The sale must be at public auction in the day-time and cannot be on Sunday or a public holiday, in the county where the mortgaged property or a part thereof is situated. If there are two or more distinct farms, tracts or plots, they must be sold separately, and only as many as are necessary to satisfy amount due at sale, and costs and expenses, but where two buildings are on one city lot and access is had to one through the other, they must be sold together. Code Civ. Proc., § 2393.

Who Might Purchase under the Revised Statutes.— The mortgagee, his assigns, or legal representatives, might fairly and in good faith purchase the premises or any part. 2 R. S. 546, § 7; 2 R. L. of 1813, 375; 20 Barb. 559; Benedict v. Gilman, 4 Paige, 58; Slee v. Manhattan Co., 1 id. 48; Jackson v. Colden, 4 Cow. 266.

If no bidders were present but the auctioneer, who bid in for the mortgagee,

the sale has been held void. Campbell v. Swan, 48 Barb. 109.

Under the Code of Civil Procedure.—The same provision is contained in this Code, § 2394. Lewis v. Duane, 23 N. Y. Supp. 433; Hubbell v. Sibley, 5 Lans. 51, affd., 50 N. Y. 468; Cox v. Wheeler, 7 Paige, 248.

Effect of the Sale before the Code of Civil Procedure.—Under the Revised Statutes, the sale did not affect judgment creditors. 2 R. S. 546, § 8; Benedict v. Gilman, 4 Paige, 58; Waller v. Harris, 7 id. 167. As amended, every sale pursuant to a power, conducted as aforesaid, to a purchaser in good faith, was to be equivalent to a foreclosure and sale under the decree of a court of equity, so far only as to be an entire bar of all claim or equity of redemption of the mortgagor, his heirs and representatives, and of all persons claiming under him or them, by virtue of any title subsequent to such

mortgage, and also of any person having lien by any judgment or decree subsequent to such mortgage, and of every person having any lien or claim by or under such subsequent judgment or decree, who had been served with notice of such sale as required by law. 2 R. S. 546, § 8, as amended, Law of 1842, Chap. 277, and 1844, Chap. 346, § 4, repealed by Laws of 1880, Chap. 245; Warren v. Blakeman, 36 Barb. 501.

The sale did not affet any mortgagee or judgment creditor whose lien

occurred prior to the sale, and they might redeem. 2 R. S. 546. § 8: Benedict

v. Gilman, 4 Paige, 58.

If the sale was irregular, the purchaser took nothing by his deed. Jackson v. Clark, 7 Johns. 217.

If the mortgage was usurious, the sale was void if purchaser had notice.

10 Barb. 558.

The owner of the equity of redemption must have had notice, or the sale was void as to him (17 Barb. 100); also a junior mortgagee or his assignees. 10 How. Pr. 51.

The sale was voidable, if the lands were not sold in distinct tracts or

lots, if so situated. 47 Barb. 416.

It was held generally, but not under our statute, that a mortgagor not objecting to the sale waived defects. Markey v. Langley, 2 Otto. 142.

Under the Code of Civil Procedure .- The mortgagor, his heir, devisee, executor or administrator and persons claiming under any of them by virtue of a title or of a lien by judgment or decree subsequent to the mortgage. upon whom the notice of sale was served and persons so claiming whose conveyance was not recorded or whose judgment or decree was not docketed at the time of the delivery of a copy of the notice of said sale to the clerk of the county, and the executor, administrator or assignee of such a person; statutory lienors or incumbrancers subsequent to the mortgage; wives or widows of the mortgagor or subsequent grantee, upon whom notice was served, where the lien of the mortgage was superior to their dower, are cut off under the Code provisions. Code Civ. Proc., § 2395. See fully this section, as to the entire effect of the sale. By L. 1889, Chap. 209, the delivery of notice to the clerk, instead of the first publication was fixed as the date when conveyances or judgments must be of record.

See Klock v. Cronkhite, 1 Hill, 107. As to effect of sale, see Vroom v. Ditmas, 4 Paige, 526.

One in possession under a contract held not affected by sale under sub-

sequent mortgage. Dwight v. Phillips, 48 Barb. 116.

The omission to make mortgagor's wife who joined in execution a party merely leaves her right unforeclosed; it does not render the foreclosure invalid as to other parties properly served. Candee v. Burke, 1 Hun, 546.

Record of Proceedings under the Revised Statutes.—Affidavits might formerly be made by the auctioneer of the sales; and also by the printer, his foreman, or clerk, of the publication; the affidavits of other persons, of the affixing of the notice and other service, and of affixing in the county clerk's book, were to be made and filed with the clerk of the county. 2 R. S. 547, §§ 9, 10, 11, as amended, see Laws of 1831, Chap. 266; 1844, Chap. 346, and 1857, Chap. 308.

Parol or other evidence of service (in another action) might be given, but it would not dispense with the filing of the affidavits. Layman v. Whiting, 20 Barb. 559; Mowry v. Sanborn, 68 N. Y. 153; Story v. Hamilton, 86

id. 428; Van Slyck v. Sheldon, 9 Barb. 278.

The affidavit of posting the notice might be by one who posted the notice

or saw it posted. Hornby v. Kramer, 12 How. Pr. 490.

The affidavits were only presumptive evidence of the facts, except as to the mortgagee and his privies. Bunce v. Reed, 16 Barb. 347; Mowry v. Sanborn, 62 id. 223, reversed in 65 N. Y. 581; 68 id. 153, on the form of the affidavit; Sherman v. Willet, 42 id. 146.

Defects in them may be supplied aliunde, and errors in date, etc., did not vitiate, if they could be corrected from entries made. Chalmers v. Wright, 5 Rob. 713; Mowry v. Sanborn, 68 N. Y. 153.

Under the Code of Civil Procedure .- The affidavit of sale should be made by the auctioneer. The publisher of the newspaper, as well as the persons named above, may make affidavit of publication. The person who posted the notice, or any one who saw it posted at least eighty-four days before the sale, may make affidavit of posting. As to affixing in the county clerk's book, the county clerk, or any person who saw it so affixed at least eighty-four days before the sale, may make affidavit. The person serving may make affidavit of service. Where different parcels are sold to unierent persons, could or several affidavits may be made, and one affidavit will do for all these things, where the same person swears as to all. A printed copy of the notice of sale must be annexed to each affidavit, and a like copy of each of service. Where different parcels are sold to different persons, either one notice of postponement to the affidavits of publication and sale. But one notice will do for a number of affidavits, where they all refer to it and are annexed to each other and filed and recorded together. Code Civ. Proc., §§ 2396 and 2397, as amended. These sections should be attentively con-

Defects cannot be remedied in affidavits, as the proceedings are not judicial.

Dwight v. Phillips, 48 Barb. 116.

Record Under the Revised Statutes .- Such affidavits were to be filed and recorded by the clerk in the book of mortgages, and such original affidavits, the record thereof, and certified copies of such record were to be presumptive evidence of the facts therein contained. The clerk was to make a minute opposite the record of the mortgage when such affidavits were recorded. 2 R. S. 547, §§ 11-13.

The affidavits must also have stated the service of the notice on the mort-

gagor, if made since the amendment of 1844. 20 Barb. 559.

Where no notice appeared by the affidavits to have been served on the mortgagor, proceedings held void. 48 Barb. 116.

Under the Code of Civil Procedure. Such affidavits are to be filed in the office for recording deeds and mortgages in the county where the sale took place, and they must be recorded at length; and the original affidavits, the record thereof and a certified copy of the record, are presumptive evidence of the facts therein stated. Where the property is in two or more counties, copies of the affidavits certified by the officer with whom the originals are filed, may be filed in the other counties and have the effect of originals. Code Civ. Proc., § 2398.

The officer with whom the affidavits or certified copies are filed is to make

a note thereof on the record of the mortgage. Id., § 2399.

Common law proof may be adduced to supplement defective affidavits of service of notice of sale upon the parties. Mowry v. Sanborn, 68 N. Y. 153; Chalmers v. Wright, 5 Rob. 713.

But not to supplement defective affidavit of publication of notice of sale.

Mowry v. Sanborn, 11 Hun, 545, revd. on another point, 72 N. Y. 532.

Record of Papers in the proceeding and of the mortgage foreclosed is

required. Cowdray v. Turnur, 85 Hun, 451.

The sale foreclosed the equity of redemption, and there was no time required for filing the affidavits; and the delay in making them did not extend the time for redemption. Tuthill v. Tracy, 31 N. Y. 157.

The affidavits were evidence of the title though unrecorded. Frink v. Thomp-

son, 4 Lans. 489; Howard v. Hatch, 29 Barb. 297, overruled, Bryan v. Butts,

28 How, Pr. 582.

The sale was not invalid as to judgment creditors for omission to serve other parties. Hubbell v. Sibley, 5 Lans. 51, affd., 50 N. Y. 468. See also as to effect of sale. Code Civ. Proc., § 2395.

The Record Operated as a Conveyance.—When the mortgaged premises, or any part of them, were purchased at such sale by the mortgagee, his legal representatives, or his on their assigns, the affidavits of the publication and of affixing notice of sale, and of the circumstances of such sale, were to be evidences of the sale and of the foreclosure of the equity of redemption, as herein specified, "without any conveyance being executed, in the same manner and with the like effect, as a conveyance executed by a mortgagee upon such sale, to a third person." 2 R. S. 547, § 14, amended, L. 1838, Chap. 266, § 8; Arnot v. McClure, 4 Den. 41; 13 Barb. 137; 16 id. 347; Brewster v. Power, 10 Paige, 562.

There was no transfer of title until all the necessary affidavits had been made and recorded. They operated as the statutory transfer of title. Layman v. Whiting, 20 Barb. 559; Bryan v. Butts, 27 id. 503, affd., 28 How. Pr. 582. overruling Howard v. Hatch, 29 Barb. 297:

The subsequent filing of an affidavit did not establish the title back by rela-

tion. Layman v. Whiting, 20 Barb. 559.

Where there had been a sale, the equity of redemption was foreclosed. though the affidavits were not filed for twenty years thereafter. Chapman v. The Delaware, etc., Co., 3 Lans. 261; Tuthill v. Tracy, 31 N. Y. 157.

Under the Code of Civil Procedure .- A purchaser obtains title without execution of a conveyance. A purchaser, other than the mortgagee. obtains title by paying the consideration and complying with the other terms of sale, without the filing of the affidavits. But he need not pay until filing or delivery or tender to bind the affidavits. Code Civ. Proc., § 2400; Slee v. Manhattan Co., 1 Paige, 48; Cowdrey v. Turner, 85 Hun, 451.

Not to Apply to Mortgage to the People .- These proceedings to a certain extent, were not to be applicable to mortgages to the people. 2 R. S. 547, § 15. This is also the present law. Code Civ. Proc., § 2409; also as regards United States Loan Commissioners. *Id.*; see Barley v. Roosa, 35 St. Rep.

Lands Out of the State. The above provisions did not apply to them. Elliott v. Wood, 45 N. Y. 71; Doolittle v. Lewis, 7 Johns. Ch. 45,

Objections to Proceedings.— Who estopped. Louis v. Duane, 69 Hun, 28. affd., 141 N. Y. 302.

Usury.—If the purchaser had notice that the mortgage was usurious, he acquired no title, nor did his grantee. Hyland v. Stafford, 10 Barb. 558; see Jackson v. Henry, 10 Johns. 185.

Surplus Moneys.—As to surplus moneys on such sale, vide Law of 1868. Chap. 804, amd., Law of 1870, Chap. 706; repealed, Law of 1880, Chap. 245. For present law, vide Code Civ. Proc., §§ 2404-2408.

Redemption.—By Law of May 12, 1837, Chap. 410, redemption was allowed within a year after any mortgage sale, by a mortgagor, his representatives, or assigns, on repayment of the amount bid and ten per cent. thereon. This Act was repealed by Law of April 18, 1838, Chap. 266; and the purchaser was allowed to take possession unless the mortgagor, his assigns, etc., who had a right to redeem, gave certain specified securities to redeem within a year. This Act also gave certain right of redemption to creditors.

See now Code Civ. Proc., § 2395, as to sale being an entire bar of all claim

on equity of redemption.

Fees, Costs, etc.— Vide Code Civ. Proc., §§ 2401-2403.

Deficiency.— In an action for a deficiency resulting from foreclosure by advertisement it is a good defense that no notice of sale was served. Dickinson v. Auld, 23 Hun, 275.

TITLE IX. MISCELLANEOUS.

Railroad and Plank Road Companies.—As to foreclosure of mortgages given by railroad or plank road companies, to secure the payment of any bond of such company, vide the Railroad Law, L. 1890, Chap. 565, § 76; also L. 1879, Chap. 505, and supra, p. 665.

On foreclosing plank road or turnpike mortgages the purchaser may be authorized to operate the road. L. 1866, Chap. 780. See also the Railroad Law of 1890, Chap. 565, and its amendments.

Mortgages to the People, or Loan Commissioners.—As to foreclosure of mortgages to the People of this State, vide I R. S. 211, amd., L. 1830, Chap. 268; 1831, Chap. 102; 1836, Chap. 457; 1839, Chap. 381; 1847, Chap. 99.

See as to foreclosure of mortgages belonging to the State. State Finance Law (L. 1897, Chap. 413), §§ 26-29; Hume v. Fleet, 23 App. Div. 185.

The Code of Civil Procedure provides that the provisions as to foreclosure of mortgages by advertisement shall not apply to the foreclosure of mortgages to the people or the loan commissioners. § 2408.

As to Loan Commissioners, Mortgages, vide Chap. XXIX.

CHAPTER XXIX.

MORTGAGES TO COMMISSIONERS OF LOANS AND SALES THERE. UNDER.

TITLE

I.— MORTGAGES, AND THE DISCHARGE THEREOF.
II.— OFFICES OF THE COMMISSIONERS, AND LIEN OF THE MORTGAGE.

III.— FORECLOSURE AND SALE.

IV .- THE EARLIER ACTS BEFORE 1837.

TITLE I. MORTGAGES. AND THE DISCHARGE THEREOF.

The offices of Loan Commissioners were created under Law of January 10, 1837, Chap. 2, and Law of April 4, 1837, Chap. 150. This latter act provided for the loaning on mortgage of the surplus moneys of the United States, deposited with the State for safe keeping under the Act of Congress of June 23, 1836, through officers then created called "Commissioners for loaning the moneys belonging to the United States," appointed for each county. The substance of the mortgages taken was to be inserted in books to be kept by the commissioners in each county, and be matter of record.

See now for these provisions, the State Finance Law, G. L., Chap. X; L. 1897, Chap. 413, §§ 82, 83, 86, as amended.

Discharge of Mortgages.—Such commissioners shall receive payment of the principal or any part thereof of any such mortgage on lands within their respective counties when tendered, and shall satisfy and discharge the same by the execution and acknowledgment of a satisfaction piece in the usual form, which shall be recorded by the County Clerk, who shall thereupon write upon the margin of such mortgage, in the book containing the same in his office, a statement to the effect that such has been discharged and satisfied by such commissioners giving the date thereof.

State Finance Law, L. 1897, Chap. 413, § 87; L. 1837, Chap. 150.

The comptroller may direct the commissioners to cancel and discharge any mortgage, on proof of payment, if the mortgage remains uncancelled and discharged of record, and the commissioners, on order must cancel and discharge such mortgage.

State Finance Law, L. 1897, Chap. 413, § 84; L. 1868, Chap. 698.

TITLE II. OFFICES OF THE COMMISSIONERS, AND LIEN OF THE MORTGAGE.

Their offices are to be kept at the court houses of their respective counties, or at some convenient place near the same, and in the city and county of New York, at the office of the Register.

State Finance Law, § 83; see L. 1837, Chap. 150; L. 1893, Chap. 672; also L. 1851, Chap. 286; L. 1882, Chap. 410, \$ 1764.

They are to permit all persons to search or examine any books on paying fifty cents for each book examined or searched.

State Finance Law, §§ 86, 86a; see also L. 1837, Chap. 150, containing voluminous provisions applicable to this fund.

Lien of the Mortgages.— The execution of the respective mortgages and their entry or being placed in their books of mortgages of the said commissioners shall have the like lien, priority, operation and effect as if such mortgages had been duly recorded in the book of mortgages in the office of the clerk of the county in which the mortgaged premises are situated.

Laws of 1837, Chap. 150, § 43, amd., Laws 1893, Chap. 672, so as to read that persons may examine the books and certificates of search may be given. The amendment is not to apply to counties having a population of less than 1,200,000.

Where to be Deposited.— The book of mortgages executed to the commissioners is to be deposited in the offices of the clerks of the respective counties and in the city and county of New York in the office of the register. State Finance Law, L. 1897, Chap. 413, § 86; L. 1837, Chap. 150, § 55. See also L. 1851, Chap. 286; L. 1882, Chap. 410, § 1764.

Proceedings to be Minuted.—The commissioners are to keep a record of their proceedings in a book to be kept for the purpose. State Finance Law, § 86; L. 1837, Chap. 150.

The ommission to make all proper entries does not vitiate the sale as against a bona fide purchaser. See Wood v. Terry, 4 Lans. 80; also White v. Lester, 34 How. Pr. 137; 1 Keyes, 316; Powell v. Tuttle, 3 N. Y. 396.

Sale of Mortgages, etc.—Such commissioners cannot sell or assign mortgages taken by them. Woodgate v. Fleet, 44 N. Y. 1; Pell v. Ulmer, 18 id. 139. Nor can one be the borrower, and a valid mortgage executed to the other. N. Y. L. I. & T. Co. v. Staats, 21 Barb. 570.

As to place of receiving interest, and as to ejectment not being remedy for supposed invalid forclosure by Loan Commissioners. Goodhart v. Street, 12 Misc. 360.

TITLE III. FORECLOSURE AND SALE.

Provision is made for the sale by the commissioners of the premises mortgaged. The object of the sale is to foreclose all equity of redemption.

State Finance Law, L. 1897, Chap. 413, § 90; L. 1837, Chap. 150, §§ 27, 30; L. 1880, Chap. 517, as amd. by L. 1891, Chap. 181.

Jackson v. Rhodes, 8 Cow. 47; Sherwood v. Reade, 7 Hill, 431; Olmsted v. Elder, 5 N. Y. 144. See also Laws 1889, Chap. 25.

Procedure.— On default in payment of interest on the first Tuesday of October, or within twenty-three days thereafter, or of principal when due, the State shall be seized of an absolute estate in fee, and the mortgagor, his heirs and assigns, shall be foreclosed and barred of all equity of redemption, but shall be entitled to remain in possession until sale under foreclosure; and shall at any time before the purchaser receives his evidence of title be entitled to redeem by paying commissioners the principal unpaid on the mortgage and the interest to the time of redemption, and all the costs and expenses of the foreclosure and sale; and on such redemption the title reverts to the mortgagor, his heirs or assigns, the amount previously paid by the purchaser, if any, to be repaid to him.

Within eight days after the last Wednesday of their attendance, yearly and every year, the commissioners shall cause an advertisement to be fixed up at not less than three public places of the county where the premises are situated, containing a description of the lands mentioned in the several mortgages foreclosed as aforesaid and giving notice in such advertisement that on the first Tuesday of February then next such lands will be sold at the court house of the respective counties, publicly to the highest bidder; and a copy shall be published in at least one county newspaper, once in each week until the sale; and service shall be made of same fourteen days prior to sale on all interested parties as specified.

On the sale the commissioners shall deliver to the purchaser affidavits of regularity, and the purchaser shall, if the advertisement has been published and fixed and served as required, hold and enjoy such estate in the said lands as was conveyed to the commissioners clearly and absolutely discharged of and from all benefit and equity of redemption and all other liens, etc., made or suffered after the execution of the mortgage.

The commissioners may also foreclose any mortgage executed to them, when in arrears, by action of foreclosure in the Supreme Court in the county where they were appointed, in conformity with the usual practice.

State Finance Law, L. 1897, Chap. 413, § 90.

Leases.— The loan commissioners are without power to lease lands. Watkins v. Clough, 119 App. Div. 527.

Surplus .- See State Finance Law, § 90a.

Sale Void .- If commissioners interested. Id., § 91.

For prior laws, etc., on this head, reference may be had to the following:

Default.— Section 30 of Law of 1837, Chap. 150, amd., Laws of 1893, Chap. 672.—On default of the mortgagor to pay the yearly interest on the first Tuesday of October, or within twenty-three days thereafter, and also the principal when due, the commissioners of the county and their successors, etc., shall be seized of an absolute and indefeasible estate in fee in the said lands, and the mortgagor, his heirs or assigns, shall be utterly foreclosed and barred of all equity of redemption of the mortgaged premises. It is supposed under this section that if the borrower fails to pay the interest on the first Tuesday of October, or within twenty-three days thereafter, the mortgage becomes ipso facto foreclosed, and the commissioners are seized in fee, subject to the right of redemption provided. See as to this provision. Fellows v. The Commissioners, 36 Barb. 655; Olmstead v. Elder, 5 N. Y. 144. This latter case was overruled in Pell v. Ulmer, 18 N. Y. 139, revg. 21 Barb. 500. See also Thompson v. Commissioners, 79 N. Y. 54.

This later case holds that the right to redeem is not an equity of redemption with common law incidents; but a special right to redeem available only

by strict compliance with the statute.

Redemption.— But the mortgagor, his heirs, etc., may retain possession until the first Tuesday of February thereafter, and may redeem the same as subsequently provided. Under this section, although on default the commissioners are stated to have an absolute estate, the right of redemption is held not to be barred until after a sale, as provided. Olmsted v. Elder, 2 Sandf. 325; 5 N. Y. 144, Sherwood v. Reade, 7 Hill, 433; Jackson v. Rhoades, 8 Cow. 47; York v. Allen, 30 N. Y. 104. But it is only a right, and gives no interest in the land. Pell v. Ulmer, 18 N. Y. 139; White v. Lester, 34 How. Pr. 136; 1 Keyes, 316; Thompson v. Commissioners, 79 N. Y. 54. Provision for redemption is made by Laws of 1878, Chap. 233, amending section 33 of the Act of 1837, which also provides that the sale take place on the third Tuesday in September. See also Law 1863, Chap. 73 amending the Law of 1837, Chap. 150, § 33.

Act of 1844.—By Act of May 7, 1844, Chap. 326, the Act of April 4, 1837, Chap. 150, was modified so as to allow forfeited mortgages to be delivered to the comptroller, certified copies whereof might be recorded and read in evidence. This act directed the commissioners to give certificates of their proceedings, which might be recorded and read in evidence, or a transcript thereof. See State Finance Law, § 93.

Advertisement and Notice.—Section 31 of Law of 1837, Chap. 150. The commissioners were to advertise the lands for sale in three public places of the county, to be sold at auction in the county court house, and advertise in one county paper, once a week, for six weeks successively, prior to the day of sale, which was to be on the first Tuesday of February. If no paper in the county then in the nearest paper. Wood v. Terry, 4 Lans. 80. By Laws of 1863, Chap. 73, the advertisement must be served on the mortgagor or his representative, executors, etc., if any, fourteen days before the sale, and also upon all his grantees, or lessees, mortgagees of record, and on all incumbrancers of record subsequent to the mortgage. The notice was also to be served personally, or by leaving the same at the dwelling-house with a person of full age, or through the post office; if the latter, on twenty-eight days' notice. Vide Rogers v. Murray, 3 Paige, 390. The advertisement must correctly indicate the mortgagors and mortgagees. Thompson v. Commissioners, 79 N. Y. 54.

Sale by one Commissioner.—The notice of the sale must be given by both commissioners, or it is void, York v. Allen; 30 N. Y. 104; and a sale by one was formerly held void even if both unite in the deed. Powell v. Tuttle, 3 N. Y. 396, overruling King v. Stow, 6 Johns. Ch. 323; also Olmsted v. Elder, 5 N. Y. 144; Pell v. Ulmar, 18 N. Y. 139. But by Laws of 1863,

Chap. 73, sales theretofore made by one commissioner are, if deed is executed by both, made valid; and if there is a vacancy, one commissioner may convey. By Laws of 1867, Chap. 704, a sale by one is made valid if the proceedings are otherwise correct, the purchase money has been paid, and the deed is signed by both. This applies to past and future sales.

The Papers Given.— The commissioners were to give the purchaser a certified copy of the mortgage, together with the affidavits, and the deed. Law of 1837, supra, § 19; 1863, Chap. 73, amd., Laws 1893, Chap. 672. The statute must be strictly pursued as to the sale. Sherwood v. Reade, 7 Hill, 431; Powell v. Tuttle, 3 N. Y. 396; Sharpe v. Johnson, 4 Hill, 92 at 99; Bloom v. Burdick, 1 Hill, 130 at 141; Thatcher v. Powell, 6 Wheat. 119. It may be postponed. Section 33, amended by Laws of 1878, Chap. 233.

Effect of Sale.—It was provided that the purchaser should hold the land free from all equity of redemption, and all other liens or incumbrances arising after the execution of such mortgage. Section 32 of Laws of 1837, Chap. 150, as amended by Law of 1856, Chap. 3; 1863, Chap. 73; 1893, Chap. 672.

Void Sales.—Section 33, Act of 1837, Chap. 150, amended Laws of 1878, Chap. 233, amd., Law 1893, Chap. 672. Commissioners not to become purchasers, or the sale is void; also, all sales made contrary to the provisions of the act. Vide White v. Lester, 34 How. 136, as to irregularities on such sales, and how far the statutory provisions are directory merely; and Sherwood v. Reade, 8 Paige, 633; 7 Hill, 431. If any of the lands had been sold by the mortgagor, they were to be sold by the commissioners in the inverse order of alienation, beginning with those expressly charged. Law of 1856, Chap. 3. As to a sale when the mortgagor repurchased, and there was an immediate judgment, vide Commrs. v. Chase, 6 Barb. 37.

Presumption.— Presumption is in favor of the purchaser that all proceedings were correct. Wood v. Terry, 4 Lans. 80. Under the former law, the deed was conclusive at law. Any remedy by the party entitled to redemption was in equity. Brown v. Wilbur, 8 Wend. 657.

Foreclosure by Advertisement.—By Code Civ. Proc., § 2409, the provisions of the Code as to foreclosure by advertisement do not apply to the Loan Commissioners.

TITLE IV. THE EARLIER ACTS BEFORE 1837.

The above Act of April 4, 1837, is in lieu of the Laws of 1786, 1792, 1797, 1808, 1819 and of the Revised Statutes; and all the duties of the former "Loan Commissioners" are by the Act of 1850 (infra) transferred to the above mentioned commissioners of the United States deposit fund.

Loan officers for each county were created under the above acts. Their offices were to be kept in the court house of each respective county; and the entry of the respective mortgages in the books of said commissioners entitled to the like priority, operation and effect, as if such mortgages were registered in the office of the cierk of the county. Provision was made for the sale of land on default, and conveyances to purchasers, and the barring of the equity of redemption thereby. Laws of 1797 and 1819. The loan officers were by subsequent acts directed to furnish minutes of all mortgages held by them to the county clerks of their counties, who were to file the same, and they would thereupon be matters of record as a mortgage. For the earlier laws on the subject, vide, also, Laws of 1815, p. 61; 1818, p. 31; 1819, p. 37; 1829, p. 246; 1821, p. 17; 1822, p. 265; 1823, p. 205; 1824, p. 341; 1825, p. 442; 1829, Chap. 91; 1832, Chap. 118. By Law of

April 21, 1825, one commissioner might execute a deed on sales under foreclosure where there was a vacancy. By Act of April 13, 1832, Chap. 118, the loan officers in the several counties, under the Laws of 1786 and 1792, were directed to transfer all their books and minutes and papers to the "Commissioners of Loans" for their respective counties. Books of mortgages were to be deposited in the clerk's offices of their respective counties.

Transfer of Mortgages under Acts of 1792 and 1808.—By Law of April 10, 1850, Chap. 337, the loan commissioners in the several counties of this State were directed to transfer to "the Commissioners for Loans of the United States" in the county, all mortgages then in their hands, and books, papers, etc., under the Laws of 1792 and 1808, and the United States loan officers were to have the same authority over them as if taken under the Act of 1837; and after settlement of their accounts, the offices of loan commissioners, under the Acts of 1792 and 1808, were to cease. By Act of February 4, 1856, Chap. 3, the provisions of the Act of 1837 were made to apply to all mortgages taken under the loans of 1792 and 1808.

CHAPTER XXX.

TITLE THROUGH PARTITION PROCEEDINGS.

I .- COURTS HAVING JURISDICTION.

II .- PROCEEDINGS UNDER THE REVISED STATUTES AND CODES.

III .- PARTITION OF THE INTERESTS OF INFANTS WITHOUT ACTION.

IV .- PARTITION OF LANDS OF IDIOTS AND LUNATICS.

V .- MISCELLANEOUS.

The title to land frequently passes under judgments in actions for partition or severance of interests of those holding lands as joint tenants or as tenants in common. At common law there was no remedy by compulsory partition. The proceedings in this State are now special and statutory, and must be strictly pursued.1

now special and statutory, and must be strictly pursued.¹

¹Mr. Fowler's Note on "Partition by Action."—The Roman law made ample provision for partition of what we call real and personal property, and it was there laid down "in communione vel societate, nemo potest invivus detinere." The English law of personal property was certainly much influenced by Roman law, and we find the same principle always applied to personal property by the common law lawyers, and its compulsory division allowed at the suit of any co-owner in common. Tripp v. Riley, 15 Barb. 334; Fobes v. Shattuck, 22 id. 568; Tinney v. Stebbins, 28 id. 290; Andrews v. Betts, 8 Hun. 322; Prentice v. Jansen, 7 id. 86.

In respect of real property the English law did not so closely follow the Roman Law. The Anglican law of feuds was distinctly opposed to the principle of divisibility of land. Prior to the reign of King Henry VIII, the law of England made no provision for compulsory partition of estates in lands, except among copareners or certain female cotenants of land. Allnatt, Partition, 52; 2 Bla. Comm. 324; Smith, Real & Pers. Prop., 547, 548. But by consent partition might readily be made and even a house could be divided by chambers. Co. on Litt., 165; Litt., § 241; Story, Eq. Jurisp., § 647; 2 Bla. Comm. 194. The hardship of the situation where consent was impossible to obtain being perceived, the Statutes 31 Henry VIII, Chap. 1, as amended by 32 Henry VIII, Chap. 32, enabled all joint tenants or tenants in common, even when tenants for years or life only, to resort to the courts of law for the old parceners' writ "De partition factenda;" whereby unwilling co-owners could be compelled to make partition in like manner and form as coparceners. See as to coparceners, FitzHerbert, Natura Brevium, 61. This writ was dilatory. See Statutes 8 and 9 Wm. III, Chap. 31, Baldwin v. Baldwin, 23 C. P. R. 268, 284. Subsequently and in the reign of Elizabeth, chancery assumed a like jurisdiction of making compulsory partition through commissioners of its own

Eq. Jurisp., § 646; Crognan v. Livingston, 17 N. Y. 218. This jurisdiction once assumed became concurrent.

Chancellor Kent states that the acts of Henry VIII were re-enacted in New York in 1788. 4 Comm. 364. But in point of fact partition acts of special import were enacted here as early as 1708. 1 N. Y. Colonial Laws 633, 882, 1006; 3 id. 1107; 4 id. 584, 1036. And see note to 1 R. L. 507. Cf. these acts with the English acts, Chap 31, 8 and 9 Wm. III, and Chap. 18, 3 and 4 Anne. But independently of these acts, the jurisdiction to make partition seems to have been recognized. See 1 N. Y. Colonial Laws, p. 634; Woods v. Clute, 1 Sandf. Ch. 200. It is probable therefore, that the English acts of 31 and 32 Henry VIII were always deemed to extend to the province of New York, independently of any local legislation. See the opinion, Smith v. Smith, 10 Paige, 470, where the right to partition is spoken of as a common law right in this State; no doubt meaning the English Statutes were part of our original common law. It is difficult to account for the acts of Henry VIII, contained in Jones & Varick's Laws and referred to by Chancellor Kent (1 J. & V. 201; 2 id. 185; 1 Gr. 165; 2 id. 13; 4 Kent Comm. 364), on any other theory; for those revisers were expressly charged with the duty of drafting for re-enactment only those acts of Parliament which had extended to New York prior to its independence of the Crown and consequently were adopted by the first State Constitution. Independently of all the acts for compulsory partition, a custom of severing lands held jointly as well as those in common by the mere taking of actual possession seems to have grown up in this Province (1 N, Y. Colonial Laws, 634; Van Schaack, N. Y. Laws, 408; Jackson v. Harder,

For the history of the law of England, and of the State of New York, respecting the partition of lands, vide Mead v. Mitchell, 5 Abb. Pr. 92, affd., 17 N. Y. 210.

A suit in partition is a proceeding in rem, and the jurisdiction of the court is confined to the subject-matter described in the petition. If other land is adjudged upon, the whole judgment is void. Corwithe v. Griffing, 21 Barb. 9. A mining interest may also be partitioned. Canfield v. Ford, 28 Barb. 336.

A mining interest may also be partitioned. Canfield v. Ford, 28 Barb. 336.

4 Johns. 202, 212; Wood v. Fleet, 36 N. Y. 499), and to have been ratified by the Legislature. 4 N. Y. Colonial Laws, 585, 591.

In 1785 and 1788, by the first authorized revision of the laws of the State, the Partition Acts of Henry VIII were, as Kent stated, re-enacted in substance. 1 J. & V. 201; 2 id. 185. The re-enactment contained an express recognition of that equity jurisdiction to partition lands which we referred to above as having grown up in England subsequently to the passage of the acts in question. Thereafter these acts were from time to time altered or amended by the State Legislature; 1 K. & R. 542; 1 R. L. 507; see all the acts in appendix to the Revised Statutes, R. S. App. 61-90; until they were finally consolidated and revised by the authors of the Revised Statutes in that very comprehensive and epoch-making revision. 2 R. S. 315, 332. The separate jurisdictions at law and equity were, however, recognized. 2 R. S. 317, § 1; 2 R. S. 329, § 79.

Before the Revised Statutes the test of regularity in jurisdiction and procedure in partition must be sought in the various acts passed after 1788. The decisions on these several acts are in the earlier reports of the State.

From 1801 until 1849 the initial procedure in partition cases at law was taken by petition (1 K. & R. 542; 1 R. L. 507; 2 R. S. 315, 317), but in equity it was by bill. Hewlett v. Wood, 62 N. Y. 75, 76; 2 R. S. 329, § 79. In 1849 the Code attempted to make an action the substitute for procedure by petition (Co. Proc., § 448; Hewlett v. Wood, 62 N. Y. 75, 76; 2 R. S. 329, § 79. In 1849 the Code attempted to make an action the substitute for procedure by petition (Co. Proc., § 448; Hewlett v. Wood, 62 N. Y. 75, 76; 2 R. S. 329, § 79. In 1849 the Code of Civil Procedure with some changes. §§ 1532-1595. The changes in question, especially that one permitting the title to real property to be tried in actions of partition (§ 1543) are noticed by Mr. Throop, the

edition of the Code of Civil Procedure. See his notes to Part II, Chap. XIV, Art. II, Code Civ. Proc.

JURISDICTION AND PROCEDURE SINCE THE CODE OF CIVIL PROCEDURE.—The jurisdiction and procedure in partition actions are now referable to statute (Doubleday v. Heath, 16 N. Y. 80, 82), and not to the equitable powers of the court. Postley v. Kain, 4 Sandf. Ch. 508; Muller v. Struppman, 6 Abb. N. C. 343; Hewlett v. Wood, 62 N. Y. 75. It must be remembered that at first the equitable jurisdiction of the Court of Chancery in England over partition was not claimed to be original but supplementary, and where that of a court of law was defective; so that except in the case of parceners it also originally depended on the Statutes of Henry VIII. Supra, p. 760; Story, Eq. Jurisp., § 647; Baldwin v. Baldwin, 23 C. P. R. 268, 283; Doubleday v. Heath, 16 N. Y. 80, 82; Wiseley v. Findlay, 15 Am. Dec. 712. No doubt the jurisdiction of Chancerv over partition of law. Supra, p. 760; and see Milford's Treatise, 109, 111. But certainly it was not independent of the statutes in question. Hargrave's note 169a Co. on Litt.; sed. cf. Fonblanque Eq. 18 and Story, Eq. Jurisp., § 646-650.

Independently of the controversy over the question, whether in England the jurisdiction of courts of equity over partition was original, concurrent or supplementary, the jurisdiction of the courts of equity in New York over partition was early recognized by statute. 2 R. S. 329, § 79, and see the acts in the Colonial epoch of government. Since the Constitution of 1846 and the acts fusing the jurisdiction of the courts of law and equity in this State in the same tribunal the jurisdiction of equity over partition is regarded in any event as wholly statutory and not referable to the equitable power of the court. Wood v. Clute, I Sandf. Ch. 199; Postley v. Kain. 4 dd. 508; Larkin v. Mann. 2 Paige, 27. Before 1830 if a question of legai title arose in equity in a partition suit, it defeated the remedy (Phelps v. Green, 3 Johns. Ch. 302), but under the refor

Div. 260.

REMEDY TO BE SOUGHT IN THE ACTION FOR PARTITION.—In actions for partition the primary remedy to be sought is always an actual partition, for it is only where that is impossible "without great prejudice" that a sale may be decreed. Willard, Eq. Jurisp. 703; Wotten v. Copeland, 7 Johns. Ch. 140; Blakeley v. Calder, 15 N. Y. 621; Stephenson v. Cotter, 5 N. Y. Supp. 749; 23 St. Rep. 74; Brevoort v. Brevoort, 70 N. Y. 139. An exception seems to exist where complaint alleges that premises are incapable of partition. Of, Townsend v. Bogert, 126 N. Y. 370; Smith v. Smith, 10 Paige, 470. But it must be remembered in this connection that at common law a house could be partitioned by rooms. So a mill by the alternative taking of tolls. the alternative taking of tolls.

As to water power, see Smith v. Smith, 10 Paige, 470. Forest Preserve Lands, see Forest, Fish and Game Law, G. L., Chap. XXXI, L. 1900, Chap. 20, § 221 (see also L. 1893, Chap. 332, § 105, repealed L. 1895, Chap. 395). See also Code Civ. Proc., § 1594.

It was held before the Code of Civil Procedure that there could be no compulsory partition under our statute, unless the owners were in possession of the land as joint tenants or tenants in common. Boyd v. Dowie, 65 Barb. 237. And Code Civ. Proc., § 1532, so provided.

It is well settled, however, by the decisions that possession is not necessary to the maintaining of the action by one having an interest by ownership in fee in the property. Weston v. Stoddard, 137 N. Y. 119; Satterlee v. Kobbe, 173 id. 91; Wallace v. McEchron, 176 id. 424; Leidenthal v. Leidenthal, 121

App. Div. 269.

The action may be maintained by one who seeks in the same action to set aside a deed. Leidenthal v. Leidenthal, 121 App. Div. 269; Place v. Kennedy, 89 id. 167; Drake v. Drake, 61 id. 1.

It is necessary, however, that facts be alleged showing that plaintiff had an interest in the property. Doane v. Mercantile Trust Co., 160 N. Y. 494.

Partition suit may be retained by court of equity notwithstanding the fact that plaintiff's title and right of possession are disputed. Place v. Kennedy, 89 App. Div. 167.

It is likewise held that the question of the power of executors to make a lease beyond the power given them in a will may be determined in an action

of partition. Van Norden Trust Co. v. O'Donohue, 122 App. Div. 51.
What possession required. Bender v. Bender, 48 App. Div. 371.
Land held by one for two others may be partitioned between the latter.

Chittenden v. Gates, 18 App. Div. 169.

An outstanding power of sale in executors does not always prevent partition. Purdy v. Wright, 44 Hun, 239.

TITLE I. COURTS HAVING JURISDICTION.

Courts of equity originally had an inherent jurisdiction to decree partition, independent of statute; but their action and jurisdiction since the Revised Statutes are confined to the statutory provisions. See, however, note at head of this chapter.

Canfield v. Ford, 28 Barb. 336, affg. 16 How. 473; Wood v. Clute, 1 Sandf. Ch. 199; Postley v. Kain, 4 id. 508. The Supreme Court had no inherent original authority to partition and sell infants' real estate, but derives its only authority from the statutes. Muller v. Struffman, 6 Abb. N. C. 343.

But it was held that where the provisions of the Revised Statutes were not broad enough to cover cases where partition was sought, the Supreme Court had power to divide estates that were certain. Canfield v. Ford, 28 Barb. 336; see Smith v. Smith, 10 Paige, 470; Van Arsdale v. Drake, 2 Barb. 599; approved, 53 Hun, 326; Danvers v. Dorrity, 14 Abb. 206.

The objection that a court of this State cannot partition lands in another

State is not available to one who has consented to the proceeding. Bowers

v. Durant, 43 Hun, 348.

Former Proceedings .- The Court of Chancery formerly had jurisdiction of such actions co-ordinate with the common law courts in like cases, in action by petition, as provided by Revised Statutes. The proceedings in said court were by bill or petition. 2 R. S. 329, § 79; Id. 317, § 1; Jenkins v. Van Schaak, 3 Paige, 242. As to the transfer of the power of the former Court of Chancery to the Supreme Court, vide Code Civ. Proc. § 217. .The Superior Court of New York city and Court of Common Pleas had also jurisdiction of such actions, if the lands were in the county (Code Proc., §§ 33, 123; Varian v. Stevens, 2 Duer, 635; 9 How. 512; 3 Daly, 185) also

(Laws of 1863, Chap. 66, repealed by Laws of City Court of Brooklyn. 1877, Chap. 417). Also County Courts. (Code Civ. Proc., § 30, subd. 4; Code Civ. Proc., § 340.) It had been questioned whether county courts had jurisdiction under the Constitution (Const. 1846, Art. VI, § 14) but it was finally decided they had in Doubleday v. Heath, 16 N. Y. 80; also Arnold v. Rees, 18 id. 57. When brought in the latter court, jurisdiction extends by the Code only to real property situated within the county. Code Civ. Proc., § 340. See also Law 1847, Chap. 280, 470. The provisions of these acts which affect the jurisdiction of the various courts were repealed by Laws of 1877, Chap. 417. The Tribunal of Conciliation of the sixth judicial district had jurisdiction (Laws of April 23, 1862), but that court was abolished by Law of 1865, Chap. 336. By Law of 1873, Chap. 239, the jurisdiction of the court of New York Common Pleas and of the Superior Courts of New York and Buffalo, and of the City Court of Brooklyn, were made concurrent with that of the Supreme Court in civil actions and proceedings, but this act was declared unconstitutional in Landers v. Staten Island R. R. Co., 53 N. Y. 450.

The Superior and Common Pleas Court of New York and the Superior Court of Buffalo and the City Court of Brooklyn were abolished by the Constitution of 1894, and the jurisdiction of these several courts was vested in the Supreme Court. Const. 1894, Art. VI, § 5.

Action under the Code of Procedure.—By the Code of Procedure, § 448, the provisions of the Revised Statutes relating to the partition of land, were made to apply to actions for such partition brought under the act, so far as the same could be so applied to the subject-matter of the action without regard to its form. St. John v. Pierce, 22 Barb. 362, 367, affd., 4 Abb. App. Cas. 140. Under that Code, the proceedings, it was held, must be by summons and complaint, and not by petition.

The Code of Procedure was wholly repealed by Laws of 1880, Chap. 245.

Action under the Code of Civil Procedure. The Code of Civil Procedure supersedes all other statutes upon the subject. It follows largely the Revised Statutes, and its provisions are given below in connection with those formerly in force. The decisions under the Revised Statutes have, in some cases, been incorporated into the Code by express provisions, and in many other cases are as applicable now as formerly, owing to the similarity of the present law to that previously in force.

TITLE II. PROCEEDINGS UNDER THE REVISED STATUTES AND CODES.

A summary of the proceedings for partition under the Codes and the Revised Statutes is here given.

Proceedings under the Revised Statutes will be found at length in Tit. 3, Chap. V., Part III., of the Revised Statutes, 2 R. S. 315. These provisions were mainly founded upon the Law of April 7, 1801; 1 Web. 542; and the Law of 1813; I R. L. 507. On January 8, 1762, a colonial act was passed regulating partition of lands. 1 Van S. 402, amd., 416, 417. For proregulating partition of lands. 1 Van S. 402, amd., 416, 417. For proceedings and titles under said act, vide Munroe v. Merchant, 26 Barb. 383, revd., 28 N. Y. 9. On March 16, 1785, was passed the first act for the revd., 28 N. Y. 9. On March 16, 1785, was passed the first act for the partition of lands under the State government (1 J. & V. 202); and the system was altered and amended February 6, 1788; February 10, 1791; April 3, 1792; February 27, 1793; March 25, 1794; April 1, 1797, and April 7, 1801, providing for partition by petition to the Supreme Court. The act was amended by the introduction of other provisions, on April 9, 1804; April 2, 1806; March 27, 1807; April 6, 1807; March 8, 1811; April 12, 1813 (vide 1 R. L. 506), embracing most of the provisions contained in the Revised Statutes of 1830, below given. This Act of April 12, 1813, was repealed in the repealing clause of the Revised Statutes, passed December 10, 1828; vide 2 R. S. 779. Acts were also passed amending the

Laws of 1813, on April 15, 1814; April 9, 1814; March 23, 1821. This Act of March 23, 1821, was also repealed by Law of December 10, 1828, establishing the Revised Statutes (2 R. S. 779), also repealing an act passed April 18, 1826. The proceedings in partition actions were also regulated by Laws of 1830, Chap. 320; 1831, Chap 200; 1833, Chap. 227; 1840, Chaps. 177 and 379; 1842, Chap. 277; 1846, Chap. 182; 1847, Chap. 430; 1849, Chap. 420. This part of the Revised Statutes and the other acts named were all repealed by Laws of 1880, Chap. 245.

For the present law, see Code Civ. Proc., §§ 1532-1595.

The Application for Partition, When and by Whom made.— When two or more persons hold and are in possession of real property, as joint tenants or as tenants in common, in which either of them has an estate of inheritance, or for life, or for years, any one or more of them may maintain an action for the partition of the property, according to the respective rights of the persons interested therein, and for a sale thereof, if it appears that a partition thereof cannot be made without great prejudice to the owners.

Code Civ. Proc., § 1532. The former procedure was by petition. 2 R. S. 317, § 1. The application must be now by summons and complaint. Vide supra.

Who Must be Parties.

Every person having an undivided share, in possession or otherwise, in the property, as tenant in fee, for life, by the curtesy, or for years; every person entitled to the reversion, remainder or inheritance of an undivided share, after determination of a particular estate; every person, who by any contingency contained in a devise or grant, or otherwise, is or may become entitled to a beneficial interest in an undivided share thereof, within certain limits; every person having an inchoate right of dower in an undivided share in the property; every person having a right of dower not admeasured shall be made a party, except that no person not a joint tenant or a tenant in common shall be a plaintiff.

Whenever an action is brought before three years from the time when letters issued on the estate of a decedent, from whom plaintiff's title is derived, the executors or administrators shall be defendants, and if none have been appointed, that fact must be alleged, and the executors or administrators of a deceased person who, if living, should be a party, shall be defendants, and if none the fact alleged. Code Civ. Proc., § 1538.

Those who have parted with their interests are not necessary parties.

Vanderwerker v. Vanderwerker, 7 Barb. 221.

Failure to comply with Code Civ. Proc., § 1538, supra, renders title so

defective that purchaser will not be compelled to complete his purchase. Bernhardt v. Kurz, 2 N. Y. Ann. Cas. 112.

Who May be Made Parties.

The plaintiff may make a tenant, by the curtesy, for life or for years, of the entire property, or whoever may be entitled to a contingent, or vested remainder or reversion in the entire property, or a creditor, or other person having a lien or interest which attaches to the entire property, a defendant. Such a person not made a party is not affected by the judgment. Code Civ. Proc., § 1539.

A creditor having a lien on an undivided share may also be made a party defendant.

Code Civ. Proc., § 1540.

WHO MAY BE PLAINTIFFS.

Persons having conflicting claims may not join. Struppman v. Muller, 52 How. 211.

Joint tenants, vide Baldwin v. Baldwin, 74 Hun, 415.

No one but a joint tenant or tenant in common can be plaintiff. Code Civ. Proc., §§ 1538 (as amd.), 1532.

Tenant in common though trustee for others. Cheesman v. Thorne,

1 Edw. 629. See also Mellen v. Banning, 72 Hun, 176. But this does not prevent the wife of a tenant in common from being a co-plaintiff with him. Foster v. Foster, 38 Hun, 365. See also Rosekrans v. Rosekrans, 7 Lans. 486.

See as to husband of a woman seized of an interest. Middlebrook v.

Travis, 66 Hun, 510.

Representative Capacity. See Merritt v. Seaman, 6 N. Y. 168; Stilwell v. Carpenter, 62 id. 639; Farrington v. Am. Loan and Trust Co., 9 N. Y. Supp. 433.

Executors. - See Code Civ. Proc., § 1814.

When Possession Necessary.—Except as changed by Code Civ. Proc., § 1537 (L. 1853, Chap. 526), the plaintiff must in all cases have possession, actual and constructive. Code Civ. Proc., § 1532. Florence v. Hopkins, 46 N. Y. 182; Sullivan v. Sullivan, 66 id. 37; Boyd v. Dowie, 65 Barb. 237; Gailie v. Eagle, Id. 583; Greene v. Greene, 7 N. Y. Supp. 30; Haskell v. Queen, 21 N. Y. Supp. 357.

Code Civ. Proc., § 1537, makes an exception in favor of heirs out of possession against those claiming under a devise, based upon the Act of 1853,

Chap. 536.

This act was held constitutional in Ward v. Ward, 23 Hun, 431. As to review of judgment on appeal in such a case, see Hewlett v. Wood, 55 N. Y.

Under § 1537, Code Civ. Proc., partition may be brought to try the validity of a devise. Maloney v. Cronin, 44 Hun, 270; Henderson v. Henderson, *Id.* 420. Bowen v. Sweeney, 89 *id.* 359. See also Weston v. Stoddard, 137 N. Y. 119. N. Y. Life Ins. Co. v. Cuthbert, 31 App. Div. 191; Henriques v. Yale University, 28 id. 354.

A contingent interest not sufficient. O'Dougherty v. Aldrich, 5 Den. 385; Striker v. Mott, 2 Paige 387; Brownell v. Brownell, 19 Wend. 367.

Adverse possession a bar to the partition proceeding. McTiague v. McTiague, 5 N. Y. Supp. 130, affd., 127 N. Y. 685; Florence v. Hopkins, 46 id. 182; Burhans v. Burhans, 2 Barb. Ch. 398; Bradstreet v. Schuyler, 3 id. 608; Clapp v. Bromagham, 9 Cow. 530. Except when action is brought under § 1537. Hewlett v. Wood, 62 N. Y. 75. Compare 5 Barb. 51; 9 id. 516; where parties have equitable claims and the court has jurisdiction over the matter as such. Boyd v. Dowie, 65 Barb. 237; Culver v. Rhodes, 87 N. Y.

The objection must be taken by answer or demurrer. It cannot be raised

on appeal for the first time. Howell v. Mills, 56 N. Y. 226.

An action may be brought by a plaintiff, seeking to set aside a deed alleged never to have been delivered, and claiming as heir at law of the grantor. Leidenthal v. Leidenthal, 121 App. Div. 260. See Best v. Zeh, 82 Hun.

And one having an interest in fee in the property may maintain the action. Weston v. Stoddard, 137 N. Y. 119; Satterlee v. Kobbe, 173 id. 91; Wallace v. McEchron, 176 id. 424; Leidenthal v. Leidenthal, 121 App.

Constructive possession of one tenant in common enough. Beebe v. Griffing, 14 N. Y. 238; Florence v. Hopkins, 46 id. 182; Culver v. Rhodes.

Possession of a life tenant is not a bar to presumption of possession in remaindermen. Blakely v. Calder, 15 N. Y. 617; but compare Sullivan v. Sullivan, 66 id. 37.

The heirs of a testator who by will created a valid life estate followed by a void remainder, cannot merely as reversioners maintain an action under this § 1537. Garvey v. Union Trust Co., 29 App. Div. 513.

When a judgment under § 1537 binds unborn persons, beneficiaries under

will adjudged invalid. Fox v. Lee, 24 App. Div. 314.

Since the killing of testate by devisee does not render the devise to him void, an heir at law cannot in partition recover on proof that the devisee killed the testator. Ellerson v. Westcott, 148 N. Y. 149.

The conclusiveness of a judgment under Code Civ. Proc., § 2653a, cannot be avoided by an action under the above § 1537. Henriques v. Miriam Osborn

Home, 22 Misc. 653.

The invalidity must extend to the whole will or an entire devise of the real property. McKeon v. Kearney, 57 How. 349.

In such an action the will may be proved under general denial. Whitney

v. Whitney, 171 N. Y. 176.

Under Code Civ. Proc., § 1537, action may be brought by heirs at law, though widow is then in possession and occupation claiming title. Ward v. Ward, 23 Hun, 431; Wager v. Wager, Id. 439.

So where devise is to one incompetent to take by reason of alienage. Hall

v. Hall, 13 Hun, 306.

Transfer of devisee's apparent title does not bar action. Cronin, 44 Hun, 270. Malanev v.

Possession by one tenant in common in the absence of ouster enures to the benefit of all. Florence v. Hopkins, 48 N. Y. 182.

The plaintiff must in an action under Code Civ. Proc., § 1537, allege and prove that the devise is void. Holder v. Holder, 40 App. Div. 255.

Married Women .- A married woman formerly could not bring suit for partition without joining her husband. Spring v. Sandford, 7 Paige, 550. Need not have husband joined in any action relating to her separate estate Code Civ. Proc., § 450.

Nor a mere dowress, she being held not a tenant in common. Wood v.

Clute, I Sandf. Ch. 199.

A married woman may, since the Code of Procedure, bring partition against her husband. Moore v. Moore, 47 N. Y. 467; Code Proc., § 114; Code Civ. Proc., § 450.

The wife of a tenant in common need not join as plaintiff, but may be

made a defendant. Rosekrans v. Rosekrans, 7 Lans. 486.

Tenant by Curtesy.— A tenant by the curtesy of an undivided interest may bring partition. Tilton v. Vail, 42 Hun, 638; 6 N. Y. Supp. 146.

Reversioners and Remaindermen, -- When two or more persons hold as joint tenants or as tenants in common a vested remainder or reversion, any one or more of them may bring the action under certain conditions. Code Civ. Proc., § 1533; also L. 1887, Chap. 683; Hughes v. Hughes, 11 Abb. N. C. 37, affd., 30 Hun, 349; Havey v. Kelliher, 36 App. Div. 201; Salisbury v. Slade, 22 id. 346.

Before 1887 see Prior v. Prior, 41 Hun, 613.

As to presumption of death of lifetenant, see Code Civ. Proc., § 841 (amd.

L. 1891, Chap. 364).

In an action by a remainderman there can be no sale except by and with the consent in writing, acknowledged, proved and certified as a deed, to be recorded by person holding the particular estate; and where actual partition cannot be had without great prejudice, the complaint must be dismissed. Code Civ. Proc., § 1533; Levy v. Levy, 79 Hun, 290; Hughes v. Hughes, 2 C. P. R. 139; Scheu v. Lehning, 31 Hun, 183.

Infant Plaintiff.— Formerly an infant could not be a plaintiff. Strupperman v. Muller, 52 How. 211. Postley v. Kain, 4 Sandf. Ch. 508. By Laws of 1852, Chap. 277 (repealed by Laws of 1880, Chap. 245), an infant might be plaintiff in partition through a next friend. The action could be brought only by order of the court. 14 Abb. 299; 21 How. 479; 26 id. 250; 13 id.

104: 15 id. 483. The nonappointment of a guardian ad litem or next friend, for an infant plaintiff, was an irregularity that might be waived or cured. Rutter v. Puckhofer, 9 Bosw. 638. So as to authority. Pearsall v. Smith, 42 Misc, 10.

Under the Code of Civil Procedure .- The written authority of the surrogate of the county in which the property or a part of it is situated is necessary now to enable an infant to bring the action. The surrogate in granting the authority must be satisfied, by affidavit or other competent evidence, that it is for the infant's interest, and the court must be satisfied of the same thing before entering judgment. This fact must be recited in the judgment. Code Civ. Proc., § 1534.

See Code Civ. Proc., § 469, as to appointment of guardian before issue of

summons.

In an action for partition the guardian ad litem can be appointed only by the court. Code Civ. Proc., § 1535. Appointment by judge a nullity. Lyle v. Smith, 13 How. 104.

The general guardian cannot act. Re Stratton, 1 Johns. 509.

Guardian's Bond.— Code Civ. Proc. § 1536.

Other Parties Who May Bring the Action.—A person seized in fee though subject to a trust. Chapman v. Cowenhoven, 7 Hun, 341. Assignees for creditors. Rutherford v. Hervey 59 How. Pr. 231; 2 Barb. 599; Van Arsdale v. Drake, *Id.* 599.

Tenant by curtesy initiate. Riker v. Darke, 4 Edw. 668. Tenant by curtesy of an undivided interest. Tilton v. Vail, 42 Hun, 638. Not so dowress,

however, Riker v. Darke, supra; Wood v. Clute, 1 Sandf. Ch. 199.
A devisee. 33 Barb. 176. Of a life estate. Ackley v. Dygert, 33 Barb. 176. Trustees. Gaillie v. Eagle, 65 Barb. 583. Compare Uhl v. Loughran, 22 St. Rep. 459, affg. 14 C. P. R. 344; 17 St. Rep. 763.

Tenants for life in possession. Jenkins v. Fahey, 73 N. Y. 355.

see Cromwell v. Hull, 97 N. Y. 209.

Tenants for life pur autre vie of an undivided portion, with a contingent

remainder. Brevoort v. Brevoort, 70 N. Y. 136.

Receivers. Powelson v. Reeve, 2 Wkly. Dig. 375. Dictum to the contrary. Dubois v. Cassidy, 75 N. Y. 298. As to receivers of estates of deceased persons. See Code Civ. Proc., § 1869.

An alien may bring it until proceedings had by the State. Nolan v. Command, 11 C. P. R. 295.

An administrator when. Herbert v. Smith, 6 Lans. 493.

Forest Preserve and Adirondack Park. Forest, Fish and Game Law, G. L., Chap. XXXI, L. 1900, Chap. XX, § 221; see also Laws 1893, Chap. 332, known as "Article VI, Forest Preserve," of Chap. XLIII, G. L.; repealed and substituted by Law of 1895, Chap. 395.

By Whom, and of What, Partition May Not be Had.

When there is a power of sale under a will. See Davies v. Davies, 15 Wkly. Dig. 118; Underwood v. Curtis, 127 N. Y. 523; Fritz v. Fritz, 17

N. Y. Supp. 800; compare Palmer v. Marshall, 81 Hun, 15.

A cestui que trust cannot bring partition, and no title can be made in an action brought by him. Harris v. Larkins, 22 Hun, 488; Thebaud v. Schermerhorn, 10 Abb. N. C. 72; Sterricker v. Dickinson, 9 Barb. 516;

McLean v. McLean, 21 Supp. 326.

Tenant by the curtesy of the whole. See Reed v. Reed, 46 Hun, 212; 107 N. Y. 545; Cromwell v. Hull, 97 id. 209. Aliter of tenant of undivided share. Tilton v. Vail, 42 Hun, 638.

Contingent interest in undivided share; Striker v. Mott, 2 Paige, 387; or after conveyance of such interest. Pickert v. Windecker, 73 Hun, 476. Owners of separate parcels, etc. Boyd v. Dowie, 65 Barb. 237.

Partners pending dissolution of firm. Danvers v. Dorrity, 14 Abb. 206. See Levine v. Goldsmith, 83 App. Div. 399.

An action will not lie for the partition of an estate which is subject to express trust. Sicker v. Sicker, 23 Misc. 737.

Tenants by entirety. Miller v. Miller, 9 Abb. N. S. 444.
Tenant in fee. Lansing v. Pine, 4 Paige, 639.
Infant's estate which is forbidden by will to be sold. Muller v. Struppman, 55 How. 521.

Receiver in supplemenary proceedings. Dubois v. Cassidy, 75 N. Y. 288; Miller v. Levy, 46 Super. 207; Payn v. Becker, 87 N. Y. 153.

Dowress; vide supra, p. 766. Adverse possession; vide supra, p. 765.

Tax sale as a bar. See in this connection Wallace v. McEchron, 176 N. Y. 424.

State Salt Lands. Newcomb v. Newcomb, 12 N. Y. 603.

A court of equity will not entertain a partition suit where the legal title is disputed or doubtful, nor where there is an action pending. Clapp v. Bromagham, 9 Cow. 530; Burhans v. Burhans, 2 Barb. Ch. 398; Bradstreet v. Schuyler, 3 id. 608; 7 Barb. 221; 14 Abb. 206.

Nor by a widow claiming merely under a dower right. Coles v. Coles, 15 Johns. 319; Huntington v. Huntington, 9 C. P. R. 182; Riker v. Darke,

4 Edw. 668.

Even after assignment. Wood v. Clute, 1 Sandf. Ch. 199.

Nor between tenant in fee and his landlord. Lansing v. Pine, 4 Paige, 639.

Parties Defendant.— As to jurisdiction over parties defendant, it may be observed, that when the defendant has never been served according to law nor appeared, and there is consequently a defect of jurisdiction, it is fatal, and can be taken advantage of by any person affected by or interested in the proceedings.

Stone v. Miller, 62 Barb. 430.

As to parties. Vide Code Civ. Proc., §§ 1538, 1539, 1540, 1570.

Who Must be Defendants.

See 2 R. S. 318, § 6; Code Civ. Proc., § 1538.

An assignee in bankruptcy is a necessary party. Smith v. Long, 12 Abb. N. C. 113.

One claiming valid term for years is not affected if not party. Code Civ. Proc., § 1539; Moore v. Townshend, 54 Super. 245, affd., 120 N. Y. 647. Insane persons, Prentiss v. Cornell, 31 Hun, 167; King v. Donnelly, 5 Paige, 46; Braker v. Devereaux, 8 id. 513; Kirk v. Kirk, 137 N. Y. 510.

Reversioners. Striker v. Mott. 2 Paige. 387.

After-born children. Kirk v. Kirk, 137 N. Y. 510.

Contingent interests. Barnes v. Luther, 77 Hun, 234; Campbell v. Stokes, 21 N. Y. Supp. 493, affd., 142 N. Y. 23; Dwight v. Lawrence, 111 App. Div.

Executors or administrators of a deceased person, who, if living, should have been made a party, are necessary parties. Code Civ. Proc., § 1538, and parties having interests in undivided shares. Legatees, Jordan v. Poillon, 77 N. Y. 518; compare Prentiss v. Janssen, 79 id. 478. Remaindermen. Campbell v. Stokes, 142 id. 23; though the present estate be in trust. Moore v. Appleby, 36 Hun, 368, affd., 108 N. Y. 237.

Infants and practice as to them, infra, p. 770.

Persons born pendente lite. As to these see p. 731. Married pendente lite, Church v. Church, 3 Sandf. Ch. 434; Wilkinson v. Parish, 3 Paige, 653; Matthews v. Matthews, 1 Edw. 565; Jackson v. Edwards, 7 Paige, 386.

Lessee. Moores v. Townshend, 54 Super. 245, affd., 120 N. Y. 647.

Who May be Defendants.

The plaintiff may, if he choose, make a tenant for life, for years, in dower or by the curtesy of the whole property, or a creditor, or any one who has a lien on or interest in the whole, a defendant. If he do so, the final judgment may award them their rights or leave them unaffected. If not parties, they are not bound by the judgment. Code Civ. Proc., § 1539.

A creditor having a lien on an undivided share or interest in the property

may also be made a defendant. Code Civ. Proc., § 1540.

See cases under these sections, supra, p. 768.

Dower.— It is not necessary, although it is advisable, to make parties having an inchaate right of dower in the whole premises parties. 1 Barb. 500; Id. 560: 8 How. 456; Wood v. Clute, 1 Sandf. Ch. 199; Bradshaw v. Callagham, 8 Johns. 558; Coles v. Coles, 15 Johns. 319.

But those entitled to dower in an undivided share must be. Code Civ. Proc., § 1538. See also Ripple v. Gilborn, 9 How. 456; Brownson v. Gifford,

Id. 389; Knapp v. Hungerford, 7 Hun, 588.

The widow of one purchasing during suit has dower. Church v. Church, 3

Sandf. Ch. 434.

If a male defendant marry, pendente lite, his wife should be made a party.

Jackson v. Edwards, 7 Paige, 386.

If not a party, the woman's dower attaches to the share set off to her husband, when divided, if no sale is made. Wilkinson v. Parish, 3 Paige, 653; Matthews v. Matthews, 1 Edw. 565.

See further as to provision for dower under the judgment, infra.

Alien Heirs .- Toole v. Toole, 112 N. Y. 333.

Incumbrancers.—By 2 R. S. 318, § 8, as amd. L. 1830, Chap. 320, §§ 40, 41, it was unnecessary to make creditors having a lien, by judgment, decree, mortgage or otherwise, parties to the proceedings in the first instance. But if on an undivided interest, the lien attached to that interest only after partition; but such incumbrancers having specific liens on undivided interests might be made parties if desired. 2 R. S. 318, § 9; repealed by Laws of 1880, Chap. 249; and to make a clear title they should be joined. Bogardus v. Bogardus, 7 How. Pr. 305.

They are now not necessary, but are proper parties. Code Civ. Proc.,

§§ 1539, 1540; and vide infra, p. 779.

If judgment creditors are made parties within ten years from the date of the judgment, they will not be barred by the lapse of the ten years pending

the action. Caswell v. Bigelow, etc., Co., 41 Hun, 434. Compare Id. 206.

If persons having a lien on the whole property are not made parties they are not affected by the judgment. Code Civ. Proc., § 1539; Leinan v. Elten,

43 Hun, 249.

Incumbrancers need not be made parties. Wotten v. Copeland, 7 Johns. Ch. 140; Sebring v. Mersereau, 9 Cow. 344; 3 Abb. 246; Harwood v. Kirby, 1 Paige, 469.

Nor formerly reversioners always. Striker v. Mott, 2 Paige, 387; 28 Barb. 336. But the rule is otherwise now. Code Civ. Proc., § 1538.

Nor lien holders. 7 How. 305; 2 Barb. 599; 7 Barb. 221.

If the lands are divided, the lien will be confined to the share of the party against whom the incumbrance is held. Harwood v. Kirby, 1 Paige, 469.

Nor the owner of a trust estate, unless the trust is void. Braker v. Devereaux, 8 Paige, 513; but the trustee should be a party; id; and substituted trustee. King v. Donnelly, 5 Paige, 46.

Contingent Interests. - Future contingent interests of persons not in esse, and though not claiming under parties to the suit, are barred by the proceedings. They are bound by the action, as virtually represented by those in whom the present estate is vested. Mead v. Mitchell, 17 N. Y. 210; 5 Abb. 92; Law of 1840, Chap. 177, repealed by Laws of 1880, Chap. 245; Code Civ. Proc., §§ 1557, 1577; Clemens v. Clemens, 37 N. Y. 59; Cheeseman v. Thorne, 1 Edw. Ch. 629; Brevoort v. Brevoort, 70 N. Y. 136.

Since the acts of 1848 and 1849 relative to married women, a husband. it. was supposed, was not a necessary party where she took an interest in land subsequent to those statutes. 22 Barb. 372; 18 id. 159, 164; 17 id. 662; 28 id. 343; but see 18 id. 556, and 29 id. 633. It was considered more judicious, however, to make him a party.

But now it has been held that he is not a proper party under Code Civ.

Proc., § 450; Mapes v. Brown, 14 Abb. N. C. 94.

It was formerly not necessary to make every person having a future and contingent interest in the premises a party. It was sufficient if the person who had the first vested estate of inheritance, and all other persons having who had the just vested estate of inheritance, and all other persons having or claiming prior rights or interests in the premises, and intermediate remaindermen, were brought before the court. Nodine v. Greenfield, 7 Paige, 544; Mead v. Mitchell, 17 N. Y. 210; Bowman v. Tallman, 27 How. 212; Monarque v. Monarque, 80 N. Y. 320. Now such persons must be parties, with a limitation where they are a class to those who would have been entitled, if the event took place immediately before the commence of the comm entitled, if the event took place immediately before the commencement of the action. Code Civ. Proc., § 1538; Moen v. Appleby, 36 Hun, 386; Dwight v. Lawrence, 111 App. Div. 616.

As to remaindermen, see supra, as to who are necessary defendants.

NEITHER NECESSARY NOR PROPER DEFENDANTS.

Owners after conveyance. Vanderwerker v. Vanderwerker, 7 Barb. 221. Purchaser pendente lite. Noble v. Cromwell, 27 How. 289; 3 Abb. Ct. App. Dec. 382; 6 Abb. 59.

Administrator of common ancestor should not be made party. Underhill v.

Underhill, 6 App. Div. 78.

Service of the Summons.— For directions as to this very important element of jurisdiction, vide Code Civ. Proc. §§ 416-434. For substituted service; §§ 435-445. As to proceedings against unknown owners; § 451.

If served by publication on a defendant whose name does not appear in the summons as published, the title will be unmarketable. Bowler v. Ennis, 46 App. Div. 309.

Infant Defendant .- By the Code of Procedure, § 134, if the infant was under fourteen, summons had to be served not only on the infant personally, but also on his father, mother or guardian, or if none in the State, on the person having the care and control of him, or with whom he resided or in whose service he is employed. This is re-enacted in Code Civ. Proc., § 426.

The Revised Statutes provided for the appointment of guardians ad litem for minors, who, on being appointed by the court, were to give bonds in such penalty and with such surety as the court should direct, to the People of this State, conditioned for the faithful discharge of their trust, and to render an account when required. On their so doing, their acts in relation to the partition "shall be binding" on such minors. 2 R. S. 317, §§ 2, 3, 4; repealed, Laws of 1880, Chap. 245. As to appointment of guardians ad litem under present law, vide Code Civ. Proc., §§ 469-471, 1535. A similar bond is required by Code Civ. Proc., § 1536. As to publication against nonresident minors, under Act of 1831, Chap. 227, according to the practice of the old Court of Chancery, vide Clemens v. Clemens, 37 N. Y. 59, affg. 60 Barb. 366.

Service of summons may be made upon the guardian ad litem nisi of a nonresident or absent infant with like effect as upon an adult without the State, when an order for that purpose has been obtained, except that the time to appear or answer is twenty days after the service of the summons,

exclusive of the day of service. Code Civ. Proc., § 473.

Guardian, how Appointed .- By the Code of Procedure, § 116 (amended in 1865), when an infant was a party to a suit, he must appear by guardian.

As to the details for the present appointment of a guardian they will be found in Code Civ. Proc., §§ 469-471, 1535, and must be carefully carried out. Guardian having adverse interests — fatally defective. Roarty v. McDermott, 84 Hun, 527; revd., 146 N. Y. 296. See Supreme Court Rules, 49. Failure to state same would not make title defective. Disbrow v. Folger, 5

The omission to have a guardian appointed prevents the court from having

jurisdiction. 41 How. 41; 60 Barb. 117; 42 id. 636.

Appointment of guardian as substitute for service of summons under Revised Statutes and Code of Procedure. Gotendorf v. Goldschmidt, 83 N. Y. 110. Since the Code of Civil Procedure the rule, if ever existing, changed. Not until service has been effected can application for appointment of guardian be made, and judgment is voidable otherwise. Crouter v. Crouter, 133 N. Y. 55; O'Donoghue v. Smith, 85 App. Div. 325; Darrow v. Calkins, 154 N. Y. 503.

A minor cannot waive the omission of the appointment of a guardian as to 3 rights. Fairweather v. Satterly, 7 Rob. 546; Crouter v. Crouter, 133 his rights. N. Y. 55.

If the court makes no order for further service after guardian appointed under Code Civ. Proc., § 427, it will be presumed that it considered none necessary. Moulton v. Moulton, 47 Hun, 607, reconsidered, 17 N. Y. St. Rep.

Where a guardian is not appointed the judgment is voidable not void; only at the election of the infants and upon their application seasonably made. McMurray v. McMurray, 66 N. Y. 175. A title under such circumstances may be rejected by purchaser as not marketable. Crouter v. Crouter, 133 N. Y. 55.

The presumption in proceedings nearly twenty years old is of regularity in appointment, but irregularity would not hurt. Wood v. Martin, 66 Barb.

241.

Judgment cannot be attacked collaterally for error in appointment. Parish v. Parish, 175 N. Y. 181.

The Guardian's Bond.— The bond may be amended (14 How. 94), even after judgment. 7 Abb. 473; 25 Barb. 336; Croghan v. Livingston, 17 N. Y. 218. See Laws of 1833, Chap. 207, as to appointment of clerk of court, register or assistant register, without security (Minor v. Betts, 7 Paige, 596), for an infant defendant absentee. Laws of 1833, Chap. 227, was repealed by Laws of 1880, Chap. 245. See now as to appointment of clerk, Code Civ. Proc., § 472; the clerk must act if appointed. Id.

The omission to file the bond held mere irregularity and amendable, and not affecting the validity of the sale. 6 Abb. 350; 25 Barb. 336; Croghan v.

Livingston, 17 N. Y. 218.

But held where the infant was plaintiff under Laws of 1852, Chap. 277, if the bond be not filed, the sale would be set aside, and purchaser released. 21 How. 479.

By Laws of 1852, Chap. 277, the court might order the bond to be filed "nunc pro tunc," if before judgment, in any case, or after judgment and actual partition. 6 Abb. 350; Croghan v. Livingston, 17 N. Y. 218; 25 Barb. 336; repealed by Laws of 1880, Chap. 245.

The bond should be executed by the guardian himself, as well as by his sureties. Code Civ. Proc., § 1536; Jennings v. Jennings, 2 Abb. Pr. 6; Člark

v. Clark, 14 Abb. 299.

Security cannot now be in any case dispensed with, even though the guardian ad litem be the general guardian. Code Civ. Proc., § 1536. This section provides for the form of the bond.

Bond; Undertaking.—A provision of law authorizing or requiring a bond to be given shall be deemed to have been complied with by the execution of an undertaking to the same effect. Statutory Construction Law, Laws 1892, Chap. 667, § 16.

It is doubtful, however, if this provision operates to prevent the necessity of execution by the guardian himself. See L. 1892, Chap. 667, § 1; also the

express wording of Code Civ. Proc., § 1536, and cases above cited.

A Judge Cannot Appoint. It is settled now that the guardian can only be appointed by the court. Code Civ. Proc., \$ 1535.

Answer of Guardian. A guardian ad litem's appearance or answer may be filed nunc pro tunc. 3 Bosw. 410.

The guardian need not necessarily answer. Bogart v. Bogart, 45 Barb. 121. Omission will not affect judgment. Althause v. Radde, 3 Bosw. 410.

Presumption of Regularity.—In the absence of evidence to the contrary, the regularity of the appointment of the guardian is to be presumed. Foote v. Stevens, 17 Wend. 483; Downing v. Rugar, 21 id. 178, 184. See also Bosworth v. Vandewalker, 53 N. Y. 597.

Presumption of service on infant from papers on appointment of special guardian alleging such service. Murphy v. Shea, 143 N. Y. 78; Sloane v. Martin, 77 Hur. 240.

Martin, 77 Hun, 249.

Settlement by Guardian.- A guardian cannot of his own action, without direction of the court, make a settlement. Edsall v. Vandemark, 39 Barb.

Infant Lunatics or Idiots.- The guardian or committee out of the State can apply for the guardian ad litem. Rogers v. McLean, 34 N. Y. 536, modifying 31 Barb. 304, affg. Rogers v. McLean, 11 Abb. 440; 10 Abb. 306.

Infant's Laches. -- If infants do not object to irregularities for a length of time after coming of age, innocent parties will be protected, and the non-appointment of a guardian, etc., cannot be objected to by a purchaser. McMurray v. McMurray, 41 How. 41; s. c., 60 Barb. 117, and another proceeding in 66 N. Y. 175; Clemens v. Clemens, 60 Barb. 366, affd., 37 N. Y. 59.

Limitations.— Darrow v. Calkins, 154 N. Y. 503.

What Complaint to State.— The complaint must describe the property with common certainty, and must specify the rights, shares, and interest therein of all the parties, as far as the same are known to the plaintiff. If a party, or the share, right, or interest of a party, is unknown to the plaintiff; or if a share, right or interest is uncertain or contingent; or if the ownership of the inheritance depends upon an executory devise; or if a remainder is a contingent remainder, so that the party cannot be named; that fact must also be stated in the complaint.

Code Civ. Proc., § 1542.

For contents of petition under the Revised Statutes, vide 2 R. S. 318, §§ 5, 6, 7; Wainman v. Hampton, 110 N. Y. 429.

A complaint is not demurrable for failure to state as required by Supreme Court Rule 65, that the parties hold no other lands in common in this State. Pritchard v. Dratt, 32 Hun, 417. The object of the rule is merely to protect as to costs.

The suit being a proceeding in rem, the jurisdiction of the court is confined to the subject matter set forth in the complaint. Corwithe v. Griffing, 21 Barb. 9.

Statement of mere belief that defendant claims a certain interest and that claim is invalid, held insufficient. Satterlee v. Kobbe, 39 App. Div. 420.

Averments in complaint that might on motion have been amended will not render decree irregular. Noble v. Cromwell, 26 Barb. 475.

Error in description may be amended. Thompson v. Wheeler, 15 Wend. 340. An unknown interest may properly be described as a "claim." Townsend v. Bogart, 126 N. Y. 270.

Notice of Lis Pendens.—It will be necessary to see that a notice of lis pendens has been filed according to Code Proc., § 132; Code Civ. Proc., §§ 1670-1674. Vide Waring v. Waring, 7 Abb. 472, as to lis pendens in partition suits and the effect of irregularities in filing; also Shannon v. Pentz, 1 App. Div. 331, to the effect that a conveyance pendente lite is without effect; also" Notice of Lis Pendens," generally, Chap. XLV.

Proof of Title and Abstract.— The Revised Statutes provided as follows: If the default of any of the defendants, whether known or unknown, shall have been entered, the court shall require the petitioners to exhibit proof of their title, and an abstract of the conveyances by which the same is held. Such proof may be taken in open court or by the clerk thereof, and reference for that purpose. And in either case, the proof given and the abstract furnished, shall be filed with the clerk." 2 R. S. 321, § 22. This provision has not been retained in the Code of Civil Procedure. Vide Code Civ. Proc., § 1545; but provision is made for a reference to take proof, where there are infants, or parties who have not appeared or pleaded.

No title is had by a partition action, when none existed before. Greenleaf

v. Brooklyn, etc., Co., 141 N. Y. 395.

Surrogate's decree, to what extent evidence. Corley v. McEmeel, 87 Hun,

Acquiesence and lapse of time under claim of title. Conkling v. N. Y. El. R. R. Co., 76 Hun, 420.

Proof must be such as to entitle to recovery in ejectment. Larkin v.

Mann, 2 Paige, 27.

Plaintiff should be required to trace back to common source of several tenants in common. Hamilton v. Morris, 7 Paige, 39.

Referee is bound by the pleadings. McAlear v. Delaney, 19 Week. Dig. 252.

Death of Parties, Plaintiff or Defendant .- Provision was made by the

Revised Statutes for the substitution of parties in interest, on the decease of parties to the action. 2 R. S. 387, §§ 6, 7, repealed, L. 1880, Chap. 345; see Code of Procedure, § 121, and Code Civ. Proc., §§ 758, 1588.

If, upon the death of one of two or more defendants, in an action of partition, the interest of the decedent in the property passed to a person, not a party to the action, the latter may be made defendant by the order of the court; and a supplemental summons may be issued, to bring him in accordingly. Code Civ. Proc., § 1588. See also the following cases, as to the death of parties before the sale, and its effect: Gordon v. Sterling, 13 the death of parties before the sale, and its energy Gordon v. Sterling, 10 How. Pr. 405; Sharp v. Pratt, 15 Wen. 610; Wilde v. Jenkins, 4 Paige, 481; Reynolds v. Reynolds, 5 id. 161; Gardner v. Luke, 12 Wend. 269; Requa v. Holmes, 16 N. Y. 193; 26 id. 338; Waring v. Waring, 7 Abb. 472; see also 9 Abb. 323; 18 How. Pr. 458; Hoffman v. Treadwell, 6 Paige, 308.

No decree can be made unless all the tenants in common are before the court. Burhans v. Burhans, 2 Barb. Ch. 398, 407; Code Civ. Proc., § 1538, amd.

L. 1890, Chap. 509.

If one die, the action must be revived, or the judgment is void. Requa v. Holmes, 26 N. Y. 338; 27 How. 289; 16 N. Y. 193; Gordon v. Sterling, 13 How. 405; Waring v. Waring, 7 Abb. 472.

Luce v. Burchard, 78 Hun, 537, as to party to whom a gross sum is allowed. Mingay v. Lackey, 74 Hun, 89, affd., 142 N. Y. 449. Also infra.

Presumption of death of unknown heirs. Code of Civ. Proc., § 841; see L. 1889, Chap. 40; L. 1891, Chap. 364.

Receivers of Estate of Deceased Persons .- As to partition by, vide Code Civ. Proc., § 1869.

Adverse Possession. How Far Seisin of Plaintiff may be Controverted .-Prior to 1880 and the enactment of Part II of the Code of Civil Procedure (Code Civ. Proc., §§ 1537, 1543; note, 28 Abb. N. C. 128), the seisin of the plaintiff could not be disputed in an action for partition, and an issue on title once raised defeated the action and drove the plaintiff to ejectment. Brownell v. Brownell, 19 Wend. 367; Haskell v. Queen, 21 N. Y.

Supp. 357; Hulse v. Hulse, 17 C. P. R. 92; Damron v. Campion, 24 Misc. 234; Townshend v. O'Bogert, 20 C. P. R. 262 and note; Harding v. Craft, 21 App. Div. 139; Florence v. Hopkins, 46 N. Y. 182; Van Schuyver v. Mulford, 59 id. 426; Culver v. Rhodes, 87 id. 348, 350; Weston v. Stoddard, 137 id. 119; Ellerson v. Westcott, 148 id. 149, 153; note to 28 Abb. N. C. 127; Stewart v. Monroe, 56 How. Pr. 193. To bring partition plaintiff must be seised. Such a seisin or possession does not necessarily mean that plaintiff must have pedis possessio, or actual possession, but a present right to possession. Purdy v. Purdy, 18 App. Div. 310, 312; Bender v. Terwilliger, 48 App. Div. 371, affd., 166 N. Y. 590; Wainman v. Hampton, 110 id. 429; Bigelow v. Bigelow, 39 App. Div. 103; Drake v. Drake, 61 id. 1. A recent case discloses the extent of the change introduced by the Code of Civil Procedure, (Satterlee v. Kobbe, 173 N. Y. 91; Weston v. Stoddard, 137 id. 119), and questions of legal title may now be tried in partition actions. Wallace v. McEchron, 176 N. Y. 424, 427.

Interlocutory Judgment.—The court ascertains the rights of the parties (generally by a reference) where there is a default or there are infant parties, and gives judgment of partition according to such rights, or for a sale, if the lands cannot be fairly divided, as infra. Issues of fact are triable by a jury and upon the pleadings, unless the court directs the framing of issues under Code Civ. Proc., § 970. See also Code Civ. Proc., §§ 1544-1548; 2 R. S. 321, §§ 23, 24; 331, § 81.

Right of infant raising issue as to plaintiff's ownership to trial by jury.

Fairweather v. Burling, 98 App. Div. 267.

No decree can be made unless all the parties interested are before the Burhans v. Burhans, 2 Barb. Ch. 398, 407; Braker v. Devereaux,

Trial by jury may be waived. Lide v. Brenneman, 7 App. Div. 273. Actual partition. Chittenden v. Gates, 18 App. Div. 169. Compensation for improvements may be allowed. Ford v. Knapp, 102 N. Y. 135. See Clapp v. Nichols, 31 App. Div. 531; Jones v. Duerk, 25 App. Div. 551.

Specific liens on undivided shares are to be determined by the interlocutory judgment. Winfield v. Stacom, 40 App. Div. 95. See also Kelly v. Werner,

Where, in an action for partition there exists a feeling of hostility between the owners, indicating a probability of future injury to the interests of the parties, a receiver of the rents and property will be appointed. Goldberg v. Richards, 5 Misc. 419.

A sale subject to an estate of curtesy in the whole property will not be ordered unless all parties consent. Hughes v. Hughes, 1 Abb. N. C. 37, affd., 30 Hun, 349.

Sale is forbidden in an action by reversioners and remaindermen unless tenant of the particular estate consent. Code Civ. Proc., § 1533 (amd. L. 1887, Chap. 683); Scheu v. Lehning, 31 Hun, 183. The sale should be properly limited to the life interest. O'Toole v. O'Toole, 39 App. Div. 302.

properly limited to the life interest. O'Toole v. O'Toole, 39 App. Div. 302. Where a party to whom a gross sum is allowed by the judgment in lieu of an estate for life dies, the judgment should be amended. Mingay v. Lackey, 74 Hun, 89, affd., 142 N. Y. 449.

Provision was made by Law of 1847, Chap. 430, §§ 1, 2, 3, 4, and 5, relative to actual partition or a sale, and when and how made and as to disposition of shares and interests, etc. This act was repealed by Laws of 1880, Chap. 245. See Code Civ. Proc., § 1546.

An error in judgment as to protecting contingent interests of remaindermen will not affect title. Rockwell v. Decker, 33 Hun, 343, distinguishing Monarque v. Monarque, 80 N. Y. 320.

Judgment takes effect from the order confirming the report. Van Orman v. Phelps, 9 Barb. 500; Lynch v. Rome Gas Co., 42 id. 591.

Judgment must be for the lands described in the complaint, and for none

other. Corwithe v. Griffin, 21 Barb. 9.

It is a matter of discretion to direct a sale or partition. Scott v. Guernsey, 48 N. Y. 106; see Fleet v. Dorland, 11 How. 489. See Chittenden v. Gates, 18 App. Div. 169.

Interlocutory judgment is conclusive as to title thereby adjudged in an action of ejectment involving such title previously brought but not previously

tried. Place v. Rogers, 101 App. Div. 193.

For Partial Partition .- Code Civ. Proc. § 1547. Ordered where the right of one defendant to an undivided moiety was admitted, but interests in the other half being disputed were left to litigation. Phelps v. Green, 3 Johns. Ch. 302.

Part may be set off to one and the rest sold, if court deems best. Haywood v. Judson, 4 Barb. 228.

See Warfield v. Crane, 4 Abb. Ct. of App. Dec. 525; Walter v. Walter, 3 Abb. N. C. 12.

Election to Take Shares in Common .- Code Civ. Proc. § 1548. See Northrup v. Anderson, 8 How. 351.

Commissioners Appointed to Partition.— The Code further provides where the interlocutory judgment directs a partition, for the appointment of three commissioners to make partition, and for their oath, and that they shall proceed to make actual partition, and allot the several portions and shares to the respective parties according to their interests as adjudged. In case it appears to them, or a majority, that partition cannot be made without great prejudice to the owners, they must make a written report to the court. The court may at any time remove any of them. Others may be appointed to fill vacancies. Their duties and proceedings are fully prescribed.

Code Civ. Proc., §§ 1549 to 1556.

Partition where there is a Particular Estate.— The method prescribed, Code Civ. Proc. § 1553.

Report. They, or any two of them, are to make a full report of their proceedings, describing the land and shares allotted to each party, etc., which report is to be acknowledged or proved and certified in like manner as a deed to be recorded, and filed with the clerk. Code Civ. Proc., § 1554; 2 R. S. 322, §§ 30, 31, 33.

All must meet (27 Barb. 350; Cole v. Hall, 2 Hill, 625), but the acts of a majority are valid. Code Civ. Proc., \$ 1554; 2 R. S. 322, \$ 31.

The statute further provides that the court must confirm or set aside the report and may, if necessary, appoint new commissioners to proceed as above. Code Civ. Proc., § 1556; 2 R. S. 322, § 34.

The report should be signed by all and should state that all met, and if not signed by all, a reason for the omission should be stated. Underhill v.

Jackson, 1 Barb. Ch. 73.

The court should set aside only on grounds that would warrant setting aside a verdict. Livingston v. Clarkson, 4 Edw. 596; Doubleday v. Newton. 9 How. 71.

Final Judgment of Partition.— Upon the confirmation, by the court, of the report of the commissioners making partition, final judgment, that the partition be firm and effectual forever, must be rendered, which is binding and conclusive upon (1) the plaintiff. each defendant duly served, and their legal representatives; (2) each person claiming from, through, or under them, by title accruing after lis pendens or judgment-roll filed; and (3) each person. not in being when the interlocutory judgment is rendered, who afterward becomes entitled by any contingency, if the party first entitled or other virtual representative of such interest was a party under (1): but does not affect a party whose interest is expressly reserved and left uneffected under Code Civ. Proc., § 1539, or a person claiming from, through or under such a party. Code Civ. Proc. § 1557.

2 R. S. 322, § 35.

Vide Monarque v. Monarque, 80 N. Y. 320; Rockwell v. Decker, 33 Hun, 343; Jordan v. Van Epps, 85 id. 427.

Judgment does not create title where none existed. Greenleaf v. Brooklyn, Flatbush, etc., R. R. Co., 141 N. Y. 395.

By Revised Statutes. The Revised Statutes, 2 R. S. 322, § 35, made the judgment binding: 1. On all parties, named therein, and their legal representatives, who shall at the time have any interest in the premises divided as owners in fee, or as tenants for years, or as entitled to the reversion, remainder or inheritance; or who may be or become entitled to any contingent beneficial interest; or who shall have any interest in any undivided share, as tenants for years, for life, by the curtesy, or in dower. 2. On all persons interested in the premises, who may be unknown, to whom notice shall have been given of the application for partition, by such publication as hereinbefore directed. 3. On all other persons claiming from such parties, or persons, or either of them.

It will bar the future contingent interest of persons not in esse. Vide

supra p. 769.

As to what questions are finally settled by the judgment, vide Jordan v. Van Epps, 85 N. Y. 427; Barnard v. Onderdonk, 98 id. 158; Home Ins. Co. v. Dunham, 33 Hun, 415; Reed v. Reed, 107 N. Y. 545. Such a judgment, where no division has already been made, is not a bar to an action for the foreclosure of a mortgage on an undivided share. Reid v. Gardner, 65 N. Y. 578.

Final judgment entered before decision and interlocutory judgment will

be set aside. Burnham v. Denike, 54 App. Div. 132.

Compelling Possession.— The judgment may direct the delivery of possession of the shares to the persons to whom they are allotted. If a party or his representative or successor, who is bound by the judgment, withhold possession, he may be punished for contempt, and the sheriff may be ordered to put the proper person in possession. Code Civ. Proc., § 1675.

Effect of Judgments on Tenants in Dower, etc.— Formerly such judgment and partition was not to affect any tenants in dower, etc.—Formerly stein judgments or for life, in the whole premises, nor any other persons except those above enumerated. 2 R. S. 323, § 36. For the present law, vide Code Civ. Proc., § 1539, leaving the effect of the judgment on these estates with the court. See also provisions as to dower, etc., considered supra, p. 769.

Ouster by Paramount Title .- If one of the parties is subsequently evicted from his part by paramount title, it is supposed that equity might order

a repartition of the rest. This principle is established by statute in Massachusetts.

Interests in Common.- By Law of 1847, Chap. 430, repealed by Laws of 1880, Chap. 245; Code Civ. Proc., § 1547, where there are conflicting claims, portions of the land must be set off in common for further adjustment.

Also if parties desire, tracts may be set off in common. Code Civ. Proc., § 1548. See Haywood v. Judson, 4 Barb. 228; McWhorter v. Gibson, 2 Wend.

443; Northrop v. Anderson, 8 How. 351.

Errors in Judgment .- Irregularities in the statement of the interest of the parties in the judgment will not vitiate the proceedings. Noble v. Cromwell, 26 Barb. 475, affd., 27 How. 289. See also p. 779.

The Sale.— (See also Chap. XXXVIII. Tit. IV. and Chap. XXVIII, Tit. V.) If it appears to the court, or is found by verdict, decision or report before the interlocutory judgment, or if a majority of the commissioners report that the property or any part thereof is so circumstanced that a partition cannot be made without great prejudice to the owners and the court is satisfied the report is just and correct, the interlocutory judgment must direct, or the court may, by amendment or by a supplemental interlocutory judgment, direct that the property or the distinct parcel thereof so circumstanced be sold at public auction to the highest bidder, by a referee named in the judgment or by the sheriff. The terms of credit are to be fixed by the court in the interlocutory judgment.²

decree of actual partition.

Rep. 116.

The history of judicial sales in partition suits discloses that a court has no inherent jurisdiction to decree a sale. It must follow the statute, which alone confers the power to decree a sale. There is no common-law power to order a sale. Even the power to decree actual partition among tenants in common is a statutory judicial power, and not inherent in courts. Mead v. Mitchell, 5 Abb. Pr. 92; s. c., 17 N. Y. 210.

After the conflicting power to decree actual partition was finally settled, so that

After the conflicting power to decree actual partition was finally settled, so that both courts of equity and courts of law exercised the power alike (Story Eq. Jurisp., § 646), a series of statutes was necessary to empower the courts of New York to

decree a sale. An act of the Provincial Assembly in 1762 first provided for a sale of a small part of premises owned jointly or in common, in order to defray the cost of actually partitioning the balance *Vide* Chap. 1171, Van Schaack's Laws of New York, passed January 8, 1762. In 1785 the State Legislature re-enacted a like law, not contemplating a judicial sale, excepting of a small part of the premises held in

²Mr. Fowler's Note on "Judgment or Decree of Sale." It is very obvious that a decree of sale of an estate without consent of the owners and by judicial flat is a very different thing from a decree of actual partition, and that such a sale was not originally intended to be authorized in this State in partitions usits, except in exceptional cases, where actual partition could not take place "without great prejudice" to the owners. 1 J. & V. 201, 207; Code Civ. Proc., § 1546. The original compulsory partition acts (31 Hen. VIII, Chap. 1; 32 id., Chap. 32), had contemplated no such proceeding as a forced sale of the estate, and for a long period under them and their sequel actual partition was required to be made formally in every case. 2 Daniel C. Pr. 1157; Story Eq. Juris., § 652. Now, under more recent acts a judicial sale of part of the estate to defray costs of partition seems to be contemplated in England, unless parties defray the costs. 31 & 32 Vict., Chap. 40.

In America, on the other hand, a decree of sale in partition actions seems to begin to be treated not as an extraordinary judicial power to be exercised only in rare cases where all the jurisdictional and statutory facts are found (Scott v. Gurnsey, 48 N. V. 106; Brooks v. Davey, 109 id. 495; cf. Brevoort v. Brevoort, 70 id. 136, 139), but as a matter of discretion. This view of the law would certainly seem a stretch of judicial prerogative, and an unnecessary interference with vested rights, for such a forced judicial sale is a high prerogative and only allowed by the statute to be decreed when a "great prejudice" would be the result of a decree of actual partition. Of. Willard, Eq. Juris., 703; David v. David, 31 St. Rep. 118.

Code Civ. Proc., §§ 1546, 1560, 1573, 1678.

The judgment must be entered in the county where the property is situated before the purchaser can be required to pay or take a deed. Code Civ. Proc. § 1677.

But it provided that in case an actual partition of houses and lots could common.

common. But it provided that in case an actual partition of houses and lots could not be made without great prejudice to owners, the houses and lots should be sold. I J. & V. 201, 207. But about the same time the Statute of Henry VIII, making the actual partition of lands compulsory on joint tenants and tenants in common was re-enacted by the State Legislature (2 J. & V. 185), thus showing that an actual judicial sale was contemplated only in the cases of great prejudice, and where there were houses as well as lots. These acts were substantially re-enacted in the Kent & Radcliff Revision of 1802 (1 K. & R. 542, 544) and in the Revised Laws of 1813. I R. L. 507, 510, Chap. 100.

Thence they pased into the Revised Statutes of 1830 (2 R. S. 315-332; 16. 233, \$37), and now are contained in the Code of Civil Procedure. §§ 1582-1595.

In all these various revisions, it is provided that no judicial sale can be made unless actual partition cannot be made among the owners without great prejudice. "Great prejudice" then is a test of jurisdiction to sell, and otherwise the statute makes actual partition mandatory on the court. See Code Civ. Proc., § 1546. Chittenden v. Gates, 18 App. Div. 169; Elsner v. Curiel, 20 Misc. 245, 246; Jackson v. Bradhurst, 16 id. 149. Courts cannot decree a sale on a prima facic case. As said in Stephenson v. Cotter (5 N. Y. Supp. 749), "there is but one case in which the court has power to order a sale, and that is where partition cannot be made without great prejudice to the owners. If that state of facts does not appear, the court is required to direct actual partition to be made." Code Civ. Proc., § 1546. Chittenden v. Gates, 18 App. Div. 169, 174; Tucker v. Tucker, 19 Wend. 226. "The Legislature evidently intended that no land should be sold under a proceeding for partition unless it should appear to the court that a sale would be greatly more beneficial to the parties interested than an actual partition." Haywood v. Judson, 4 Barb. 228, 231; Willard, Eq. Juris., 703; Smith v. Smith, 107

asylum until maturity and common consent had made a private division possible.

Partition Actions According to Modern Law.— It is desirable to bear in mind that under the modern law the entire legislative theory of compulsory partition seems to have undergone a change. Compulsory partitions at their inception were not directed to lands, but to estates in them. Estates in lands held jointly or in common, could be partitioned, but the lands were then only incidentally partitionable. Thus tenants in common o. joint tenants of derivative estates for life or for years in possession could make partition inter se without partitioning the lands or affecting reversioners or remaindermen of the original or entire estate. Wollen v. Copeland, 1 Johns. Ch. 140. But the moment compulsory sale of the lands became possible in a partition suit, then the interests of those in reversion or remainder were necessarily to be affected, and the entire juridical theory of partition proceedings change to meet the modern requirements. And yet it cannot be denied that it may in many instances be for the best interests of the teants in common to sell the property, and not to partition it. Thus if the estate is valuable only as a whole or will be rendered much less valuable by partition, the case of great prejudice to the owners is them made out as required by the statute, and a decree of sale is certainly the appropriate remedy. Scott v. Guernsey, 48 N. Y. 106; et vide intra under Code Civ. Proc., § 1546.

But notwithstanding it has been held that it is discretionary with the court to order a sale in partition (supra, p. 777), it seems the decision may be reviewed for error. Jordan v. Van Epps, 85 N. Y. 427, 436, and cases cited. Thereby successive estates and not one estate in land became salable at the instance of one only authorized originally to seek partition of his share of a single undivided estate. The law had changed. The change was subtle and the results curious. Now derivative estates, although successive in a fee simple, are of

with the reversions and remainder and exposed to a judicial sale, the purchaser thus acquiring a fee simple absolute, while the rights to successive estates in land are commuted into mere money payments. And all this is brought about notwith standing the theory that the suit is to partition one of several successive estates, if possible. Of. O'Toole v. O'Toole, 39 App. Div. 302; Green v. Head, 54 Misc. 484.

The terms of sale are to be made known at the time of sale, and if the premises are in parcels they are to be sold separately. The sales are to be noticed and made in the same manner as for land under execution. Chap. XXXVIII. Code Civ. Proc., § 1678; 2 R. S. 326, §§ 56, 57; 22 Barb. 167; see as to correction where the time was short, Alvord v. Beach, 5 Abb. 451; see formerly as to Hamilton Co., Laws of 1860, Chap. 297; 1866, Chap. 296; 1867, Chap. 162; 1870, Chap. 662.

Where credit is allowed for any part of the purchase money it must be secured at interest by the bond of the purchaser, and a mortgage upon the property sold. Separate mortgages may be taken to the county treasurer or to any owner of full age for his share. The court may require additional security. Code Civ. Proc., §§ 1574, 1575; 2 R. S. 323, §§ 39, 40.

Fees, etc., of Sheriff of City and County of New York on Sales .- Vide Laws 1869, Chap. 569; 1874, Chap. 192; 1880, Chap. 245, repealing § 4 of the Act of 1869; 1881, Chap. 537, repealing § 3 of the Act of 1869; Laws of 1882, Chap. 410 (Consolidation Act), § 1088.

Irregularities.— Irregularities in a judgment for sale, which do not affect the jurisdiction of the court or the parties, or the subject-matter, do not affect the title taken under the sale. If any necessary parties were not brought before the court, the judgment is void as to them. Alvord v. Beach, 5 Abb. 451.

If the plaintiff omits to file any of the papers necessary to the regularity of the judgment, the court may allow them to be filed nunc pro tunc. Waring v. Waring, 7 Abb. 472; 6 Abb. 350; Croghan v. Livingston, 17 N. Y. 218; 26 Barb. 475; 45 id. 121; Rogers v. McLean, 34 N. Y. 536; 21 How. 479.

Even the summons may be amended as to parties after judgment and sale, 11 Abb. 473, affd., 4 Abb. App Cas. 496; 20 How. 222; 39 id. 392.

Irregularities in the proceedings may be amended nunc pro tunc. 45 Barb.

121; 27 How. 289; 31 id. 279; Fawcett v. Vorg, 59 N. Y. 597.

The judgment-roll need not be enrolled, signed or docketed, to make title.

42 Barb. 591. Vide as entry of judgment, Code Civ. Proc., § 1677.

The statutory provision as to selling in parcels, is directory merely. Woods v. Monell, 1 Johns. Ch. 502; 7 Abb. 183; Cunningham v. Cassidy, 17 N. Y. It is a mere irregularity and the sale is voidable at the instance of the party aggrieved, but not void. Id. Referee usually decides. Underhill v. Underhill, 4 St. Rep. 858, affd., 113 N. Y. 666.

The omission to give notice of sale shall not affect the title of a bona fide

purchaser. 22 Barb. 167.

By 2 R. S. 326, § 58, as now by Code Civ. Proc., § 1679, if a commissioner or a guardian of an infant purchase except for the infant's benefit, the sale is void. 22 Barb. 171.

Attorney cannot purchase for himself unless client consents. Yeoman v. Towshend, 74 Hun. 625.

As to when purchaser need not complete, vide Stephens v. Humphreys, 73 Hun, 199, affd., 141 N. Y. 586; Shriver v. Shriver, 86 N. Y. 575; Rice v. Barrett, 99 id. 403; Prentiss v. Cornell, 31 Hun, 167; Toole v. Toole, 112 N. Y. 333.

As to when purchaser should complete. Wanser v. De Nyse, 116 App. Div.

796.

Where "31 acres, more or less," were advertised and there were but 24. purchasers not relieved. Dennerlein v. Dennerlein, 111 N. Y. 518. See also p. 783 infra.

Taxes, etc.— Taxes, assessments, etc., are to be paid by the officer making the sale, unless the judgment otherwise direct, and are to be considered expenses of the sale. Code Civ. Proc., § 1676. See Weseman v. Wingrove, 85

Vacating Sale.— Fay v. Fay, 69 Hun, 149. For fraud. Fisher v. Hersey, 78 N. Y. 387.

Specific and General Liens.—Formerly before a sale was ordered, if those having specific liens on an undivided interest, were not made parties, the court might order them to be made parties, and ascertain the incumbrances through the clerk or a referee. Laws of 1830, Chap. 340; and of 1847, Chap. 280; repealed by Laws of 1880, Chap. 245.

Cannot be ordered nunc pro tunc, 8 N. Y. Supp. 278.

Now the court must, before interlocutory judgment, direct a reference to ascertain liens unless the party by clerk's and register's searches and affidavits shows that there are none. Code Civ. Proc., § 1561. Winfield v. Stacom, 40

App. Div. 95.

The referee must publish a notice once a week, for six weeks, in a newspaper, designated by the court, printed in the county in which the place of trial is designated, and also in a newspaper published in each county wherein the property is situated, requiring all persons, not parties, having any lien at the date of the order, on any undivided interest or share in the property to produce proof on all such liens. Code Civ. Proc., § 1562.

Advertising was formerly only a method of cutting off certain general liens, if any were in existence. 5 Abb. 451; 10 How. 188; Noble v. Cromwell, 27

How. 289; s. c., 3 Abb. App. Cas. 382, affg. 26 Barb. 475.

Nor is it necessary for the referee to annex to his report any searches for liens. His statement of the liens and incumbrances is sufficient. Id.

As to allowing creditors to establish their liens after the time for doing so

has expired, vide Horton v. Buskirk, I Barb. 421.

Searches instead of publishing, when sufficient; vide Doremus v. Doremus, 21 N. Y. Supp. 13; s. c., 66 Hun, 111; Code Civ. Proc., § 1561.

Payment of Incumbrances.—The Revised Statutes provided for the payment of the incumbrances on the interest of any party to the suit out of his proportion of the proceeds of sale, and for the satisfaction or cancellation of such incumbrances. 2 R. S. 325, § 48.

Provision is now made for payment of the proceeds of sale belonging to the party against whom the lien exists into court, and for distribution on appli-

cation of lienors by Code Civ. Proc., §§ 1538, 1564 and 1565.

Sale of Dower Interest.— Where a party has an existing right of dower in the entire property directed to be sold at the time when the interlocutory judgment of sale is rendered, the court shall determine whether it is for the interest of the parties that such estate be excepted from the sale, or sold. If a sale thereof be ordered, a sale shall pass the title thereto. The court shall direct the payment of a gross sum out of the proceeds to the dowress in satisfaction of her right of dower, or one third of the proceeds shall be paid into court to be invested for her benefit. Code Civ. Proc., §§ 1567, 1568.

How inchoate right of dower is provided for. Bartlett v. Van Zandt, 4 Sandf. Ch. 396; Benedict v. Seymour, 11 How. 176; Disbrow v. Folger, 5

Abb. 53.

Gross Sum for Tenant in Dower, etc.—A party who has a right of dower or is tenant for life, or for years in an undivided share of property sold is entitled to receive from proceeds of sale a gross sum to be fixed according to the principles of law applicable to annuities, in satisfaction of same. The written consent of the party to receive such gross sum, acknowledged or proved, and certified in like manner as a deed to be recorded, must be filed at or before the filing of the report of sale; otherwise the court must direct that out of the proceeds of the sale, which belong to the undivided share to which the estate or interest attaches, one-third in case of a dowress and in any other case the entire proceeds, or such a proportion thereof as fairly represents the interest of the holder of the particular estate, be paid into court to be invested for the benefit of the person entitled. Code Civ. Proc., § 1569.

See Matter of Zabrt, 94 N. Y. 605; Wood v. Powell, 3 App. Div. 318;

Purdy v. Purdy, 18 id. 310.

Before the Code of Civil Procedure it was held that acceptance by a widow of a sum in gross extinguished dower. Bond v. McNiff, 38 Super. 83, affd., without opinion, in 41 Super. 543.

A tenant for life, by the curtesy or in dower, cannot be compelled to take a gross sum in lieu of the estate for life. Luce v. Burchard, 78 Hun, 537.

Inchoate Dower or other Future Interests. Where there is an inchoate right of dower, or any vested or contigent future right or estate, or any person may by any contingency become entitled to any interest or estate in the property sold, the court must fix the proportional value, or set aside so much of the proceeds of sale to which the contingency attaches and direct that proportion to be invested, secured, or paid over in such manner as it deems best calculated to protect the rights and interests of the parties. Code Civ. Proc., § 1570; L. 1840, Chap. 177, § 1.

A married woman may release to her husband her inchoate right of dower, in the property directed to be sold, by a written instrument duly acknowledged by her and certified in like manner as a conveyance to bar her dower, which must be filed with the clerk. Thereupon the share of the proceeds of the sale arising from her contingent interest must be paid to her husband. Code Civ.

Proc., § 1571; L. 1840, Chap. 177, § 2.

Parties having estates in dower not admeasured, curtesy, or for life or for years in an undivided share of the property, may have shares allotted to them, without regard to the duration of such estate, and the remainders thereon may be allotted to those entitled to be enjoyed upon the determination of the particular estate. Code Civ. Proc., § 1553; L. 1847, Chap. 430.

The above acts, which were passed before the Code of Civil Procedure, were

repealed by Laws of 1880, Chap. 245.

See also, as to dower interests, Post v. Post, 65 Barb. 192.

See also, as to dower interests, Post v. Post, b5 Barb. 192.

If a wife is a party, her inchoate right of dower is divested by the sale.

Jackson v. Edwards, 7 Paige, 386, affd., 22 Wend. 498.

The widow of a purchaser who has paid a part of the purchase money has dower. Church v. Church, 3 Sandf. Ch. 434.

The amount payable to a dowress was regulated by the Revised Statutes and not by the rules of court. Banks v. Banks, 2 Supm. 483.

If the dowress were made a party it was enough, though the judgment did not provide for accordining the value of the inelector right of dower. Lordan

not provide for ascertaining the value of the inchoate right of dower. Jordan v. Van Epps, 19 Hun, 526, affd., 85 N. Y. 427.

As to effect of execution sale on inchoate dower, vide Ford v. Knapp, 102

N. Y. 135.

Parties Holding Over After Sale.—They may be removed by an order made in the action, and are also guilty of contempt. Code Civ. Proc., § 1675.

Oral notice of reservation of crop planted after filing of notice of lis pendens held to bind purchaser, though not mentioned in interlocutory judgment, terms of sale or referee's deed. Banta v. Merchant, 45 App. Div. 141.

Resale.—As to when a resale will be ordered, vide Jackson v. Edwards, 7 Paige, 387, affd., 22 Wend. 498; Lefevre v. Laraway, 22 Barb. 167.

Confirmation of the Sale and Conveyances .- Immediately after completing the sale, the officer making it must file with the clerk his report thereof under oath, containing a description of each parcel sold, the name of the purchaser and the price.

If such sale be confirmed by the court, a final judgment shall be entered confirming it accordingly, and directing the officer making it to execute the proper conveyances and take the proper securities pursuant to the sale, and also directing concerning the application of the proceeds; which judgment is made binding on the same persons as in Code Civ. Proc., § 1557; and it effectually bars each of those persons, who is not a purchaser at the sale from all right, title and interest in the property sold.

Code Civ. Proc., §§ 1576, 1577.

Formerly confirmation was by order. 2 R. S. 326, § 59; 327, § 60.

Parties to the judgment can only attack it by appeal. They cannot impeach it collaterally. Jordan v. Van Epps, 85 N. Y. 427. If the judge has jurisdiction, it cannot be attacked collaterally by a purchaser. Kennedy v. Lamb, 102. App. Div. 429.

Nor by anyone. Prior v. Prior, 49 Hun, 502.

Effect of the Judgment or Conveyance .- The Revised Statutes provided that such conveyances should be recorded in the county where the premises. were situated; and should be a bar, both in law and equity, against all parties interested and named in the action, and those proceeded against by publication as unknown, and against all persons claiming under them. 2 R. S. 327, § 61.

By the Code of Civil Procedure the judgment is a bar against the same persons, and to the same extent as the judgment of actual partition as provided by Code Civ. Proc., § 1557; Code Civ. Proc., § 1577. See also Woodhull v. Little, 102 N. Y. 165; Reed v. Reed, 13 C. P. R. 109.

The deed and record established a prima facie case in ejectment. Greenleaf

v. Brooklyn, etc., Co., 37 Hun, 435.

The purchaser takes all the rights of all the parties. Beyer v. Schultze, 54 Super. 212.

A sale does not change the character of the estate, the proceeds being treated as realty. Matter of Thomas, 1 Hun, 473.

When Judgment a Bar to Lienors not Parties. - Such a final judgment is also a bar against each person, not a party, who has at the time when it is rendered, a general lien by judgment or decree on the undivided share or interest of a party, if notice was given to appear as prescribed; (see Code Civ. Proc., § 1562), and also against each person made a party, who then has a specific lien on any such undivided share or interest, but a person having any such specific lien appearing of record at the time the filing of the notice of the pendency of the action, who is not made a party, is not affected by such judgment. Code Civ. Proc., § 1578, as amd. by L. 1883, Chap. 393. See L. 1830, Chap. 320, § 45.

The amendment of 1883 (L. 1883, Chap. 393), consisted of a provise expressly saving the rights of specific lienors of record, when the lis pendens

was filed, who are not made parties.

Unsecured creditors, when protected. See Johnson v. Weir, 72 App. Div. 325. Hughes v. Golden, 44 Misc. 128.

The judgment actually transfers title to money deposited in court. Treacy

v. Ellis, 45 App. Div. 492.

The purchaser gains no title, legal or equitable, until the date fixed for the delivery of the deed. Harrigan v. Golden, 41 App. Div. 423.

Distribution of Proceeds.— Vide Code Civ. Proc. §§ 1580, 1581, 1582; 2 R. S. 327, §§ 63, 64, 65; Hibbard v. Dayton 32 Hun, 220; Ford v. Knapp, 102 N. Y. 135; Platt v. Platt, 105 N. Y. 488.

Payment to attorney in fact. Lythgoe v. Smith, 140 N. Y. 442.

After judgment, court cannot make an order not in terms amending it but directing different distribution. Fannon v. McNally, 33 App. Div. 609.

Partition under Proceedings in Chancery.— The Court of Chancery formerly had the same power, upon petition or bill, to decree partitions and sales, as was given to the common-law courts. 2 R. S. 329, § 79. When the proceedings were by bill or petition in chancery, there were further provisions for sales by masters, in the same manner as by commissioners, and deeds to be given by them (Laws of 1826, p. 146; 2 R. S. 330) for taking judgment by default in said Court of Chancery, and for decreeing compensation for equality of partition. 1 R. L. 514, §§ 16, 17; 2 R. S. 330, §§ 82, 83. The decree of said court was made as binding on all parties as in the proceedings in the Supreme Court. 2 R. S. 330, § 84. The powers of the Court of Chancery are now vested in the Supreme Court. Vide supra, Chap. XXVIII, Tit. I.

Infants, Unknown Parties, etc.— Shares of infants are to be paid to general guardians or invested as directed. Code Civ. Proc., § 1581.

There are further directions as to investments, costs, and the practice in the proceedings, and as to writs of error and appeals.

The rights of unknown owners must be protected by the court. Code Civ. Proc., § 1572; 2 R. S. 326, § 55; Casey v. Casey, 19 App. Div. 219.

Their shares are to be invested for their benefit. Code Civ. Proc., § 1582;

2 R. S. 327, § 65.

So where the proceeds of a sale belonging to any tenant in dower or by the curtesy or for life shall be brought into court, the court shall direct same to be invested in permanent securities at interest. Code Civ. Proc., § 1583; 2 R. S. 327, § 66.

The fact that suppositious unknown heirs of a decedent, who do not exist, are made parties by fictitious names does not constitute a defect in title acquired under a judgment of sale in such action. 51 App. Div. 535.

General Efficacy of a Judicial Sale.— Vide infra, Chap. XXXVIII.

Defects in the Proceedings .- Courts have power to add parties to the summons, to add verifications, etc. Alvord v. Beach, 5 Abb. 451; and supra, Van Wyck v. Hardy, 39 How. 392; and Herbert v. Smith, 6 Lans. 493. See also supra, p. 779.

Irregularities may be cured nunc pro tunc. 45 Barb. 121; 27 How. 289; 31 id. 279; Wawcett v. Very, 59 N. Y. 597; Bergen v. Wyckoff, 84 id. 659; Rogers v. McLean, 34 id. 536; Croghan v. Livingston, 6 Abb. 350; 17 N. Y. 218.

Recitals in judgment as prima facie evidence. Fuchs v. Vandewater, 12 N. Y. Supp. 574; Bosworth v. Vandewalker, 53 N. Y. 597; Pringle v. Woolworth, 90 id. 508.

Summons, defective, amending. 11 Abb. 473, affd., 4 Abb. App. Cas. 496;

20 How. 222; 39 id. 392.

Referee's report. Austin v. Ahearne, 61 N. Y. 6; Safford v. Safford, 7 Paige, 259; Carpenter v. Schermerhorn, 2 Barb. Ch. 314.

Security to Refund.—The court may require security from any person before he receives his share of the proceeds to refund it if it appears that he was not entitled to it. As to the security, in whose name taken, and actions upon it, vide Code Civ. Proc., §§ 1584, 1585, 1586; 2 R. S. 327, § 67; 328, §§ 68, 71.

Compensation for Equality of Partition.— Vide Code Civ. Proc. § 1587; 2 R. S. 330, § 83a; Larkin v. Mann, 2 Paige, 27; Smith v. Smith, 10 id. 470; Eisner v. Curiel, 20 Misc. 245; Hitchcock v. Skinner, Hoffm. 21; Post v. Post,

Apportionment of Rents .- Code Civ. Proc., § 1589; Rich v. Rich, 50 Hun, 199; Levine v. Goldsmith, 71 App. Div. 204.

TITLE III. DIVISION OR PARTITION OF INFANT'S INTERESTS WITH-OUT ACTION.

Where an infant holds real property in joint tenancy or in common the general guardian may apply to the Supreme Court or to the County Court of the county wherein the property lies, for authority to agree to a partition of it.

Code Civ. Proc., § 1590. The Superior Courts and the Court of Common Pleas had jurisdiction formerly (L. 1882, Chap. 410, "Consolidation Act," § 1154, as to New York); they were abolished by the Constitution of 1894; vide Const. 1894, Art. VI, § 5.

Petition. The petition must be verified by affidavits and must describe the property and state the rights of the various owners and the particular partition proposed. The court may order notice to be given to such persons as it thinks proper. Code Civ. Proc., § 1591.

Order .- The court must inquire into the merits by reference or otherwise, and if it thinks best for the infant may make an order authorizing the partition, and the execution by the guardian of releases of the infant's interests in the parts set off to other persons. It may direct such partition as will give the infant his share in common with others, if they consent in writing. Code Civ. Proc., §§ 1592. See 2 R. S. 331, § 87, and infra.

Releases by Guardian.— They are as effectual as if the infant being of full age had executed them. Code Civ. Proc., § 1593; 2 R. S. 331, § 88.

Former Law.— Whenever it appeared satisfactorily to the Supreme Court, that any infant held real estate, in any manner which would authorize his being made party to a suit in partition, and that the interests of such infant, or of any other person concerned therein, required that partition of such estate should be made, such court might direct and authorize the general guardian of such infant to agree to a division thereof, or to a sale thereof, or of such part of the said estate as in the opinion of the court should be incapable of partition, as should be most for the interest of the infant, to be sold. Laws of 1814, 129; 2 R. S. 330, § 86 (as amended by L. 1830, Chap. 320, § 46, and modified by substituting "referee to the Supreme Court," in place of "master to the Court of Chancery"). On the approval and confirmation of the sale by such guardian the court shall direct him to make conveyances to purchasers, or releases of the shares that fall to the other joint tenants or tenants in common; which deeds shall be valid and effectual. The husband of a married infant might be appointed her guardian. 2 R. S. 331, §§ 87, 88. Repealed by Laws of 1880, Chap. 245; see Code Civ. Proc., §§ 1592, 1593; Matter of Congdon, 2 Paige, 566; 27 How. Pr. 179.

TITLE IV. PARTITION OF LANDS OF IDIOTS, LUNATICS, AND HABITUAL DRUNKARDS.

Partition by committees of idiots, lunatics, or habitual drunkards, may be made under direction of the court, in a similar manner as in the case of infants, *supra*.

Code Civ. Proc., §§ 1590-1593.

The effect of the releases to be executed by the committee shall be the same as if they were executed by the person in whose behalf they are executed, and as if the idiot, lunatic, or habitual drunkard were of sound mind and competent to manage his affairs. Code Civ. Proc., § 1593.

mind and competent to manage his affairs. Code Civ. Proc., § 1593.

For the former law which differed from the present law only in details, and in not including habitual drunkards, vide 1 R. L. 148, § 4; 2 R. S. 330,

§§ 89-91.

Partition between committee of lunatic and cotenants induced by fraud of latter set aside at suit of heirs. McNally v. Fitzsimmons, 70 App. Div. 179.

TITLE V. PARTITION, MISCELLANEOUS.

People as Parties.— The people of the State may be made a party defendant to an action of partition in the same manner as a private person. In such a case the summons must be served upon the attorney-general, who must appear for the people.

Code Civ. Proc., § 1594, L. 1814, 249, §§ 2, 3; 2 R. S. 331, § 92 (limiting such proceedings to the court of chancery and the supreme court); 332, § 93. The attorney-general, when so directed by the commissioners of the land office, shall cause partition to be made of any real property held in joint tenancy or tenancy in common, in which the people are interested, and for that purpose he may, in the name of the people, do all such acts as any joint tenant or tenant in common is authorized by law to do. Public Lands Law, G. L., Chap. XI, L. 1894, Chap. 317, § 6; 1 R. S. 207, § 65.

Partition by Arbitration.— Partition may also be made under the statutes by "arbitration."

Code Civ. Proc., § 2365; see 2 R. S. 541, § 2 (repealed by Laws of 1880, Chap. 245), for the former law.

Pre-emption Rights.— See the "Consolidation Act" of 1882 (L. 1882, Chap. 410), §§ 1110-1122 as to title. It was provided that where several persons are, or claim to be, owners of any real estate or chattels real in the city and county of New York, having different estates therein, and they claim, by reason of such ownership, a pre-emptive right to a grant or lease of any other land or easement from the mayor, aldermen and commonalty of the city of New York, the Supreme Court is authorized on the application of either of said owners, or of the said mayor, aldermen and commonalty, to sell such rights of pre-emption and to distribute the net proceeds among them.

This took the place of Laws of 1847, Chap. 391 (which applied only where infants and nonresidents were concerned), and Laws of 1848, Chap. 32, amdg, the Act of 1847.

Parol Partition.—A parol partition of lands by tenants in common may also be made, and if followed up by possession, is valid, and sufficient to sever the possession.

Jackson v. Harder, 4 Johns. 202; Jackson v. Vosburgh, 9 id. 270; Jackson v. Livingston, 7 Wend. 136; Corbin v. Jackson, 14 id. 619; Bool v. Mix, 17 id. 119; Ryers v. Wheeler, 25 id. 434; Morton v. Morton, 20 Barb. 123.

This, however, cannot prejudice the rights of third parties, but is binding on the heirs. Wood v. Fleet, 36 N. Y. 499.

A parol partition may be made by those having a contract for lands. Taylor v. Taylor, 43 N. Y. 578.

In the case of Towlin v. Hilyard, reported in 43 Illinois, it is held, that although the legal title to the individual alletment between the state of the state o

although the legal title to the individual allotment between two tenants in common may not be considered to have passed, unless after a possession sufficiently long to justify the presumption of a deed, yet each cotenant would stand seized of the legal title of one-half of his allotment, and the equitable title to the other half, and could compel from his cotenant a con-

veyance according to the terms of the partition.

Recording the Judgment.—An exemplified copy of the judgment-roll or of the final judgment in partition may be recorded in the office for recording deeds in each county in which any real property affected thereby is situated.

Code Civ. Proc., § 1595. Lynch v. Rome Gaslight Co., 42 Barb. 591. For the former law, see Laws of 1846, Chap. 182, § 4. See also as to record with register of New York county L. 1851, Chap. 277. Both these acts were repealed by Laws of 1880, Chap. 245.

CHAPTER XXXI.

INSOLVENT ASSIGNMENTS.

TITLE I.—ASSIGNMENTS ON APPLICATION OF THE INSOLVENT OR OF CREDITORS, II.—GENERAL ASSIGNMENTS IN TRUST FOR CREDITORS.

TITLE I. ASSIGNMENTS ON APPLICATION OF AN INSOLVENT OR CREDITORS.

Assignments on Application of the Insolvent.—Voluntary assignments may be pursuant to the application of an insolvent, on notice to his creditors. The insolvent is discharged from his debts, upon executing an assignment of all his estate for the benefit of his creditors, on the provisions of law being complied with.

Code Civ. Proc., Chap. XVII, Tit. I, Art. I, §§ 2149 to 2187 inclusive. For the former law vide R. S., Part II, Chap. V, Tit. I, Art. III; 2 R. S. 16 et seq., repealed by Laws of 1880, Chap. 245.

The first general act for the relief of insolvents was passed July 5, 1755; amended, May 19, 1761. The system continued in force by different subsequent acts till January 1, 1770, when it expired by its own limitation. No general system was adopted after January 1, 1770, until the Act of April 17, 1784, and that having been amended at different times, the Act of March 21, 1788 (2 Greenl. 204), was passed, commonly called the three-fourths act, which was revised April 3, 1801. 1 Web. 428. All former insolvent acts were repealed by Law April 3, 1811. The Act of April 3, 1811, was itself repealed, and the three-fourths Act of 1801 revised by an Act of February 14, 1812. The three-fourths Act continued till April 12, 1813, when the system requiring two-thirds only of the creditors to petition, etc., was adopted. Under these various laws, assignees were appointed and a conveyance made to them by the insolvent; and they were empowered to sell and execute deeds of his real estate. These laws as amended are found in Revised Laws of 1813; see 1 R. L. 460. The Revised Statutes contain the provisions next in force, as amended by Laws of 1849, Chap. 176; Laws of 1850, Chap. 210, repealed by Laws of 1880, Chap. 245. The Code of Civil Procedure has superseded all these acts and the Revised Statutes.

For the history of the legislation on the subject, see Am. Flask, etc., Co.

v. Son, 3 Abb. N. S. 333.

The title of an insolvent was not affected by his proceedings in insolvency until actual assignment under the statute, so that it may be divested by process of law, or by act of the debtor meanwhile. Bailey v. Burton, 8 Wend. 339

Assignment of the Estate.—On compliance with the provisions of the law, the court or judge directs an assignment of the insolvent's estate, real and personal, both in law and equity, in possession, reversion or remainder, except that which is exempt on execution, to be made by such insolvent to trustees. No contingent interest passes unless the same shall become vested within three years after the making of the assignment. The assignment is to be recorded in the county clerk's office. Code Civ. Proc., §§ 2174, 2175, 2177; 2 R. S. 20, §§ 25, 26; 21, § 28.

No title passed by the assignment, if the proceedings were defective. Rock-

well v. McGovern, 69 N. Y. 294.

The assignment will support an action of ejectment, when there is no affirmative evidence of any invalidity in the insolvent proceedings. Rockwell v. Brown, 33 N. Y. Super. 380.

Compulsory Assignment .- The Revised Statutes also provided for the procurement of a compulsory assignment of a similar nature as the above on application by a creditor of a debtor imprisoned for sixty days for a debt of \$25 and upward. 2 R. S. 24-28, § 1 et seq. These provisions have been repealed and no such proceeding is provided for now.

The assignment had the same effect as the above mentioned, and all property acquired by the debtor after the first publication to creditors vested in the assignees. 2 R. S. 27, § 19. Repealed by Laws of 1880, Chap. 245.

Assignment to Exempt or Discharge Insolvent Debtor from Imprisonment.— An insolvent debtor may make an assignment similar to the above on application for exemption from imprisonment, on compliance with certain provisions. The judge nominates and appoints the trustee, and the assignment has the same effect as that above mentioned.

Code Civ. Proc., §§ 2188-2199.

For former law vide R. S. Part II., Chap. V., Tit. 1, Art. 5 (2 R. S. 28-30). Repealed by Laws of 1880, Chap. 245.

No debts or judgments, however, or the lien thereof, are affected by the

discharge. Code Civ. Proc., § 2198.

Held to include a debtor who has been charged in execution. Develin v. Cooper, 84 N. Y. 410.

Assignments to Procure Discharge of Judgment Debtor from Imprisonment.— Assignments by a debtor may also be made on application to procure his discharge from imprisonment on execution in civil causes.

Code Civ. Proc., §§ 2200-2218; 2 R. S. 31-34.

The court may order petitioner to execute an assignment of all his property, not exempt on execution, or of sufficient to satisfy execution or executions on which he is imprisoned. Code Civ. Proc., § 2208.

GENERAL MEMORANDA AS TO THE ASSIGNMENT.

As to what the assignment vests in the trustees.—Code Civ. Proc. §§ 2177, 2211 (2 R. S. 21, § 28; 29 § 8; 30 § 9; 32 § 9; repealed by L. 1880, Chap. 245).

Discharges to be Recorded .- The discharge, and the petition, affidavits, orders, schedule and other papers, on which the discharge was granted (except the minutes), must be recorded in the clerk's office of the county within three months after the discharge becomes operative.

Code Civ. Proc., §§ 2181, 2196; 2 R. S. 38, § 19. It the discharge was not filed as above, other rights might intervene. Barnes v. McGill, 12 Abb. N. S. 169.

Assignments to be Recorded.- All of the assignments under the above provisions of the Revised Statutes were to be recorded by the clerk of the county in which they were executed respectively, upon being acknowledged or proved in the same manner as deeds of real estate. 2 R. S. 38, § 20. Also certificates of revocation of assignments were to be recorded. 2 R. S. 39, § 25.

By Code of Civil Procedure, where real property passes by the assignment. in either case it is to be acknowledged and recorded as a deed in the proper office for recording deeds in the county where the real estate is situated. In any case it must be acknowledged and certified as a deed and be recorded in the clerk's office of the county. Code Civ. Proc., §§ 2175, 2194, 2211.

Assignments, When to take Effect—The trustee or trustees under the above provisions shall be deemed vested with all the estate, real and personal, of the debtor (excepting legal exemptions) in these proceedings from the time of the execution of the assignment. All contingent interests which may vest in three years also pass. Code Civ. Proc., §§ 2177, 2194. See also § 2211 as to form and effect of assignment in discharge of imprisoned judgment debtor.

See also 2 R. S. 21, § 28; Id. 30, § 9; Id. 32, § 9; and in the case of involuntary assignments, 2 R. S. 27, § 19, providing that they should take effect

on the day of first publication of notice.

Trust Powers. - All beneficial powers and rights to compel the exercise of trust powers passed by the assignment. Real Property Law, § 144: 1 R. S. 735, § 104.

The assignment passed all the estate of the debtor, whether in the in-

ventory or not. Roseboom v. Mosher, 2 Den. 61.

Powers.— As to the powers, authority, right of survivorship, acts of majority, etc., of said assignees, vide 2 R. S. 40 et seq.

Assignments under Law of April 26, 1831, Chap. 300 (repealed by Laws of 1880, Chap. 245). Assignments were also to be made under this act (non imprisonment act), subject to the general provisions of 2 R. S., Pt. II, Chap. V, Tit. I, Art. 8.

What the Deed or Assignment is to State to Pass Real Estate. - It should

recite the proceedings. Rockwell v. Brown, 11 Abb. N. S. 400.

The words, "all my estate," would pass lands although not in the inventory. Roseboom v. Mosher, 2 Den. 61.

Foreign Insolvent Proceedings.—As to the effect of a foreign proceeding or one in another State, on property in this State, vide Story's Conflict of Laws; Oakey v. Bennett, 11 How. (U. S.) 33; Johnson v. Hunt, 23 Wend. 87.

Trustees of Absent, Concealed, Absconding, and Imprisoned Debtors.— These trustees under the laws formerly in force had the same powers as the above assignees. Transfers and sales by the debtor after notice of attachment were void. The trustees were to cause their appointment to be recorded with the county clerk. Their appointment vested in them the estate of the debtor from the first publication of notice in the case of absent, etc., debtors, and in case of imprisoned debtor, from their appointment. Laws of 1822, 239; 2 R. S., Pt. II, Chap. V, Tit. I, Arts. 1, 2. Repealed by L. 1877, Chap. 417, and Laws of 1880, Chap. 245.

The special provisions of this act were considered directory merely, and a deed from trustees would not be invalid by omissions. Wood v. Chapin,

13 N. Y. 509.

The trustees had a title to the debtor's land and not a mere power to

As to trustees appointed in case of person confined for crime. Vide Code Civ. Proc., § 2226. See also Code Civ. Proc., § 644, as to interest in real property subject to attachment.

TITLE II. GENERAL ASSIGNMENTS FOR THE BENEFIT OF CREDITORS.

It has been seen above (Chap. X) that among the classes of trusts permitted to be created by the Revised Statutes, is one authorizing the selling of lands for the benefit of creditors. A special act relaTIT. II.

tive to assignments for the benefit of creditors was passed April 13, 1860. (Laws of 1860, Chap. 348.) This act, after undergoing various amendments, was finally wholly superseded and repealed by an act passed June 16, 1877. (Laws of 1877, Chap. 466.) This latter act provides that every conveyance or assignment made by a debtor of his estate, real or personal or both, to an assignee for the creditors of such debtor shall be in writing and shall be duly acknowledged before an officer authorized to take the acknowledgment of deeds; and must be recorded in the county clerk's office of the county where such debtor resided or carried on business at the date thereof; that an assignment by copartners must be recorded in the county where the principal place of business of such copartnership is situated; that when real property is part of the property assigned, and is situated in a county other than the one in which the original assignment is to be recorded, a certified copy shall be filed and recorded where such property is situated. The assent of the assignee, subscribed and acknowledged, shall appear in writing, embraced in or at the end of or indorsed on the assignment, before it is recorded, and if separate shall be duly acknowledged.

By L. 1888, Chap. 294, the assignment must also specifically state the residence of and the kind of business carried on by the assignor and where it is conducted.

This Act of 1877 was entitled the "General Assignment Act of 1877." It provides also that an inventory was to be made and filed within twenty days with the county judge, after the filing of the assignment; the inventory to contain names, etc., of assignors and assignees, and a list of all creditors and sums due, and the causes thereof; and of all securities therefor; an inventory of the debtor's estate and incumbrances thereon, and of all vouchers - and the nominal and actual value thereof, and affidavit of the above facts. Provision is also made in case of default of the debtor, for filing an inventory by the assignee; and for an examination of the debtor and others; and for failure to file the inventory in thirty days. Provision is also made as to advertising for creditors, filing a bond as directed, and the assignee is to have no power until he files the bond. Provision is made as to filing a provisional bond by the assignee, and as to the removal of the assignee, or the appointment of another, and as to an accounting. Full details are also given as to the powers of the courts in adjudications under the law.

Preferences are limited to wages and salaries actually owing to employees for services rendered within one year prior to the execu-

tion of the assignment, and in addition to one-third in value of the assigned estate left after deducting such wages and salaries and the costs and expenses of executing such trust.

L. 1877, Chap. 466, § 29, as amd. by L. 1884, Chap. 328; L. 1886, Chap. 283; L. 1897, Chaps. 266, 624; and § 30, as amd. by L. 1887, Chap. 503.

As to one-third preferences, see Matter of Dauchy, 169 N. Y. 460.

Preference held to include former employees. Matter of Scott, 148 N. Y. 588. See also Hopkins v. Cromwell, 89 App. Div. 481.

This provision as to employees' wages is not retroactive, however. Id. Nor

do notes given destroy the preference. Id.

Reference should be had to the above Law of 1877, as amd. L. 1877, Chap. 466, amd. L. 1878, Chap. 318; L. 1886, Chap. 283; L. 1887, Chap. 503; L. 1894, Chap. 134; L. 1897, Chaps. 266, 624.

Concurrent jurisdiction with the County Courts and judges in these matters was conferred upon the Supreme Court and the justices thereof by L. 1885.

Chap. 380.

In New York city and county all papers except assignments, which were directed to be filed with the county clerk, were to be filed with the clerk of the Court of Common Pleas. L. 1877, Chap. 466; now the Supreme Court. Const. of 1894, Art. VI, § 5.

See also Matter of Merklen, 44 Misc. 169; Mills v. Husson, 140 N. Y. 99.

The conversion, disposition and distribution of an assigned estate is from its inception a court proceeding; and a purchaser subjects himself to the jurisdiction of the court. Matter of Sheldon, 173 N. Y. 287.

A debtor has a right to transfer his property to any of his creditors,

A debtor has a right to transfer his property to any of his creditors, and they may accept it in payment of their debts to the exclusion of other creditors, provided the transfer is made in good faith and has a reasonably adequate consideration. Union Bank of Rochester v. Bolton, 87 Hun, 547.

A failing debtor may practically prefer creditors to as great an extent as his property will permit, as long as he does so by mortgage, bill of sale or by confessing judgment, instead of by expressing such preference in a general assignment, which is alone condemned by the statute. London v. Martin, 79 Hun, 229.

A general assignment, made for the purpose of preventing parties who are bringing suits against the assignor from getting their pay in full upon judgment and execution, is not void. Davis v. Howard, 73 Hun, 347.

If only proved by the subscribing witness, and not acknowledged, it is void. 14 Abb. 466; 16 id. 23; 21 id. 23.

All the assignors must acknowledge in person, and not by attorney. 14 Abb. 466; 3 Abb. N. S. 46; Wells v. March, 30 N. Y. 344; 50 Barb. 440.

Where a partner is absent, held there must be an authorization or ratification. 42 Barb. 88; 36 How. 479; Lowenstein v. Flauraud, 11 Hun, 399, affd., 82 N. Y. 494.

If one absconds, his assent has been held not necessary. 43 Barb. 509.

A purchaser from assignees under a fraudulent assignment will be protected, if he had no knowledge of the fraud. 42 Barb. 284.

A surviving partner may make the assignment. Loeschigk v. Addison, 4 Abb. N. S. 210.

And his individual creditors cannot set it aside. Haynes v. Brooks, 42 Hun, 528, affd., 116 N. Y. 487. Vide also, as to assignments by a surviving partner, Beste v. Burger, 17 Abb. N. C. 162, affd., 110 N. Y. 644.

The assignment is now held void if not acknowledged as provided by statute. Briton v. Lorenz, 45 N. Y. 51; Hardman v. Bowen, 39 N. Y. 196.

In Baldwin v. Tynes, an acknowledgment by one partner has been held 19 Abb. Pr. 32.

The Act of 1860, applied only to resident debtors. Ockerman v. Cross, 54

N. Y. 29, distinguished in Warner v. Jaffray, 96 id. 248.

Under the Act of 1877, a consent by the assignee subscribed, acknowledged, and recorded after the assignment, was held ineffectual. Schwartz v. Soutter, 41 Hun, 323, affd., 103 N. Y. 683, disapproved, 125 N. Y. 49. But if the assignee join in the assignment it is sufficient. Scott v. Mills, 18 Abb. N. C. 330; s. c., 45 Hun, 263, affd., 115 N. Y. 376.

Its Effect.—The execution and delivery of a general assignment prevents a subcontractor from obtaining a mechanic's lien under a notice thereafter filed. Armstrong v. Borden's Condensed Milk Co., 65 App. Div. 503.

Later Acts.—L. 1878, Chap. 318, makes amendment as to the verification of the schedule when filed by the assignee and for an allowance of further time for filing not exceeding sixty days, and as to compelling the assignee to make returns, etc. Provision is also made as to removal of assignee and appointing another, and as to new schedules and as to accounting and allowing a composition, as to effect of orders and decrees, and as to a record book of assignments with the clerk of the court as to trials, etc. Law of 1884, Chap. 328, gives a preference to claims of employees as preferred. Law of 1885, Chap. 464, made amendments as to the sale and compromising of claims. Law of 1886, Chap. 233, as to preferences for employees. Law of 1887, Chap. 503, was also as to preferences for employees of the assignor. Law of 1894, Chap. 134, amending above Law of 1877, Chap. 466 as to orders and decrees in the proceedings and as to fees of clerks.

Recording.— The assignment must be recorded in the office of the clerk of the county where the place of business or residence of the debtor, or (in case of partners) where the principal place of business is. In New York city, formerly in the office of the clerk of the Court of Common Pleas, now the Supreme Court (Const. 1894, Art. VI, § 5). If lands pass by it which are in other counties, a certified copy must be filed and recorded in each of such counties. Laws of 1877, Chap. 466.

It must also be recorded in the Register's office if there be one. Warner

v. Hodge, 34 Hun, 524.

As to recording under the Act of 1860, vide Scott v. Guthrie, 25 How. Pr. 512.

The assignee is not a purchaser for value. Griffin v. Marquardt, 17 N. Y. 29.

Inventory, Schedules and Bond.—The Act of 1860 provided for a sworn inventory of the assets and of the creditors, to be made and delivered to the county judge of the county in which the debtor resided, within twenty days after the execution of the assignment, and a bond to be filed within thirty days by the assignee. Amended as to the bond, by Laws of 1875, Chap. 56, and as to the filing of schedules, by Laws of 1874, Chap. 600. Similar provisions as to the schedule are found in the Act of 1877, § 3, amended by Laws of 1878, Chap. 318. The Act of 1877 also provides for the bond, § 5. The Act of 1878 provides for a sworn schedule by the debtor, within twenty days. If not so filed the assignee has the right to file it within thirty days. A further time not exceeding sixty days might be allowed by the court.

These provisions were at first held directory merely. 14 Barb. 298; 23 id. 313; 26 id. 586; 34 id. 620; 45 id. 317. The Court of Appeals, in Juliand v. Rathbone (1868), 39 N. Y. 369, so far reversed the same case, in 39 Barb. 97, as to hold that these requirements must be strictly complied with in order to vest title. So also Fairchild v. Gwynne, 16 Abb. 23, revg. 14 id. 121. The Act of 1874, Chap. 600, was held, in Produce Bk. v. Morton, 67 N. Y. 199, infra, to have abrogated the rule laid down in Juliand v. Rathbone.

An omission of a debt will not vitiate. 4 Robt. 161.

Nor failure to acknowledge the schedule separately. 10 Bosw. 408.

As to the bond vide Thrasher v. Bentley, 2 Supm. 309, affd., 59 N. Y. 649; s. c., 1 Abb. N. C. 39, overruling Hedges v. Bungay, 3 Hun, 594, which held approval of the bond absolutely necessary. To the same effect, Plume, etc., Co. v. Strauss, 17 Hun, 586, and Brennan v. Wilson, 71 N. Y. 502; s. c., 4 Abb. N. C. 279, holding failure to give a bond not to be a fatal defect. See also Worthy v. Benham, 13 Hun, 176; Van Hein v. Elkus, 8 Hun, 516; Bostwick v. Burnet, 74 N. Y. 317.

Under the Act of 1877, title vests in the assignee upon assignment, and is not divested by failure to give a bond. Ryan v. Webb, 39 Hun, 435.

Unless the schedules were annexed to the assignment before it was sworn to, it was formerly held void. Kercheis v. Schloss, 49 How. Pr. 284. But by Laws of 1874, Chap. 600, provision was made for filing schedules by the assignee, where the debtor did not furnish them, and under this Act it has been held that they need not be annexed to the assignment. Produce Bk. v. Morton, 67 N. Y. 199. In a case where the schedules were not annexed, acknowledged or filed until three days after assignment filed it was set aside. Francy v. Smith, 47 Hun, 119, revd., 124 N. Y. 44, on the ground that there had been a substantial compliance with the General Assignment Act and no other rights had intervened. This case also holds that assent of the assignee might be on a separate paper.

An intentional omission from the schedules proves fraud, but not if the

item omitted be valueless. Schultz v. Hoagland, 85 N. Y. 464,

Miscellaneous.—Held while an assignment in trust, with a reservation in favor of grantor, would be void, an assignment to creditors themselves, with a reservation to the assignor would not be. That operates as a mortgage, and any surplus might be reached. Leitch v. Hollister, 4 N. Y. 211, criticised, 49 Hun, 372.

As regards sales made by assignees of insolvent debtors, under assignments which are subsequently declared fraudulent, the opinion is that such sales would be void only as to the creditors hindered, delayed, etc. Therefore such sales would be good as against the assignor, unless the creditors had actually taken proceedings to set them aside.

A general assignee takes subject to equities in favor of the creditors of

the assignor. Standard, etc., Co. v. Nichols, 41 Hun, 261.

A general assignment under the Act of 1877, held to take effect from delivery and not from record. Nichol v. Spowers, 105 N. Y. 1.

A conveyance in trust to pay creditors and pay back surplus to the grantor is valid. Knapp v. McGowan, 96 N. Y. 75.

As to when assignee's title is divested by discharge, vide Julien v. Lalor,

47 Hun, 164.

Assignments Before the Statute.—Before these statutory provisions were enacted general assignments in favor of creditors were frequently made. When real estate was transferred under them, the rules regulating their validity were the general provisions regulating the transfer of land by deed, and the creation of trusts.

When Void.— Care is to be taken in all cases to see that their provisions do not render them fraudulent as against creditors, otherwise they are void. If fraudulent in fact they are also void. Scott v. Guthrie, 10 Bosw. 408; O'Neil v. Salmon, 25 How. Pr. 246; Kavanagh v. Beckwith, 44 Barb. 192; Terry v. Butler, 43 id. 395; Dunham v. Waterman, 17 N. Y. 9; Jessup v. Hulse, 21 id. 168; Russell v. Lasher, 4 Barb. 232; Curtis v. Leavitt, 15 N. Y. 9; Haydock v. Cooper, 53 id. 68, among many other cases, as to fraud appearing on their face or by the facts. In a special case an assignment was held not void by preference of notes given for debts due to members of the firm. First Nat. Bank of Champlain v. Wood, 128 N. Y. 35; 45 Hun, 41.

Condition as to management and disposition of assigned property make the assignment void; but not mere superflowous directions, which in themselves would be legal. Dunham v. Waterman, 17 N. Y. 9, overruling Cunningham v. Freeborn, 11 Wend. 240. See also Jessup v. Hulse, 21 N. Y.

161.

What constitutes facts sufficient to avoid for fraud. Faxon v. Mason, 76 Hun, 408.

When prior transfer of more than a third does not vitiate. Abegg v-Bishop, 142 N. Y. 286.

Authority given to the assignee to compromise debts does not invalidate the assignment. Baglee v. Bowe, 105 N. Y. 171.

Nor does a failure to prefer wages due. Johnston v. Kelly, 43 Hun, 379. But see Smith v. Hartwell, 55 Super. 325; and see as to preference, supra.

An assignment is held not a fraud on one creditor, though it operate to give all the assignor's property to another. Hauselt v. Vilmar, 2 Abb. N. C. 222,

affd. in 43 Super. 574, and that affd. in 7 N. Y. 630.

Fraud in one provision invalidates all. National Bank, etc. v. Cohn, 42 Hun, 381.

As to evidences of fraud, vide Brown v. Halstead, 17 Abb. N. C. 197.

Fraud will never be presumed, and the mere fact of the omission of assets will not, under the Act of 1877, ipso facto, make the assignment void. Shultz v. Hoagland, 85 N. Y. 464.

See also "Fraudulent Conveyances," Chap. XXI.

When Notice to Purchasers.—It has been held by the Superior Court of New York city (Simon v. Kaliske, 6 Abb. N. S. 224), that these assignments to be notice to bona fide purchasers, should be also recorded in the register's office (or county clerk's where there is no register's) among conveyances. See also Waring v. Hodge, 34 Hun, 524.

By Infants.- If one of several partners is an infant, the assignment was held void. Fox v. Heath 16 Abb. Pr. 163; 21 How. Pr. 184. But the contrary has been decided to be law. Yates v. Lyon, 61 N. Y. 344.

Effect of Setting Aside Assignment.—Where an assignment is set aside the lien of judgments attaches to land in the order of priority. New York Life Ins. Co. v. Mayer, 19 Abb. 92, affd., 14 Daly, 318, affd., 108 N. Y. 655. Vide, as to general rights of creditors, Classin v. Gordon, 39 Hun, 54.

Sale may Also be Set Aside.— See Matter of Sheldon, 173 N. Y. 287.

Effect of Bankrupt Laws on. Vide supra, Chap. XXXII.

Impeachment of Assignments, Transfers, etc., for Fraud .- Vide supra Chap. XXI.

Assignments by Corporations .- The Stock Corporation Law provides that when a corporation has refused payment of its notes, etc., assignments made while it is insolvent or its insolvency is imminent with the intent of giving a preference (except as to wages) are unlawful. The insolvency and the intent must both exist. Matter of Rogers Construction Co., 79 App. Div. 419.

And no corporation formed under or subject to the banking, insurance or railroad law shall make any assignment in contemplation of insolvency. Stock Corp. Law, L. 1890, Chap. 564 (as amd.).

As to the limits of the above provisions, see Swan v. Stiles, 94 App. Div.

117, where a transfer by a corporation to raise money was sustained.

The Revised Statutes provided generally that when a corporation had refused payment of its notes, etc., assignments in contemplation of insolvency were void. 1 R. S. 603, § 4.

Manufacturing corporations cannot make them. Harris v. Thompson, 15

Barb. 62; Sibel v. Remsen, 33 N. Y. 95.

Nor Banking Companies. Robinson v. Bank of Attica, 21 N. Y. 406.

See also supra, p. 662; and Chap. XXIV.

Under the law as it stood in September, 1891, a manufacturing corporation organized under the Act of 1848 could not make a general assignment, without preferences, in contemplation of insolvency. Troy Waste Mfg. Co. v. Harrison 73 Hun, 528.

The prohibition against assignments by corporations in contemplation of insolvency, contained in Laws of 1890, Chap. 564, § 48, applies only to domestic corporations. Where there is no statute or by-law providing to the contrary, an assignment for creditors by a foreign corporation may be properly executed by its president and secretary, under the authority of its board of directors. Vanderpoel v. Gorman, 140 N. Y. 563. An assignment for the benefit of creditors, valid under the law of its domicile, made by an insolvent foreign corporation in this State, is valid. Id.

Mortgage by Assignor after Assignment.— This may operate as an equitable mortgage of his residuary interest. Briggs v. Palmer, 20 Barb. 393; modified as Briggs v. Davis, 20 N. Y. 15.

Accounting by Assignees.— Vide Laws 1860, Chap. 348; 1870, Chap. 92; 1872, Chap. 838; 1875, Chap. 56; 1877, Chap. 466, repealing all these prior acts; 1878, Chap. 318.

For present law, vide supra, p. 788. Also Mills v. Hasson, 140 N. Y. 99.

Conveyance by Assignees.—All the assignees must join in a conveyance. Brennan v. Wilson, 71 N. Y. 502.

End of Trust.—In default of other limitation the trust ends at the end of twenty-five years, and the estate then remaining in the assignee reverts to the assignor, his heirs or privies in estate or interest. Laws of 1875, Chap. 545; Real Property Law, § 90. Held constitutional. Mills v. Husson, 140 N. Y. 99.

This act was held not retrospective. McCahill v. Hamilton, 20 Hun, 388, declared overruled, 46 Hun, 209, doubted, 103 N. Y. 572. But that decision was distinguished and questioned in Kipp v. Hirsch, 103 N. Y. 565, holding that the act applied to prior assignments and was a statute of limitation.

CHAPTER XXXII.

ASSIGNMENT AND TRANSFERS UNDER UNITED STATES BANKRUPT . ACTS, MARCH 2, 1867, TITLE XLI, U. S. R. S., AND ACT OF JULY 1, 1898.

The Act of 1867 was superseded upon the enactment of the Revised Statutes of the United States, which contained the laws in force on December 1, 1873, and repealed all prior laws. Tit. XLI, which contained the bankruptcy law, was repealed September 1, 1878. The Bankruptcy Act of 1898 followed, Act of July 1, 1898, which, as amended, now governs bankruptcies.

By the Act of 1867 (§§ 14, 15; R. S. §§ 5044, 5045, 5046), as soon as the assignee in bankruptcy was appointed, the judge or register, by an instrument, was to assign and convey to the assignee all the estate, real and personal, of the bankrupt; and such assignment related back to the commencement of such proceedings in bankruptcy, and thereupon, by operation of law, the title to all such property and estate (except what was exempt by the law of the State, certain personal property exempted by the act, and trust property) vested in the assignee; and any attachment thereon, issued within four months next preceding the commencement of said proceedings, was dissolved.

The assignment related back to the commencement of the proceedings notwithstanding any amendments to the petition, etc. In re Patterson, 1 Ben. 500; 6 Int. Rev. 27; Chapman v. Brewer, 114 U. S. 158.

By the Act of 1898 the trustee of the estate of a bankrupt, upon his appointment and qualification, is vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt (except as to exempt property), the title remaining in the bankrupt to that date and perhaps even to the date of the appointment of the trustee; the title of the trustee relating back, however, on his appointment to the date of the commencement of the proceeding. And attachment liens, etc., and conveyances with intent to hinder, delay and defraud suffered or made within four months prior to the filing of the petition are void, except as to purchasers in good faith and for a present fair consideration.

See Bankruptcy Act of 1898, §§ 67, 70; Keegan v. King, 3 Am. B. 79; 96 Fed. Rep. 758; In re Appel, 4 Am. B. 722; 103 Fed. Rep. 931.

Between adjudication and appointment the title is considered to be in custodia legis. Keegan v. King, supra; March v. Heaton, Fed. Cas. 9,061; In re Rosenberg, Fed. Cas. 12,055.

Record of the Assignment.—Under the former law the assignee was within six months to cause the assignment to be recorded in every registry of deeds or other office within the United States, where a conveyance of any lands owned by the bankrupt ought by law to be recorded.

Record of Adjudication.— Under the present law the trustee must within thirty days after the adjudication file a certified copy of the decree of adjudication in the office where conveyances of real estate are recorded in every county where the bankrupt owns real estate not exempt from execution. Act of 1898, § 47, as amended by Act of February 5, 1903.

What Passed Under the Assignment.—Leases with covenants did not pass, unless the assignee adopted them. 6 Bing. 321; 1 B. & A. 93.

The assignment held not to divest prior legal or equitable liens. 5 Gilm.

346; 2 Story, 360, 630; Cook v. Whipple, 55 N. Y. 150.

Nor the wife's right of dower. 1 Glynn & J. 232; In re Wilbur, 1 Ben. 527; In re Schepf, 2 id. 72.

All property that came to the bankrupt before adjudication held to pass.

2 Story, 327, 360; 1 Tenn. 296.

Debtor making assignment could reserve no interest to himself in the property or make provisions to delay the creditors. Means v. Dowd, 128 U. S. 273.

Equities of redemption passed under the decree. 5 Humph. 389.

Also contingent estates. 3 P. Wms. 132.

After filing petition, no interest could be acquired under proceedings in a State court (8 Blatch. 153); and the sheriff was liable for proceeds to the assignee. Miller v. O'Brien, 9 Blatch. 270.

But commencement of bankruptcy proceedings against a mortgagee held

not to prevent his foreclosure. Lenihan v. Hamann, 55 N. Y. 652.

What Passes to Trustee.— The present statute itemizes with great particularity the property that passes to the trustee. Act of 1898, § 70.

Documents of title; property fraudulently transferred; Id.; In re Yukon Woolen Co., 96 Fed. Rep. 326; property which might have been transferred or levied upon; § 70; In re Burka, 104 Fed. Rep. 326; remainders and interests in trust; In re Woodward, 95 id. 260; In re Shenberger, 102 id. 978; not where the contingency is one both of time of vesting and of person; In re Hoadley, 3 Am. B. 780; In re Gardner, 26 Fed. Rep. 670; In re Ehle, 6 Am. B. 476; or where the interest of bankrupt depends on trustee's discretion; In re Wetmore, 102 Fed. Rep. 290; but see as to surplus income, In re Baudouine, 101 id. 574; dower and curtesy; In re Walterson, 95 Pa. St. 312; Hesseltine v. Prince, 95 Fed. Rep. 802; rights of action arising on contracts; § 70.

Exemptions.—Assignees did not acquire title to the exempt property of a bankrupt under homestead laws, etc. Re Hurst, 5 Bank. Reg. 493, and other cases; 2 id. 62; id. 85; 3 id. 21; id. 38; id. 60; 4 id. 59.

other cases; 2 4a. 62; 4a. 85; 3 4a. 21; 4a. 45; 4a. 60; 4 4a. 59.

A mortgage upon a homestead for a debt not proved in the proceedings nor released, is not affected by the discharge. Long v. Bullard, 117 U. S. 617.

See as to exemptions under the present law. Act of 1898, §§ 6, 70.

See as to exemptions under the present law. Act of 1898, §§ 6, 70.

The exemptions prescribed by State laws are preserved, § 6. As to home-

steads, see *In re* Buelow, 98 Fed. Rep. 86; *In re* Duerson, Fed. Cas. 4,117. As to payment of mortgage on homestead. *In re* Wilson, 123 Fed. Rep. 20.

Possession.—The bankrupt's possession became that of the assignee's, from date of appointment. Re Rosenberg, 3 Ben. 366.

Title.—The assignee took the property as held by the bankrupt, and no greater interest than creditors take under adverse statutory proceedings. Appold's Estate, 7 Am. L. Reg. N. S. 624; Re Fuller, 4 Bank. Reg. 29.

His grantee is barred where under the act the assignee would be. Wisner v.

Brown, 122 U. S. 214.

The trustee is vested with the title of the bankrupt. Act of 1898, § 70-Subject to all valid claims, liens and equities. Chattanooga Natl. Bk. v. Rome

Iron Co., 102 Fed. Rep. 755, and has no better title than bankrupt had. In re N. Y. Econ. Pr. Co., 110 Fed. Rep. 514.

Sales by the Assignee. By § 15, of the Act of 1867 (R. S. § 5062), the assignee was to sell all the unincumbered estate, real and personal, on such terms as he thought best for creditors. The court might make orders concerning the time, place and manner of sale.

But mortgagees not regularly made parties were not bound by such sales.

Factors & Traders' Ins. Co. v. Murphy, 111 U. S. 738.
Under the Act of 1841 there could be no sale without an order of court, which must fix the time of sale or the sale was void. Smith v. Long, 12

Abb. N. C. 113. Distinguished as applying only to public sales, in Gignoux v. Stafford, 42 Hun, 426, affd., semble, 118 N. Y. 666.

Improper, irregular or fraudulent assignee's deeds might be set aside and ordered canceled, while the property was in the hands of the grantee, by summary order, even after the discharge of the bankrupt and the end of all proceedings. Matter of Hyde 11 Blatch 115.

proceedings. Matter of Hyde, 11 Blatch. 115.

If the assignee purchased the sale would be set aside. 8 Vesey, 351;
1 Glynn & J. 112; 4 Madd. 459.

The purchaser was entitled to a marketable title. The deed should recite the decree in bankruptcy and order appointing the assignee, and the con-

veyance must have been made in the manner directed by the court.

Section 18 of the Act of 1867 (R. S., §§ 5040 to 5043), provided for the appointment of a new assignee when necessary, and the former assignee was to convey to the one appointed all the estate held by him. No title to property sold was to be affected by reason of the ineligibility of the assignee.

Sales by Trustee.-- Real and personal property of the bankrupt shall when practicable, be sold subject to the approval of the court; not otherwise for less than seventy-five per cent. of the appraised value (Act of 1898, § 70b); and title conveyed to the purchaser by the trustee. Id. § 70c.

As to ten days notice, see Act of 1898, § 58a; also Gen. Orders in Bank-

ruptcy, XVIII (seemingly contra).

The present law has no provision for sales free of incumbrances, but in practise such sales are authorized following the analogy of the earlier statute. În re Waterloo Organ Co., 118 Fed. Rep. 904; In re Pittelkow, 92 id. 901.

Sales can also of course be made subject to incumbrance, in which case the purchaser takes the property so charged. In re Gerry, 112 Fed. Rep. 957; In re Mulhauser Co., 121 id. 669.

Preference by Insolvents Void.—By § 35, of the Act of 1867 (R. S. U. S., §§ 5128, 5129, 5130), if any person being insolvent, or in contemplation of insolvency, within four months before the filing of the petition for or against him, with a view to give a preference, etc., procured any part of his property too be attached, sequestered, or seized on execution, or made any assignment, transfer, or conveyance, etc., thereof, directly or indirectly, absolutely or conditionally, the grantee, transferee, etc., having reasonable cause to believe such person to be insolvent, and that such attachment, conveyance, transfer, etc., was made in fraud of the provisions of this act, the same was void; and the assignee might recover the property, or the value of it, from the person so receiving it or to be so benefited. And if any person being insolvent, or in contemplation thereof or of bankruptcy, within six months before the filing of the petition for or against him, made any sale, transfer, conveyance, etc., or other disposition of his property, to any person who then had reasonable cause to believe him to be insolvent, or to be acting in contemplation of insolvency, and that such sale, conveyance, transfer, etc., was made with a view to prevent his property coming into the hands of his assignee in bankruptcy, or to otherwise evade the act, etc., the same was void; and the assignee might recover the same or the value thereof.

Under the present Law of 1898, liens pursuant to suit or proceeding at law or in equity begun four months before the filing of the petition are dissolved by adjudication, if (1) it was obtained and permitted while defendant was insolvent and its existence and enforcement will work a preference, or (2) the

parties to be benefited had reasonable cause to believe the defendant was insolvent or in contemplation of bankruptcy, or (3) that it was sought and permitted in fraud of the act (except that if the dissolution of the lien would be against the best interests of the estate, in which event the trustee is subrogated). And conveyances or incumbrances made or suffered by bankrupt within four months prior to the filing of the petition with intent to hinder, delay and defraud creditors are null and void, except as to purchasers in good faith and for a present fair consideration; and such property remains part of the estate and may be recovered by the trustee. Also judgments, attachments and other liens obtained within four months prior to the filing of the petition are void, in case of adjudication, unless ordered preserved for the benefit of the estate, a purchaser for value without notice however to be protected. Act of 1898, § 67.

A person is deemed to have given a preference, if, being insolvent, he has within four months before the filing of the petition or after the filing and before adjudication procured or suffered a judgment or made a transfer of his property, the effect of which will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of the same class, and such period of four months dates from recording or registering. And if a perference is given and the person receiving it or to be benefited has reasonable cause to believe it was intended as such, it is voidable by the trustee. Act of 1898, § 60a-b, as amended by Act of February 5, 1903; See also § 70e.

Held to apply to mortgages. Blennerhassett v. Sherman, 15 Otto, 100. Mortgages to secure antecedent debts void. In re Ronk, 111 Fed. Rep. 154. But mortgages in good faith are valid to the amount advanced before petition is filed. Marvin v. Chambers, Fed. Cas. 9,179.

Under the former Bankrupt Law of 1841, it was held that the transfer, etc., was void only as against an assignee properly appointed. See 3 Barb. Ch.

344; 8 Met. 400.

A general assignment made within three months of the petition in bankruptcy would be set aside regardless of fraud under the Act of 1867. Harding v. Crosby, 17 Blatch. 348. Under the present Act of 1898, such an assignment is avoided by bankruptcy, being in itself an act of bankruptcy if made within four months of the filing of the petition. Act of 1898, §§ 3, 67e; West Co. v. Lea, 174 U. S. 590.

See also as to effect of conflict of general assignment and fraudulent conveyance. Talcott v. Harder, 119 N. Y. 536.

As to conveyances by the bankrupt under the Act of 1867. Warren v. Moody,

122 U. S. 132; Adams v. Collins, Id. 382. Under the Act of 1898, fraudulent transfers, unlike fraudulent preferences, may be made at any time when the transferrer is solvent. Pollock v. Jones, 124 Fed. Rep. 163.

Though four months have expired, there may still be a remedy under the State law by the trustee under § 70e, as by bill in equity. In re Mullen, 101 Fed. Rep. 413; Lewis v. Bishop, 47 App. Div. 554.

Legal liens are not void, unless the lienee was insolvent at the time. Simpson v. Van Etten, 108 Fed. Rep. 199.

As to purchasers in good faith are Tiffany v. Tugge 15 Well 410. Self.

As to purchasers in good faith, see Tiffany v. Lucas, 15 Wall. 410; Sedgwick v. Wormser, Fed. Cas. 12,626; Curran v. Munger, Id. 3,487. Neither the plaintiff nor the sheriff is such. In re Kaufrisch Creamery Co., 107 Fed. Rep. 93; Jones v. Stevens, 5 Am. B. 571.

"All levies" in § 67 of the Act of 1898 includes replevin. In re Hymes,

Co., 130 Fed. Rep. 977.

Where an attachment is over four months old any later lien, as by judgment and levy within the four months, is valid. Metcalf v. Barker, 187 U. S.

A Bona Fide Sale would be held valid unless the purchaser had reasonable grounds to believe that it was made for the purpose of defrauding creditors under the act. 9 B. & C. 45; 3 id. 415; 3 Bing. N. C. 400; see Tiffany v. Lucas, 15 Wall. 410; Sedgwick v. Wormser, Fed. Cas. 12,626; Curran v. Munger, Id. 3,487.

So of a mortgage. Barbour v. Priest, 13 Otto, 293; Marvin v. Chambers,

Fed. Cas. 9.179.

By section 37 of the Act of 1867 (R. S., § 5122), these provisions and those relating to assignments referred to joint stock companies and corporations

It was decided in the case of Sedgwick v. Place, 1 Am. L. T. Bankr. 97, that the assignee in bankruptcy could not take the property assigned to the general assignee for creditors transferred before the petition, where there was no fraud. Nor could he take the property in the hands of a receiver under a judgment creditor's bill to set aside a general assignment. Sedgwick v. Menck, per Nelson, Judge, 6 Blatch. 156. But see Hardy v. Binninger, 7 Blatch. 262, modifying the above views under the present act. A general assignment being not only a fraud on the act, but an act of bankruptcy, and void by operation of law, no title passes and the general assignee does not become an adverse claimant, but at most only an agent of the assignor and property of the bankrupt in his possession may be reached summarily. See Bryan v. Bernheimer, 181 U. S. 188; Mueller v. Nugent, 184 U. S. 1. Compare also Bardes v. Bank, 178 U. S. 524, for earlier view.

Assignees were authorized under the direction of the court to redeem the property from liens. Act of 1867, § 14 (R. S., § 5066); Gen. Order 17 of

1867.

The beginning of a creditor's suit held not to operate as a lien so as to prevent the assignee in bankruptcy under the Act of 1867 from taking. Stewart v. Isidor, 5 Abb. Pr. N. S. 68.

Under the present Act of 1898, however, if a creditor's suit was begun before the four months' period, though judgment was within it, the lien acquired before that period is good. Metcalf v. Barker, 187 U. S. 165.

As to attachments under the Act of 1867, see Pennington v. Lowenstein, 1
Bank. Rep. 157; Chapman v. Brewer, 114 U. S. 158.

Nature of Assignment.— Under the Act of 1867 an assignee in bankruptcy did not acquire the beneficial interest, but merely the title and control of the assets. Hence the assignment was not within a condition in a contract restricting alienation of the beneficial interest. Starkweather v. Cleveland Ins. Co., 2 Abb. N. S. 67; 4 Bank. Reg. 110.

Assignee in Bankruptcy as to Foreclosure. Held he need not be made party to a foreclosure, where the mortgagor was declared bankrupt during the foreclosure. Cleveland v. Boerum, 23 Barb. 201; 24 N. Y. 613. If made a party individually and not in his official capacity, he is not cut off, even where his only interest was as assignee. Landon v. Townsend, 112 N. Y. 93, revg. 44 Hun, 561. See also supra, Chap. XXVIII, Tit. II.

As to power to prevent a foreclosure in United States Courts, vide In re

Iron Mountain Co., 9 Blatch. 320.

Proceedings to set Aside Fraudulent Deeds.— Vide Cookingham v. Ferguson, 8 Blatch. 488. See also Act of 1898, § 70, as amended by Act of February 5, 1903.

The State courts held jurisdiction under the Act of 1867. Cook v. Whipple,

55 N. Y. 150; Kidder v. Horrobin, 72 id. 159.

Under the Act of 1898, both the courts of bankruptcy and State courts have jurisdiction by express enactment. Act of 1898, § 70e, as amended by Act of February 5, 1903.

As to the rights of a receiver in supplementary proceedings to bring action to set aside as fraudulent a general assignment, after appointment of assignee under act of 1867. Olney v. Tanner, 21 Blatch. 541.

Discharge.— The discharge in bankruptcy held to bar execution on a judgment recovered in a State court pending the proceedings, though no stav was had, as it might have been, under § 5106, R. S., U. S.; Boynton v. Ball, 121 U. S. 457; Wolf v. Stix, 99 id. 1; Hill v. Harding, 130 id. 699.

If suit is commenced after discharge, however, it must be pleaded. Dimock

v. Revere Copper Co., 117 U. S. 559.

To what debts it is not a bar. Act of 1898, § 17, as amended by Act of February 5, 1903; see Act of 1867, § 34; U. S. R. S., § 5119.

Constitutionality of the Act.— Vide Bump on Bankruptcy (5th ed.), 539, where the cases are collected; and Holyoke v. Adams, 59 N. Y. 233, affg. 2 Supm. 1.

"Fraud" Defined.— The word "fraud" under the Bankrupt Act defined. Ames v. Moir, 138 U.S. 306.

See as to debts not barred by fraud. Act of 1898, § 17, as amended by Act of February 5, 1903; Act of 1867, § 34; U. S. R. S., § 5119.

CHAPTER XXXIII.

TITLE BY ESCHEAT AND FORFEITURE.

TITLE I .- TITLE BY ESCHEAT. II .- TITLE THROUGH FORFEITURE TO THE STATE.

TITLE I. TITLE BY ESCHEAT.

Title by escheat was, under the common law, a result of feudal tenure; the land reverting to the lord, on failure of heirs of the feudatory. In this State, the State itself, by its right of sovereignty, is the original and ultimate proprietor of land within its jurisdiction, to whom it reverts on default of lawful owners.

1 R. S. 718; Const. 1846, Art. I, § 11; Const. of 1894, Art. I, § 10.

The provisions of the Revised Statutes were based upon those of Revised Laws of 1813, which were repealed by the general repealing Act of 1828, as also the Law of April 14, 1820.

Escheat was not purely of feudal origin however, it grew out of national policy. Cf. 2 Black. Comm. 249, 252; 3 id. 258; Bernheim Hist. of Law of Aliens, 124, 125; Chitty Prerog. of Crown, 215; Goodrich v. Russell, 42 N. Y. 177; Lee Abs. of Title, 202.

At common law, in cases of intestacy, where there was no heir or where there was a failure of competent heirs by reason of alienism, the lands vested immediately in the State, as no title or estate whatever could pass to an alien by operation of law. When the ancestor died, if the persons who would otherwise inherit were aliens, it passed by them, and not through them, and vested at once in the State. A "purchase" by an alien, however, did not necessarily create a forfeiture, but the government might interfere and deprive him of his title. In the meantime the estate was deemed vested in him until office found, or until his death; in which case, as he could have no heirs and the title could not descend, it immediately reverted to the people without office found. A trust created by an alien in order to evade the law would also escheat. See fully as to the above principles, and as to the rights of aliens, and the various changes of the common law by as to the rights of aliens, and the various changes of the common law by the statute law of this State, supra, Chap. III, Tit. IV.

Lands that have escheated may be conveyed by the State before entry, even if they be held adversely. McCaughal v. Ryan, 27 Barb. 376; Ettenheimer v. Heffernan, 66 id. 374; but see below.

Where the naked fee is in others who are bound to convey on demand, the estate escheats on the death of the beneficial owner without heirs. Johnston v. Spicer, 107 N. Y. 185. And see Fowler's Real Property Law (2d ed.), 103, 114, 125, 126.

What Estate is Taken.— The State takes the estate in the condition in which the party held it, subject to all liens, remainders, etc. 1 R. S. 718, § 2; Public Lands Law, L. 1894, Chap. 317, § 68; Foster's Crown Law, 96; Borland v. Dean, 4 Mason, 74.

British Subjects .- As to the rights of British subjects under the treaties of 1783 and 1794, vide supra, Chapter I, Title I.

Trusts in Escheated Lands .- The Revised Statutes declared that all escheated lands when held by the State or its grantee, are to be subject to the

51 [801] same trusts, incumbrances, charges, rents and services, to which they would have been subject if they had descended, and the attorney-general is to convey them to any person equitably entitled thereto. 2 R. S. 718, § 2. See similar provision in the Public Lands Law, L. 1894, Chap. 317, § 68.

Proceedings of Escheat.—By the Code of Civil Procedure, as formerly by the Revised Statutes, the attorney-general shall cause an action of ejectment to be brought for the recovery of escheated lands, and must publish a notice at least once in each week for twelve successive weeks in three designated publications. He may likewise proceed against unknown claimants. Code Civ. Proc., §§ 1977-1979; 1 R. S. 282, §§ 1-3; see also Laws of 1818, Chap. 293; 1820, Chap. 248; 1830, Chap. 320; see 8 Barb. 195; and see the above acts and the Code of Procedure for former laws.

As to whether an escheat of land can be enforced or established by anyone but the State, through its attorney-general in the mode prescribed by statute (Code Civ. Proc., §§ 1977 et seq.), quære. Croner v. Cowdrey, 139 N. Y. 471. See also Haley v. Sheridan, 46 Misc. 506; 190 N. Y. 331; McCormack v. Coddington, 46 Misc. 510; 109 App. Div. 741; 184 N. Y. 464.

Unknown Claimants may contest within five years after sale and conveyance, and until any disability removed, if infants, insane, imprisoned or married women. Code Civ. Proc., §§ 375, 1980; 1 R. S. 282, § 4; L. 1830, Chap. 320, § 64.

Bounty Lands.—As to lots on "Military bounty lands" escheating on death of patentee to be sold by commissioners of the land office, vide 1 R. S. 283, §§ 5, 6, 7.

Contracts for Sale.— The commissioners of the land office are to fulfill all contracts existing relative to escheated lands, with tenants and others, under certain conditions. Public Lands Law, L. 1894, Chap. 317, § 66; L. 1831, Chap. 116, §§ 1, 2.

Actions by the People.—By the Code of Civil Procedure (as formerly by the Code of Procedure, Chap. II, §\$ 75-77) the people of the State will not sue any person for or with respect to real property, unless their right has accrued within forty years before the action is commenced, or unless they or those from whom they claim have received the rents and profits of the real property or of some part thereof within the same period. Code Civ. Proc., § 362. The limitation also was made by Laws of 1788, 2 Greenl. 93; and of 1801, 1 Web. 619; People v. Clarke, 9 N. Y. 349; People v. Livingston, 8 Barb. 253; People v. Arnold, 4 N. Y. 508; Wendell v. Jackson, 8 Wend. 183; People v. Dennison, 17 id. 313; People v. Van Rensselaer, 9 N. Y. 319, approved, People v. The Rector, etc., of Trinity Church, 22 id. 44; Champlain Co. v. Valentine, 19 Barb. 484.

There is no presumption of title in favor of the people. People v. The Rector, etc., of Trinity Church, 22 N. Y. 44.

The land, however, must have been held in hostility to the title. People v. Arnold, 4 N. Y. 508; Genesee Val. Con. R. R. Co. v. Slaight, 49 Hun, 35.

Action by Grantee from State.—Shall not be brought unless it might have been maintained by the people, if the patent or grant had not been made. Code Civ. Proc., § 363.

Taking Possession.—The State cannot take possession until the alienism and escheat have been judicially established. Larreau v. Davignon, 5 Abb. N. S. 367.

Nor is the escheat complete until the entry of judgment. Goodrich v. Russell, 42 N. Y. 177; Maynard v. Maynard, 36 Hun, 227.

See also Croner v. Cowdrey, 139 N. Y. 471.

Suspension of Proceedings by the People Against Lands Escheated, or Interests Therein—As to proceedings for this, vide Law of 1845, Chap. 115, repealing Law of April 29, 1833, Chap. 300; which latter act had repealed Act of April 26, 1832. The Law of 1845 also repealed Act of April 26, 1832,

and virtually repealed Act of March 18, 1834, Chap. 37. The Act of 1845 was extended by Act of April 15, 1857, Chap. 576. These acts of 1845 and 1857 were repealed by the Real Property Law, 1896, Chap. 547. See more fully as to said act, supra, Chap. III, Tit. IV. As to the interpretation of the above acts of 1833 and 1834, vide Englishbe v. Helmuth, 3 N. Y. 294.

The title of any person to hold cannot be questioned or impeached by reason of the alienage of any person through whom such title may have been derived. Real Property Law, § 7; supra, Chap. III.

See also Fowler's Real Property Law (2d ed.), 123 et seq.

Proceedings to Release Escheat .- Public Lands Law, L. 1894, Chap. 317, Art. IV (as amd. by L. 1905, Chap. 360 and L. 1908, Chap. 613); see also L. 1890, Chap. 279; L. 1892, Chap. 625; L. 1893, Chap. 191.

Patents Ratified .- Patents of real property escheated granted before May 16, 1892, ratified and confirmed to the patentees, their heirs and assigns. Public Lands Law, L. 1894, Chap. 317, § 69.

TITLE II. TITLE THROUGH FORFEITURE TO THE STATE.

This is a title created by act of the owner whereby he forfeits to the State all land owned at the time of the offense, or at any time afterward. In New York, forfeiture to the State for crime is confined to cases of outlawry on conviction for treason, and to the lifetime of the convict and no longer.

Code Crim. Proc., § 819; Penal Code, § 710; see also 1 R. L. 495; 2 R. S. 701, § 22 (repealed by Laws of 1886, Chap. 513).

Under the common law it tainted the blood of the party forfeiting, so that others could not inherit through him. This provision is abolished by the Constitution of the United States.

After the successful termination of the Revoluntary war with Great Britain, the Legislature passed an act (October 22, 1779, 1 Greenl. 25; November 13, 1781; also May 12, 1784, id. 127) declaring certain persons nominatim and others thereafter designated, attainted of treason and felony against the United States, banishing them from the State and forfeiting all their property; and all conveyances by them since July 9, 1776, were held fraudulent. "Commissioners of forfeiture were appointed for the sale of said estates; no sales to be made before October 1, 1780, and deeds to be given which shall operate as warranties by the people; the land to be sold in their respective counties; and not over 500 acres to be included in one sale; the commissioners are not to purchase, themselves." Books of these conveyances were made by the commissioners of forfeiture for the registers and clerks of many counties in the State. These acts have been great districts of the State. Such a book is to be found in the office of the held retrospective, so as to affect prior titles. Col. & C. Cases, 88. Acts were also passed as to the above forfeited estates, November 27, 1784, March 31, 1785, May 1, 1786. By Law of March 2, 1788, 2 Greenl. 200, the office of commissioners of forfeiture was abolished after September 1, 1788, and their duties were to be executed by the surveyor-general. By Law of March 28, 1797, after five years from the date of the act or accruing of an interest in a forfeited estate, all right to an action to recover the estate was barred; with exceptions in favor of femes coverts, insane persons and infants. As to actions and the limitation of actions by the people for for-feited estates, vide supra, p. 802, the same provisions applying as in the case of escheat (Code Civ. Proc., §§ 1977–1980; § 362); and also People v. Clarke, 9 N. Y. 349.

Estates in Remainder.— These estates are not lost by forfeiture of the particular estate. Foster Crown Law, 95; 4 Mason, 174; Code Crim. Proc., § 819.

Forfeiture before 1783.— Treaty with Great Britain in 1783 provided against further confiscations or prosecutions (Art. VI). See as to forfeiture before 1783, as to British subjects, Chap. I, *supra*, and McGregor v. Comstock, 16 Barb. 427, affd., 17 N. Y. 162.

Recovery by the People.—By the Revised Statutes real estate forfeited to the People of this State upon any conviction or outlawry for treason might be recovered in the same manner as escheated lands. 1 R. S. 284; 1 R. L. 382. And the proceedings might be had in any court of record. 2 R. S. 586, § 53. By the Code of Procedure, § 447, the action was to be in the Supreme Court. Tnese provisions are now repealed and proceedings are regulated in the same manner as in the case of escheat and they may be brought in any court having jurisdiction. Code Civ. Proc., §§ 1977-1980, 1962.

Forfeiture of Lands held under letters patent, when there has been Fraud, Mistake, etc.— See supra, Chapter I, Title III.

CHAPTER XXXIV.

TITLE BY POSSESSION.

I .- LIMITATION OF REAL ACTIONS.

II .- ADVERSE POSSESSION.

III.- Possession as Notice.

IV .- SQUATTERS, INTRUDERS AND HOLDERS OVER.

Possession gives title through a continued occupation, that so far infers ownership or right as to exclude the recovery by others claiming title, unless under certain exceptions established by law.

Baker v. Oakweed, 49 Hun, 416, affd., 123 N. Y. 16; see also p. 810. Prescription and adverse possession is itself a method of obtaining title of property. Satterle v. Kobbe, 173 N. Y. 91. See also Heller v. Cohen, 154 N. Y. 299; Sims v. McElroy, 160 id. 156; Lewis v. N. Y. & Harlem R. R. Co., 162 id. 202; Sweetland v. Buell, 164 id. 541.

TITLE I. LIMITATION OF REAL ACTIONS.

The statutes of this State have prescribed certain limits as to time to the recovery of land, even by the true owner, against parties who have the possession; which possession in time ripens into an indefeasible legal title. These provisions, as now in force, are found in the Code of Civil Procedure.1

Vide Code Civ. Proc., §§ 362-375; also §§ 398-415.

¹Mr. Fowler's Note on "Adverse Possession and Limitations to Actions for the Recovery of Real Property." Account of the Statutes.—The history of the statutes of limitations of actions to recover real property in England is briefly told by Cruise. Dig., Tit, 31, Chap. II; 3 Bla. Comm. 188. Prior to the statute 32 Henry VIII, Chap. 2, the period prescribed by the Statutes of Merton and Westminster I had become really no limitation at all; they referred the period of limitation back to the then ancient reigns of Henry I or Richard I. The statute of 32 Henry VIII, Chap. 2, next prescribed a seisin within three score years as a perequisite of a real action by a demandant. The statute of 21 James I, Chap 16 in effect shortened somewhat the period in actions, entries, etc., between private persons and to sixty years as to the Crown. Re-enacted and reaffirmed 9 Geo. III, Chap. 16; People v. Arnold, 4 N. Y. 508. After independence this subject was regulated in England by the statute of 3 and 4 Wm. IV, Chap. 27, taking effect on December 31, 1834.

The doctrine of a title by adverse possession is comparatively modern, and may be said to have been formulated subsequently to the abolition of tenures (12 Car. II, Chap. 24). Before that time a "disseisin" which would put an owner to his entry, or real action, was well understood in the common law. The old Statutes of Henry VIII and James I provided bars by lapse of time to the entry and also to the real actions by the disseisee, which bars were fairly certain. See Wallace, note to Taylor v. Horde, 2 Smith L. C. 396. The main question then for a trial of title was "seisin" or "disseisin" within the time prescribed. In new countries like America "possession" necessarily plays a greater part in questions of title to lands. See opin. Chan. Livingston in Street's Council Revision, 225; People v. Arnold, 4 N. Y. 508. But at common law, and at present it is not otherwise, the presumption is that a de facto entry and possession are rightful (La Frambois v. Jackson, 8 Cow. 589, 617;

The statute of limitations, with reference to real property, was revised in 1801, and again by the Revised Statutes, and subsequently by the Code of Procedure. That Code, § 73, repealed the chapter of the Revised Statutes, entitled "Of actions, and the times of commencing them," and was itself

An entry on a deed from one tenant in common after twenty years' possession bars the other tenants in common, as the conveyance is regarded as an "ouster," and the possession under the deed is adverse as to the tenant in common not joining in the deed. Sweetland v. Buell, 164 N. Y. 541; Hamershlag v. Duryea, 58 App. Div. 288. The possession of one tenant in common may be adverse as to the others (Pope v. Thrall, 33 Misc. 44 and cases cited; and see Code of Civ. Proc. § 1515; Hamershlag v. Duryea, 38 App. Div. 130; again, 58 id 288; Zapf. v. Carter, 70 App. Div. 395), although the possession of one is presumptively that of the others. Sweetland v. Buel, 164 N. Y. 541, 551. But one tenant in common cannot by adverse possession acquire an easement as against his cotenants (Farley v. Howard, 33 Misc. 57. Cf. Winne v. Winne, 4 Misc. 435) or buy an outstanding title to his prejudice. Turner v. Walker, 40 Misc. 379.

Infants.—A title may be completely adverse, even if acquired from infants twenty years after they attain majority. Strauss v. Bendheim, 162 N. Y. 469; Binzen v. Binzen, 58 App. Div. 304.

Grantor and Grantee.— The possession of a grantee may be adverse to his grantor. Sherman v. Kane, 86 N. Y. 57; Mannix v. Riordan, 75 App. Div. 135.

Constitutional Declaration Construed.— The Constitution of the State declares that the People in their right of sovereignty are deemed to possess the original and ultimate property in and to all lands within the State. Const. 1894, Art. I, § 10. This is not a rule of evidence, but a principle of sovereignty, and there is no presumption of title in favor of the State in an action by the State against the actual occupant, until it is shown that the possession has been vacant within forty years. People v. Trinity Church, 22 N. Y. 44; People v. Van Rensselaer, 9 id. 291, 318, 319; N. Y. Central, etc., R. R. Co. v. Brennan, 12 App. Div. 103; Clark v. Holdridge, Id. 613; People v. Arnold, 4 N. Y. 508; Johnson v. Spleer, 107 id. 185; Wendell v. People, 8 Wend. 183, 188; People v. Dennison, 17 id. 312.

There is no presumption of title in favor of the People until it is shown that the possession has been vacant within forty years (Code Civ. Proc., § 362; People v. Trinity Church, 22 N. Y. 44; People v. Arnold, 4 id. 508; Genesee Valley Canal R. R. Co. v. Sleght, 14 C. P. R. 420, 426); or that the People, or their grantees, have received the rents within that period. Id., supra; People v. Arnold, 4 N. Y. 508, 511; Bliss v. Johnson, 94 id. 235, 242. Unless the land is adversely possessed, the People are however presumed to have received the rents of wild or vacant land. Id., supra.

Actions by Others Than the People.— Plaintiff must, under Code Civ. Proc., Constitutional Declaration Construed .- The Constitution of the State declares

possessed, the People are however presumed to have received the rents of wild or vacant land. Id., supra.

Actions by Others Than the People.—Plaintiff must, under Code Civ. Proc., \$365, establish seisin or possession within twenty years affirmatively. Clapp v. Bromaghan, 9 Cow. 530; Timpson v. Mayor, 5 App. Div. 424, 429; Doherty v. Matsell, 11 C. P. R. '92, 399; s. c., 119 N. Y. 146; Lewis v N. Y. & Harlem R. R. Co., 162 N. Y. 202, 220. What is a seisin since the abolition of tenure has been often discussed (Fowler's Real Property Law (2d ed.), 107, 562, 839 850); the word "possession" covers terms of years, Bedell v. Shaw, 59 N. Y. 46, and as there stated is now nothing else but ownership of a legal title, as is well shown by Code Civ. Prov., \$368. Where a legal title is proved by plaintiff in ejectment, a sufficient possession under this section follows the title, or, in other words, is presumed from the factum of legal title. Code Civ. Proc., \$368; Bedell v. Shaw, 59 N. Y. 46, 49; Cutting v. Burns, 57 App. Div. 185. Thus the onus probandi an adverse possession of twenty years, rests on defendant. Stevens v. Hauser, 39 N. Y. 302; Doherty v. Matsell, 119 id. 646; Lewis v. N. Y. & Harlem R. R. Co., 162 N. Y. 202, 220. An adverse possession of twenty years confers a marketable title. Hamershlag v. Duryea, 31 Misc. 678; 38 App. Div. 130; again 58 id. 288. The Code of Civil Procedure provides that an entry upon real property is not sufficient unless action is begun within one year thereafter and within twenty years after the right accrued. Code Civ. Proc., \$367. At the common law an entry or claim on lands was very efficacious, or was the cause or gravamen of several old writs in real actions. We little comprehend now the extent of the importance of the common law doctrines of entry to revest estates or restore a lost seisin. Tomlin's Lyttleton, 425; Tomlin's Dict. Tit. "Entry." Co. on Litt. "Entry" and Hargrave and Butler's notes on "Entry." 1 Preston, Abstracts of Title, 297; 2 Bla. Comm. 312; 1 Cruise, Dig. 5

repealed as to this by Laws of 1877, Chap. 417. The provisions of that Code upon this subject are now superseded by those of the Code of Civil Procedure; vide supra.

The provisions for limitations contained in the Revised Statutes, held not to affect causes of action or defenses accruing before their enactment. Prindle

v. Beveridge, 7 Lans. 225.

When the People will not Sue .- The people will not sue a person with respect to real property, unless the cause of action accrued within forty years before the action is commenced, or the people or those from whom they claim have received the rents and profits of the real property, or of some part thereof within the same period. Code Civ. Proc., § 362; Co. Proc. § 75 amd.

As to limitation of action by the people and adverse possession as against

them, vide Gen. Val. Can. R. R. Co. v. Slaight, 49 Hun, 35.

The former statutes of 1798 and 1801 may operate as a bar to an action by the people to recover lands held under patents in 1685 and 1704; People v. Van Rensselaer, 9 N. Y. 291.

Grants from the People,- Provision is made for actions based upon grants from the people, and for suits after patents or grants by the people are declared void. Code Civ. Proc., §§ 363, 364. Formerly covered by Code Proc., §§ 76, 77.

By the Code of Civil Procedure an action to recover real property or the possession thereof, cannot be maintained by a party, other than the people, unless the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the premises in question, within twenty years before the commencement of the action.

Code Civ. Proc., § 365; see Code Proc., § 78.

A defense or counterclaim founded on title, or to rents or services out of same, is not effectual unless the person making it or under whose title it is

made, or his ancestor, predecessor or grantor, was seized or possessed of the premises within twenty years before the commitment of the act with respect to which it is made. Code Civ. Proc., § 366.

Possession in this section is construed to mean the right to possession in view of Code Civ. Proc., § 368. Deering v. Reilly, 38 App. Div. 164.

Title to land under water in the Hudson river with the right to build bulkheads may be acquired by adverse possession against the city of New York. The city is a party other than the people. Timpson v. Mayor, 5 App. Div. 424.

The limitation emplies only

The limitation applies only to cases where prior to the Code of Procedure the remedies sought were administered by courts of law. Miner v. Beekman, 50 N. Y. 337, distinguished in Shriver v. Shriver, 86 id. 575; Hubbel v. Sibley, 50 id. 468; distinguished in Trim v. Marsh, 54 id. 599; and vide supra, "Foreclosure," Chapter XXVIII.

Such seizin or possession as carries with it the title to the premises or a right of entry which will authorize an action of ejectment is necessary, and such title is possessed when the party has right of security on breach of a condition. Tyler v. Heidorn, 46 Barb. 439.

The fact that twenty years have elapsed since recovery of judgment for possession, during which time plaintiff has never sought to enforce it by writ of possession, held not to raise the presumption that the defendant has at some time during that period paid the rent and costs and thus become entitled to keep possession. Van Rensselaer v. Wright, 31 St. Rep. 897; 121 N. Y. 626.

The State may acquire title by adverse possession for twenty years on a taking under a statute which is unconstitutional. Eldridge v. City of Binghamton, 120 N. Y. 309.

By the Code of Civil Procedure action must be commenced within a year

after entry, to make it valid, and within twenty years from the time the right accrued. Code Civ. Proc., § 367; Code Proc., § 80.

As to when actions are deemed commenced, vide Code Civ. Proc., § 398; and as to absence of defendant from the State, § 401; a foreign corporation is a person out of the State within this section. Olcott v. Tioga R. R. Co., 20 N. Y. 10; as to actions by representatives after death of party entitled,

In an action of ejectment brought as a substitute for a writ of right, to enforce a claim accruing before the Revised Statutes, an adverse possession of twenty-five years, (the period of adverse possession required prior to the Revised Statutes, McCormick v. Barnum, 10 Wend. 104; Simpson v. Downing, 23 id. 316) is necessary to bar the action, e. g., as in a case where a right to realty existed, and the party died leaving heirs. Their right does not accrue until the death of the ancestor. See also, as to claims by writ of right, Fosgate v. The Herkimer, etc., Co., 9 Barb. 287, affd., 12 N. Y. 580; see also 12 Barb. 352. As to adverse possession before the Revised Statutes, vide Cahill v. Palmer, 45 N. Y. 478.

As to reversal of judgment and time for new action, Code Civ. Proc., § 405;

as to the time not being stayed by injunction or statutory prohibition, § 406. In case of fraud the time runs from discovery of the fraud, and is not enlarged by new fraud. Piper v. Hoard, 107 N. Y. 67.

If a person who might maintain the action or interpose the defense or counterclaim is when his title first descends, or his cause of action or right of entry first accrues:

(1) An infant (2) insane or (3) inprisoned on a criminal charge or in execution upon conviction of a criminal offense for a term less than for life:

The time of such disability is excluded, but the time cannot be extended more than ten years after the disability ceases or after the death of the

party so disabled. Code Civ. Proc., § 375; Code Proc., § 88.
"Married Women" were originally among the persons named in Code Proc., § 88, but the words were struck out. By the former rule, a married

woman had only ten years after coverture ceased, and twenty years in all. Wilson v. Betts, 4 Den. 201; Laws of 1870, Chap. 741.

Ten years after 'death of person under disability his heirs must have brought the action under the Revised Statutes, and had only that time, even if some were under disability. Carpenter v. Schermerhorn, 2 Barb. Ch. 314,

323.

Where an owner died in 1866, leaving a daughter who became of full age in 1884, but died in 1891, leaving an infant 3 years of age, held the statute had not run against such infant under Co. Civ. Proc., § 375, providing that where the right accrues to a person under 21 years the time of disability is not part of the time limited. Meiggs v. Hoagland, 68 App. Div. 182.

See also Howell v. Leavitt, 95 N. Y. 617; Hoeffner v. Sevestre, 30 St.

Rep. 296.

As to the exact computation of the ten years, vide Phelan v. Douglass, 11 How. 193. The disability must exist when the right accrues or descends. Code Civ. Proc., § 408; Code Proc., § 106. If two or more exist when the right accrues, limitation does not begin until all are removed. Proc., § 409; Code Proc., § 107.

See fully as to disabilities, and the early cases reviewed, Jackson v. Johnson, 5 Cow. 74. Formerly where the time has begun to run, a subsequently accruing disability as of an heir to whom title descended was held not to suspend it. Fleming v. Griswold, 3 Hill, 85; and cumulative disabilities are not allowed. Bradstreet v. Clark, 12 Wend. 602. Successive disabilities cannot operate to enlarge the time. Jackson v. Robins, 15 Johns. 169; Demarest v. Wynkoop, 3 Johns. Ch. 129; Jackson v. Moore, 13 Johns. 513.

When Limitation Begins .- The statute of limitations does not begin to run from the time of occupancy, but from the commencement of the adverse possession. Jackson v. Thomas, 16 Johns. 292; Jackson v. Newton, 18 id. 355; Minor v. Mayor, 37 Super. 171; Fleming v. Burnham, 100 N. Y. 1.

Residence out of State as preventing running of Statute of Limitations. Barney v. Oelrichs, 138 U. S. 529.

Reversioner.— As against a reversioner, there can be no adverse possession. It can only exist against one entitled to possession. Clark v. Hughes, 13 Barb. 147.

As Against Remaindermen.— The statute does not begin to run till the determination of the precedent estate. Fogal v. Pirro, 10 Bosw. 100. See also as to reversioners and remaindermen. Jackson v. Johnson, 5 Cow. 74; Jackson v. Schoonmaker, 4 Johns. 390; Moore v. Jackson, 4 Wend. 58; Carpenter v. Schermerhorn, 2 Barb. Ch. 314; Gilbert v. Taylor, 76 Hun, 92.

Mortgagor.—The mortgagor or those claiming under him may redeem against the mortgagee in possession or those claiming under him, unless he or they have continuously maintained an adverse possession of the mortgaged premises for twenty years after the breach of a condition of the mortgage, or the nonfulfillment of a covenant therein contained. Code Civ. Proc., § 379.

See also Becker v. McCrea, 119 App. Div. 56.

Aliens may plead the statute as a defense, although they may not acquire title by an adverse possession, against the State. Overing v. Russell, 32 Barb. 263.

As to alien enemies, the period of hostility is to be deducted from the time the statute runs. Code Civ. Proc., § 404; Code Proc., § 103. Vide Bormean v. Dinsmore, 23 How. 397; Sanderson v. Morgan, 25 id. 444, affd., 39 N. Y. 231; U. S. v. Victor, 16 Abb. 153.

Land Formerly Part of a Street .- Vide Miner v. Mayor, etc., 37 Super. 171.

Corporations.—A toreign corporation held not entitled to avail itself of the Statute of Limitations. Robeson v. Central R. R. Co. of N. J., 76 Hun, 444; See Rathbun v. Northern Central R. R., 50 N. Y. 656.

TITLE II. ADVERSE POSSESSION.

Adverse Possession Superior to Legal Title.— By the Code of Civil Procedure, a person establishing a legal title to premises, in an action for the recovery of real property or the possession thereof, shall be presumed to have been possessed thereof within the time required by law; and the occupation of the premises, by another person, is deemed to have been under and in subordination to the legal title, unless the premises have been held and possessed adversely to the legal title, for twenty years before the commencement of the action.

Code Civ. Proc., § 368; Code Proc., § 81.

Corporations may hold adversely. Robie v. Sedgwick, 35 Barb. 319; Sherman v. Kane, 86 N. Y. 57; but semble, possession by a railroad corporation of an easement of a tract does not make an adverse possession. Watson v. N. Y. C. R., 6 Abb. N. S. 91.

Possession under a tax lease is not adverse. Bedell v. Shaw, 59 N. Y. 46. The possession must continue for twenty years after the expiration of the lease and all renewals, to give title. Doherty v. Matsell, 54 Super. 17. In the absence of adverse possession, the possession follows the legal title. Wood v. Squires, 1 Hun, 481, revd. on another point, 60 N. Y. 191; see Yates v. Van De Bogert, 56 N. Y. 526.

Adverse possession divests and transfers title. Baker v. Oakwood, 123 N. Y. 16.

Title by adverse possession is as good as by grant. Sherman v. Kane.

86 N. Y. 57.

The State can acquire by adverse possession. Birdsall v. Cary, 66 How. Pr. 358; Eldredge v. Binghamton 42 Hun, 202, affd., 120 N. Y. 309; Mayor, etc., v. Carleton, 113 id. 292.

User will not give title in fee where an easement only will secure the privilege enjoyed. Roe v. Strong, 107 N. Y. 350.

Burden of proof is on the person asserting the adverse possession. Lam-

bert v. Huber, 22 Misc. 462.

The title acquired by twenty years' adverse possession is not lost by interruption of actual possession after the twenty years. Sherman v. Kane, See also Woodruff v. Paddock, 130 N. Y. 618; Delancey v. Hawkins, 23 App. Div. 8.

When Land Deemed to be Held Adversely under a Conveyance. Judgment. etc.—Lands are deemed to be held adversely. where the occupant, or those under whom he claims, entered into possession of the premises under claim of title, exclusive of any other right, founding the claim upon a written instrument, as being a conveyance of the premises in question, or upon the decree or judgment of a competent court; and there has been a continued occupation and possession of the premises, included in the instrument, decree or judgment, or of some part thereof for twenty years under the same claim; the premises so included are deemed to have been held adversely, except that where they consist of a tract divided into lots, the possession of one lot is not to be deemed possession of any other lot.

Code Civ. Proc., § 369. Substantially a re-enactment of Code Proc., § 82.

Northport Impt. Co. v. Hendrickson, 139 N. Y. 440.

The deed must include in its boundaries the exact land claimed as a general rule. Jackson v. Camp, 1 Cow. 605; Jackson v. Woodruff, Id. 276, 286; Jackson v. Richards, 6 id. 617; Sharp v. Brandon, 15 Wend. 597; Hallas v. Pell, 53 Barb. 247; Robinson v. Phillips, 65 id. 418, affd., 56 N. Y. 634. But more may be gained if fenced. Rock v. Doerr, 15 N. Y. Supp. 15; Eldridge v. Kenning, 129 N. Y. 625. As to land outside the boundary line of lot conveyed. Voight v. Meyer, 42 Misc. 350.

To constitute adverse possession, it must not be under a general claim, but under claim of some specific title. Crary v. Goodman, 22 N. Y. 170; Hallas v. Bell, 53 Barb. 247; Higginbotham v. Stoddard, 72 N. Y. 94; Biglow v. Biglow, 39 App. Div. 103.

The mere fact that a party is in the possession of real estate and asserts an adverse claim thereto does not render a deed thereof void; the claim must

be under a specific title. Fortman v. Wheeler, 84 Hun, 278.

The title need only be prima facie good. Jackson v. Woodruff, 1 Cow. 276; Jackson v. Hill, 5 Wend. 532; and must not be a void or fraudulent one, c. g., as by a deed fraudulently obtained. Jackson v. Case, 7 Wend. 152; Livingston v. Peru Co., 9 id. 511.

The lands claimed must be fully identified or described in the instrument. Lane v. Gould, 10 Barb. 254; Jackson v. Woodruff, 1 Cow. 276; Jackson

v. Camp, Id. 605.

An actual adverse title to private incorporeal hereditaments in street not necessary to an adverse possession; a general assertion of ownership, if there be color of title, however groundless in fact, will suffice. Am. Bank Note Co. v. N. Y. El. R. R. Co., 129 N. Y. 252.

The occupant need not have declared that he held adversely. Christie v. Gage, 2 Supm. 344. Apparently affirmed, 71 N. Y. 189.

Adverse possession against the public cannot be set up by a deed which recognizes the public right. Bridger v. Wyckoff, 67 N. Y. 130.

No possession can be adverse to one who has not at the time the right of entry and possession. Devyr v. Schaeffer, 55 N. Y. 446; as for instance a remainderman, until the death of the life-tenant. Thompson v. Simpson, 128 N. Y. 270. See also Baker v. Oakwood 123 N. Y. 16.

An invalid assessment lease will not support it. Hilton v. Bender, 69

N. Y. 75.

Where the claim is made under a deed from a purchaser at a valid tax sale, the owners or occupants of the property sold for nonpayment of the tax will, after such sale, be regarded as holding the same in subordination to the title of the purchaser at such sale. In such case both parties claim the same title. Fortman v. Wheeler, 84 Hun, 278.

An ancient deed, even if in some respects not perfectly regular, will do.

Hoopes v. Auburn, etc., Co., 37 Hun, 568; 8 N. Y. Supp. 379.

A mortgagee in possession as such cannot set up adverse possession. Gross v. Wellwood, 90 N. Y. 638; Landon v. Townshend, 14 N. Y. Supp. 522, affd.,

Adverse possession established against trustees who have a fee held to cut off cestuis qui trustent and remaindermen. Bennett v. Garlock, 79 N. Y.

An acknowledgment of an easement in the opponent is fatal to adverse possession. It must be exclusive. Ogden v. Jennings, 66 Barb. 301, affd.,

Adverse possession begun by one religious corporation may be continued by another organized by the same religious society on lapse of the first. First Soc. of the M. E. Church, etc., v. Brownell, 5 Hun, 464. Religious corporations may lose land by adverse possession. Reformed Church v. Schoolcroft, 65 N. Y. 134.

Adverse possession for sixty-one years without any record title whatever

is good, and specific performance will be decreed. Ottinger v. Strasburger, 33 Hun, 466, affd., 102 N. Y. 692. Forty years' claim, Mangam v. Village

of Sing Sing, 86 Hun, 604.

The adverse possession need not be under color, though it must be under claim of title. Eldridge v. Kenning, 35 St. R. 190; 129 N. Y. 625.

Adverse possession may commence under an invalid deed. Hilton v. Bender,

2 Hun, 1.

Entry and possession under a deed given without right in the grantor is entry under color of title, and the possession is adverse. Sands v. Hughes, 53 N. Y. 287; see Pope v. Hammer, 8 Hun, 265, affd., 74 N. Y. 240; Ledoux v. Samuels, 116 App. Div. 726.

Possession of land, animo dominandi, is prima facie evidence of title, good as against any one who cannot show earlier possession or better title, nor is the right lost by temporary abandonment, animo revertendi. Mayor, etc., v. Carleton, 113 N. Y. 284.

A deed to a tenant in possession under the owner from one who has no title to the land is void, and insufficient as a basis for adverse possession.

McRoberts v. Bergman, 132 N. Y. 73.

That an adverse claimant and his grantees "were in the undisturbed possession of the land for 20 years and upwards," does not show title in them by adverse possession under Code Civ. Proc., § 369; Kneller v. Lang. 137 N. Y. 589.

Claim under a deed the only evidence as to which consists of a purchase

money mortgage presumably based upon it. Id.

Where a deed from trustees of a town includes land not intended to be conveyed, and the grantee takes possession of the land he actually bought. the statute of limitations does not run in his favor as to the rest. DeForest

v. Trustees of Huntington, 78 Hun, 611.

An alien may defend his possession as against one showing title, if he shows an adverse possession for twenty years. Overing v. Russell, 32 Barb. 263; Munro v. Merchant, 28 N. Y. 9.

So a corporation incapable of taking title. Humbert v. Trinity Church.

24 Wend. 587.

Possession under claim of title can only be interrupted by an action or by possession in hostility to such claim; loose verbal claims are not effectual. Robinson v. Phillips, 56 N. Y. 634; see Devyr v. Schaefer, 55 id. 446; Becker v. Van Valkenburgh, 29 Barb. 319.

Adverse possession may be acquired under a sheriff's deed on a void sale. Van Voorhis v. Kelly, 31 Hun, 293.

A certificate under a tax sale does not transfer a title under which adverse possession may be set up. Bedell v. Shaw, 59 N. Y. 46; Bensel v. Gray, 62 N. Y. 632; 80 id. 517; Fish v. Fish, 39 Barb. 513.

Nor does a lease under an assessment sale. Hilton v. Bender, 69 N. Y. 75.

A purchaser or a grantee of a purchaser at tax sale may acquire under a deed in fee, by adverse possession. Sands v. Hughes, 53 N. Y. 287; Doherty v. Matsell, 119 id. 646.

What Constitutes Adverse Possession .- To constitute adverse possession by a person claiming a title founded upon a written instrument or a judgment or decree, land is deemed to have been possessed and occupied in either of the following cases: 1. Where it has been usually cultivated or improved. 2. Where it has been protected by a substantial inclosure. 3. Where, although not inclosed, it has been used for the supply of fuel or of fencing timber, either for the purposes of husbandry or for the ordinary use of the occupant. Where a known farm or single lot has been partly improved, the portion of the farm or lot that has been left not cleared, or not inclosed, according to the usual course and custom of the adjoining country, is deemed to have been occupied for the same length of time as the part improved and cultivated. Code Civ. Proc., § 370.

Substantially, Code Proc., § 83; vide Price v. Brown, 101 N. Y. 669; Bolton v. Schriever, 49 Super. 168; Northport, etc., Impt. Co. v. Hendrick-

son, 139 N. Y. 440; Freund v. Ostrander, 66 Hun, 326.

See fully as to constructive possession under Code Proc., § 83, and a subconstructive possession. Finlay v. Cook, 54 Barb. 9; Jackson v. Vermilyea, 6 Cow. 677.

The doctrine of constructive adverse possession under a deed, etc., held not applicable to large tracts of land not bought for cultivation, but only to single farms or tracts. Jackson v. Woodruff, 1 Cow. 276; Thompson v. Burhans, 61

Mere occasional cutting of timber held not enough. Weeks v. Martin, 32 St. Rep. 811. See also Trustees of Easthampton v. Kirk, 68 N. Y. 459; Governeur v. Nat. Ice Co., 134 N. Y. 355; Wiechers v. McCormick, 122 App. Div. 860.

Mere occupancy of a lot in virtue and under claim of a grant which does not embrace it, is not adverse possession sufficient to defeat a transfer of title.

Laverty v. Moore, 33 N. Y. 658; Pope v. Hammer, 74 N. Y. 240.

The payment of taxes and State rents under a nominal grant, and the hiring of men to protect timber was held sufficient in People v. Van Rensselaer, 9 N. Y. 291; approved, People v. The Rector, etc., of Trinity Church, 22 N. Y. 44. See Thompson v. Burhans, 61 N. Y. 52; Mission, etc., v. Cronin, 143 N. Y. 524, holding surveying, paying taxes, etc., not enough of itself.

Acts may be as effective as assertions of claim to establish adverse posses-

sion. Cornelius v. Hall, 32 Misc. 663.

Planting trees along a highway will not suffice as against the owner of the

land on which the highway is. Bliss v. Johnson, 94 N. Y. 235.

There can be no adverse possession of vacant, unoccupied, uninclosed and unimproved land. Merely taking a deed from one not the owner, going upon the land and there asserting title, and occasionally taking grass and sand, will

not suffice. Price v. Brown, 101 N. Y. 669. See also College Point Savings Bank v. Vollmer, 44 App. Div. 619; Halloran v. Bell Tel. Co., 64 App. Div. 41. Necessity of keeping up fences after estate perfected. Second, etc., Church v. Humphrey, 21 N. Y. Supp. 89, affd., 142 N. Y. 137.

Fence held necessary where not usually cultivated or improved. McAvoy v. Cassidy, 8 Misc. 595.

There must be a real substantial enclosure. Archibald v. N. Y. Central, etc.,

R. R., 157 N. Y. 574.

As to adrerse possession of land encroached upon, see Roulston v. Stewart, 40 App. Div. 200.

Lands held under a Contract.— A possession by a purchaser under a contract cannot be adverse against the grantor, until he pay the purchase money. Fosgate v. Herkimer M. Co., 12 Barb. 352; Matter of Dept. of Parks, 73 N. Y.

But it may be adverse as to strangers. Vroman v. Shepperd, 14 Barb. 441;

Howland v. Newark Cemetery Ass'n, 66 Barb. 366.

After a full performance by a vendee, a conveyance may be presumed after centy years. Vroman v. Shepperd, 14 Barb. 441. See also Clapp v. Bromagham, 9 Cow. 530; partially overruling Jackson v. Johnson, 5 Cow. 74.

The possession will be adverse from time of entry as to all the world but his grantor. Howland v. Newark Cemetery Ass'n, 66 Barb. 366.

Possession under a deed from holder of determinable fee is not adverse until that estate has ended. Fleming v. Burnham, 100 N. Y. 1. Compare Christie v. Gage, 71 id. 189.

Possession Must be Hostile, etc.—Adverse possession to constitute a bar to the assertion of a legal title must be actual and hostile, and not a mere trespass. Fosgate v. Herkimer, etc., Co., 12 Barb. 352; McGregor v. Comstock, 16 id. 427, affd., 17 N. Y. 162; Humbert v. Trinity Ch., 24 Wend. 587, declared overruled, 45 Hun, 271; Kent v. Harcourt, 33 Barb. 491; Sturges v. Parkhurst, 50 Super. 306; Coleman v. Pickett, 82 Hun, 287.

It must not recognize the rightful title. Jackson v. Croy, 12 Johns. 427; Jackson v. Britton, 4 Wend. 507. It must continue hostile. Lewis v. N. Y.

& Harlem R. R. Co., 162 N. Y. 202.

But the occupant may take a release. Northrop v. Wright, 7 Hill, 476; Stevens v. Rhinelander, 5 Robt. 285.

Permissive possession held not to ripen into title in case of roadway. Lewis

v. N. Y. & Harlem R. R. Co., 162 N. Y. 202.

Attaching a joist to an existing house wall held a notorious and hostile act. Pearsall v. Westcott, 45 App. Div. 34.

It cannot be adverse, if held under a lease or tenancy of any kind or assignment by a tenant. Corning v. Troy, etc., Factory, 40 N. Y. 191; another proceeding, 34 Barb. 485; Tompkins v. Snow. 66 id. 525.

This applies to any one who succeeds to tenant's possession, though ignorant

that he was a tenant. Bradt v. Church, 110 N. Y. 537.

It must be hostile in its inception, or there must have been a surrender of a holding not hostile. Knolls v. Barnhart, 71 N. Y. 474; Bradt v. Church, 39 Hun, 262; revd. on another point, 110 N. Y. 537.

As to when the occupation of a tenant may be adverse to his landlord, vide Church v. Schoonmaker, 42 Hun, 225, affd., 115 N. Y. 570; Hasbrouck v. Burhans, id. 376. See also People v. Van Rensselaer, 9 id. 291; People v. The Rector, etc., of Trinity Church, 22 id. 44.

Visible, Distinct, etc.—The possession also must be visible, continuous, notorious and distinct, or definite, and inconsistent with the claim of others. Burhans v. Van Zandt, 7 Barb. 91, revd. on other grounds, 7 N. Y. 523; Humbert v. Trinity Ch., 24 Wend. 587, declared overruled, 45 Hun. 471; Cahill v. Palmer, 45 N. Y. 479; Becker v. Van Valkenburgh, 29 Barb. 319.

A person holding adversely is a freeholder de facto. Roseboom v. Van

Vechten, 5 Den. 414.

Not, however, if he hold under an assessment lease. Sands v. Hughes, 53 N. Y. 287.

As to subterranean rights not embraced in deed, see Patten v. N. Y. Elev. R. R. Co., 3 Abb. N. C. 306.

Peaceable.— Must be peaceable. McAvoy v. Cassidy, 8 Misc. 595.

Presumption Against Adverse Holding.— A seizin is presumed continuous, and another entering without claim, is presumed as of that seizin and subservient to it, unless the contrary is proved. Jackson v. Thomas, 16 Johns. 293; Fosgate v. The Herkimer, etc., Co., 9 Barb. 287, affd., 12 N. Y. 580; see also same title, 12 Barb. 352; Bogardus v. Trinity Ch., 4 Sandf. Ch., 633, declared overruled, 45 Hun, 371; Landers v. Riedinger, 30 App. Div. 277. See also Code Civ. Proc., § 368; Code Proc., § 81.

Presumption as to Delivery of Deed, When Overcome.—Mannix v. Riordan, 75 App. Div. 135.

When Party Estopped.—A party is not estopped from setting up adverse possession by purchase of a right from the legal owners. Jackson v. Vanderlyn, 18 Johns. 355; see also Burhans v. Van Zandt, 7 N. Y. 523; Fish v. Fish, 39 Barb. 513; Northrop v. Wright, 7 Hill, 476; Stevens v. Rhinelander, 5 Robt. 285; Kent v. Harcourt, 33 Barb. 491, as to estoppel generally in cases of adverse possession.

Title by Adverse Possession Marketable.—Freedman v. Oppenheim, 187 N. Y. 101; Hamerschlag v. Duryea, 31 Misc. 678; Kahn v. Mount, 46 App. Div. 84.

Water-courses.—Water-courses are also the subject of adverse possession. Townsend v. McDonald, 12 N. Y. 381; Law v. McDonald, 9 Hun, 23.

But non-user during twenty years will not impair title. Id.; Olmstead v. Loomis, 9 N. Y. 423, modifying 6 Barb. 152; and see infra, "Prescription;" and Corning v. Troy Co., 40 N. Y. 191.

Conveyance or Mortgage of Land held Adversely.—As to such conveyances, vide 1 R. S. 739, §§ 147, 148; Real Property Law, § 225; and supra, Chap. XX, Tit. X, also Arents v. L. I. R. R. Co., 156 N. Y. 1; Crooked Lake, etc., Co. v. Keuka, etc., Co., 37 Hun, 9; Willis v. Gehlert, 34 Hun, 566; Dawley v. Brown, 79 N. Y. 390; Swettenham v. Leary, 18 Hun, 284; De Garmo v. Phelps, 176 N. Y. 455, revg. 64 App. Div. 591; Dever v. Caulkins, 43 App. Div. 354. Also Code Civ. Proc., § 1501, 1498. Also Penal Code, §§ 129, 130, 131 (amd. L. 1888, Chap. 282).

A vendee cannot be compelled to perform where at time fixed for performance land is in the actual possession of persons claiming title adversely to vendor. Bullard v. Bicknell, 26 App. Div. 319.

Indians.— The possession of lands in this State by Indians is not such an adverse possession as will avoid conveyances by patentees of the State. Jackson v. Hudson, 3 Johns. 375.

Grants from the State.—The statute against conveyances under adverse possession (1 R. S. 739, §§ 147, 148; Real Property Law, § 225), held not to apply to grants from the State. 34 Barb. 349; 36 id. 533.

Adverse Possession Under Claim of Title not Written.— Where there has been an actual continued occupation of premises, under a claim of title exclusive of any other right, but not founded upon a written instrument, or a judgment or decree, the premises so actually occupied, and no others shall be deemed to have been held adversely.

Code Civ. Proc., § 371; Code Proc. 84; see Eldridge v. Kenning, 129 N. Y. 625.

What Constitutes the Possession .- For the purpose of constituting such What Constitutes the Possession.—For the purpose of constituting such adverse possession, land is deemed to have been possessed and occupied in either of the following cases and no others:

1. Where it has been protected by a substantial enclosure.

2. Where it has been usually cultivated or improved. Code Civ. Proc., § 372; Code Proc., § 85.

The right of a person to the possession of real property is not impaired or affected by a descent being cast, in consequence of the death of a person in possession of the property. Code Civ. Proc., § 374; Code Proc. 87.

In considering acts of an adverse character, reference should be had to the character of the land and the uses to which it is ordinarily applied; for the purpose of escentaining with what mind it was so possessed on the one side.

purpose of ascertaining with what mind it was so possessed on the one side, and such possession was permitted on the other. Corning v. Troy Factory, 44 N. Y. 577.

Possession of a small portion of a large body of land, too large to be used

as one body, is held insufficient. Thompson v. Burhans, 61 N. Y. 52. So payment of taxes on land is held insufficient. *Id.* Archibald v. N. Y. C. & H. R. R. R. Co., 157 N. Y. 574; Greenleaf v. B. F. & C. I. R. Co., 141 N. Y. 395.

As to efficacy of other acts, see also Miller v. Downing, 54 N. Y. 631.

Whole Title.— The claim must be for the entire title, and not subservient to another, or acknowledged title in another. Howard v. Howard, 17 Barb. 663; Jackson v. Johnson, 5 Cow. 74; Stevens v. Rhinelander, 5 Robt. 285; compare Zorn v. Haake, 75 Hun, 235; and see supra, p. 810.

Enclosure.— The enclosure held to mean not a fence far away embracing the lands, but an enclosure of the lot alone, upon lines claimed. The enclosure may be by a natural barrier, as of rocks, etc. Doolittle v. Tice, 41 Barb. 181; Becker v. Van Valkenburgh, 29 id. 319. See also Jackson v. Schoonmaker, 2 Johns. 230; Jackson v. Halstead, 5 Cow. 216; Jackson v. Warford, 7 Wend. 62; Buffalo Creek R. R. Co. v. Collins, 41 App. Div. 8.
But a highway or marked trees will not do. Pope v. Hannier, 74 N. Y. 240.

It must be a substantial enclosure, not merely enough to give notice of ownership. Bolton v. Schriever, 49 Super. 168; Kip v. Hirsch, 53 Super. 1; Yates v. Van de Bogert, 56 N. Y. 526.

The mere fact that a person for twenty years claimed title to land that was uninclosed, unimproved and unoccupied, and that he surveyed it, marked the boundaries by monuments, cut trees thereon from time to time and paid taxes for a few years, does not establish adverse possession, nor, in the absence of constructive possession, authorize the presumption of a grant from the true owner. Mission of the Immaculate Virgin v. Cronin, 143 N. Y. 524.

Piles driven, but not used held not to constitute a substantial enclosure.

Fortier v. Del., L. & W. R. R. Co., 93 App. Div. 24.

Cultivated and Improved. The land must not only be cultivated but Reaping alone is not sufficient, nor keeping up an old fence; mowing grass or cutting brush; there must be sowing, ploughing, etc., or the erection of buildings. Jackson v. Woodruff, 1 Cow. 276; Jackson v. Camp, id. 605; Doolittle v. Tice, 41 Barb. 181; Munro v. Merchant, 28 N. Y. 9; Finlay v. Cook, 54 Barb. 9; Bliss v. Johnson, 94 N. Y. 235; Price v. Brown, 101 id. 669. See also Wiechers v. McCormick, 122 App. Div. 860.

Occasional taking of sea-weed is not enough. Trustees v. Kirk, 68 N. Y.

Nor entering and cutting thatch once a year. Wheeler v. Spinola, 54 N. Y.

Nor occasional cutting of marsh grass. Roberts v. Baumgarten, 110 N. Y. 380; 126 id. 336.

To constitute adverse possession of land usually cultivated and improved, an actual continued occupation under a claim of title exclusive of any other right must be shown. Smith v. Reich, 80 Hun, 287.

Continuity. An interruption is fatal. Cleveland v. Crawford, 7 Hun, 616. Several possessions cannot be tacked together so as to make continuity of possession unless there is some privity between the successive occupants. Smith v. Reich, 80 Hun, 287.

Actual Occupancy. - Occasional resort to or temporary occupation of open lands, is not sufficient without a paper title distinctly describing the lands. Lane v. Goold, 10 Barb. 254; Trustees v. Kirk, 68 N. Y. 460; Wheeler v. Spinola, 54 id. 377.

There must be actual occupancy measured by a distinct, visible and marked. and not a presumptive or constructive possession. Corning v. The Troy, etc., Factory, 44 N. Y. 577, affg. 34 Barb. 529. Compare Second, etc., Church v. Humphrey, 21 Supp. 89, affd., 142 N. Y. 137.

Actual occupancy of the bank of a stream will not carry constructively to the center. There must be actual occupancy of the land under water. Corning v. The Troy, etc., Factory, 44 N. Y. 577, affg. 34 Barb. 529.

The Claim.— To found title under a claim of title, and actual occupation, it is immaterial whether the deed be valid in form; and there need be no deed or written evidence of title; and the party may even know his title to be bad. Bogardus v. Trinity Church, 4 Sandf. Ch. 633, declared overruled, 45 Hun, 371; Jackson v. Wheat, 18 Johns. 40; Burhans v. Van Zandt, 7 N. Y. 523, revg. 7 Barb. 91; Jackson v. Camp, 1 Cow. 605; Kent v. Harcourt, 33 Barb.

But it must be a claim of title, even if oral, and exclusive of the claim of all others. Humbert v. Trinity Church, 24 Wend. 587, declared overruled, 45

Hun, 371; see also supra, p. 814; and infra.

And it must be a claim of a specific title and not a mere general assertion. Higginbotham v. Stoddard, 72 N. Y. 94; Crary v. Goodman, 22 id. 170; Hallas v. Bell, 53 Barb. 247.

Loose verbal claims are rarely sufficient. Robinson v. Phillips, 56 N. Y. 634.

Possession of a Tenant.— The possession of a tenant shall be deemed the possession of the landlord, until the expiration of twenty years from the termination of the tenancy, or where there is no written lease from the time of last payment of rent, notwithstanding that the tenant has acquired another title or has claimed to hold adversely to his landlord. But this presumption shall not be made after that period. Code Civ. Proc., § 373; Code Proc., § 86. See also Whiting v. Edmunds, 94 N. Y. 309.

There is no limitation in case of a lease in fee. Bradt v. Church, 110

N. Y. 537.

The limitation does not run from time of the tenant's possession, but from

his adverse claim. Jackson v. Thomas, 16 Johns. 293.

The tenant must surrender lease and landlord must have notice of the adverse claim. Bedlow v. N. Y. F. D. D. Co., 112 N. Y. 263.

Naked Possession without Claim.—Any possession to be adverse must be accompanied with a claim of right or title; a mere naked possession or intrusion without claim of right will enure to the benefit of the owner. Humbert v. Trinity Church, 24 Wend. 587, declared overruled, 45 Hun, 371; Jackson v. Frost, 5 Cow. 346; Howard v. Howard, 17 Barb. 663; Burbank v. Fay, 65 N. Y. 57; Bridger v. Wyckoff, 67 id. 130; Willey v. Greenfield, 64 App. Div. 220; De St. Laurent v. Gescheidt, 18 App. Div. 121. As to tenancy under a lease in fee, vide Tyler v. Heidorn, 46 Barb. 439.

Tenants in Common.—The possession of one tenant in common will be held the possession of all (no matter how long continued), and not adverse to them, unless he claim for the entire title, or has ousted them. And if a tenant in common of part convey the whole, the grantee holds adversely to the others. Clapp v. Bromagham, 9 Cow. 530; Town v. Needham, 3 Paige, 545; Smith v. Burtis, 9 Johns. 174; Sigler v. Van Riper, 10 Wend. 414; Humbert v. Trinity Church, 24 Wend. 587, declared overruled, 45 Hun, 371; Florence v. Hopkins, 46 N. Y. 182; Kathan v. Rockwell, 16 Hun, 90; Millard v. McMullin, 68 N. Y. 345; Woolsey v. Morss, 19 Hun, 273; Culver v. Rhodes, 87 N. Y. 348; Zanf v. Carter, 70 App. Div. 305, Pore v. Threll, 23 Mise 44. 87 N. Y. 348; Zapf v. Carter, 70 App. Div. 395; Pope v. Thrall, 33 Misc. 44; Hamerschlag v. Duryea, 38 App. Div. 130. See the above case of Clapp v. Bromagham, as to various acts which may constitute an adverse tenancy against cotenants in common. See also supra, Chapter XI, Title II.

Licensee. Possession of a licensee is not adverse. St. V. Orph. Asylum v. City of Troy, 76 N. Y. 108; Coleman v. Pickett, 82 Hun, 287; Slattery v. McCaw, 44 Misc. 426; Monahan v. N. Y. Central & H. R. R. R. Co., 31 Misc. 619; Bird v. N. J. & N. Y. R. R. R. Co., 3 App. Div. 344.

As to Wharf Property.— Under a claim that a party had appropriated to himself the whole wharfage or wharf property for thirty years, when he was entitled only to wharfage of half the pier, a corporation having annually demised the other half to lessees from time to time, it was held that there should be proof, knowledge by, or notice to the corporation of an adverse claim and enjoyment, to establish title by prescription against it. Thompson v. The Mayor, 11 N. Y. 155.

Public Rights held not affected by adverse possession, the public not being barred by neglect of officials to protect such rights. St. Vincent Orphan Asylum v. City of Troy, 76 N. Y. 108; Miner v. Mayor, etc., of N. Y., 37 Super. 171; see also Walker v. Caywood, 31 N. Y. 51; Mills v. Hall, 9 Wend. 315; Milhau v. Sharp, 27 N. Y. 611; Morrison v. N. Y. El. R. R. Co., 74 Hun, 398.

As to Roads, Highways, etc. Discontinuance of a "Dutch" road and occupation of it for twenty years constitutes adverse possession. Falvey v. Bridges, 15 N. Y. Supp. 878, affd., 133 N. Y. 663.

As to alleys, see Woodruff v. Paddock, 130 N. Y. 618; Canals. Eldridge v.

City of Binghamton, 120 N. Y. 309.

Title to a portion of a highway used by the public cannot be acquired by adverse possession. Morrison v. New York El. R. R. Co., 74 Hun, 398. See

also St. Vincent Orphan Asylum v. City of Troy, 76 N. Y. 108.

An owner of land abutting on highway cannot acquire title to any portion of the highway by an adverse possession, not based on a written instrument. unless he encloses the land or customarily cultivates it; and such owner cannot compel the removal of poles erected in the highway by a telephone company which do not impair his easements in the highway. Halleran v. Bell Telephone Co., 64 App. Div. 41.

As to Water Lots .- Where a municipal corporation has a title to land between high and low water, held an adverse title cannot be established against it by reason of lateral fences running below the tide-way on either side, nor by the building of a bulkhead and filling in of a portion of it, or cutting sedge thereon, nor by reason of payment by the claimant of taxes and assessments thereon, the property having been assessed to him on the city maps. McFarlane v. Kerr, 10 Bosw. 249. See also Stevens v. Rhinelander, 5 Robt. 285; Towle v. Palmer, 1 Abb. N. S. 81; Wheeler v. Spinola, 54 N. Y. 377.

Also see, as to land between high and low water mark, Roberts v. Baumgarten, 110 N. Y. 380; Beach v. Mayor, etc., of New York, 45 How. Pr. 357, 368; Towle v. Remsen, 70 N. Y. 303, 316.

The construction by the owner of land bounded by navigable tide water of a marine railway from his land into the water for the purpose of hauling up boats held not an adverse possession of the land below high-water mark. De Lancey v. Piepgrass, 138 N. Y. 26; 141 id. 88; De Lancey v. Hawkins, 23 App. Div. 8.

As to what constitutes adverse possession of a beach on the Atlantic

Ocean, see O'Donohue v. Cronin, 62 App. Div. 379.

Easements Cannot be Acquired by User Under a License.—Cronkhite v. Cronkhite, 94 N. Y. 323. Actual knowledge of the owner is not required. Ward v. Warren, 82 N. Y. 265.

See also infra, Chap. XLIII, as to Ferry Slips.

Electric Wires and Cables .- No presumption of right arises from attaching electric wires and cables to or stretching them over any land or building, no matter how long continued. L. 1886, Chap. 40, § 1; Andrews v. Delhi & Stamford Tel. Co., 36 Misc. 23, affd., 66 App. Div. 616.

Actions By and Against. - An action of trespass quare clausum fregit cannot be maintained against one who is in the actual, exclusive and adverse posses-

sion of the locus in quo. Zorn v. Haake, 75 Hun, 235.

Possession of land under a claim of title is sufficient to entitle a party to maintain an action of conversion for crops removed therefrom. Russell v.

Willette, 80 Hun, 497.

Repossession.— The owner may at any time repossess himself before the adverse possession ripens into title. Brinkerhoff v. Mooney, 42 App. Div. 420.

TITLE III. Possession as Notice.

The possession of real estate is notice of the claim or right of the occupant to all subsequent mortgagees, purchasers and others. It is prima facie evidence also, of the highest estate in the property. namely: a seizin in fee. See fully, as to possession as notice, supra, Chapter XXVI, Title V, and cases cited.

TITLE IV. SOUATTERS OR INTRUDERS; AND HOLDERS OVER.

Squatters or intruders may be removed by summary proceedings. Code Civ. Proc. § 2232, subd. 4 (so amd. L. 1894, Chap. 232).

Also parties holding after a sale on execution or foreclosure, or on an agreement to cultivate on shares when the time fixed has expired.

Code Civ. Proc., § 2232, subds. 1, 2, 3.

By L. 1857, Chap. 396, any person who should "intrude" or "squat upon" any lands within the bounds of any incorporated city or village, or put any hut, house, shanty, hovel or other structure thereon, without license or authority from the owner, or in the streets thereof, was guilty of a misdemeanor, and the owner might give him ten days' notice to quit his land on a days energified by leaving the same on the promises.

day specified, by leaving the same on the premises.

If the squatter or his successor did not remove he was guilty of a misdemeanor, and the owner might remove any hut, hovel or shanty, or other structure thereon, and cause the squatter to be removed. The process for so

doing was not specified.

This act was repealed by Laws of 1886, Chap. 593, the misdemeanor having been provided for by the Penal Code, and the removal by the Code of Civil Procedure.

See Penal Code, §§ 467, 640, subd. 9; see also People v. Stevens; Hewitt v. Newberger, 141 N. Y. 538; People v. Upton, 9 N. Y. Supp. 684; O'Donnell v. McIntyre, 16 Abb. N. C. 87; Code Civ. Proc., § 2232 et seq.

CHAPTER XXXV.

TITLE BY DEDICATION.

TITLE I.— DEDICATION, HOW MADE.
II.— DEDICATION OF STREETS AND WAYS.
III.— DEDICATION OF PUBLIC PLACES.

TITLE I. DEDICATION, HOW MADE.

The right to hereditaments incorporeal and corporeal may pass to the public by such acts or permission of the owner, as may be tantamount in law to a transfer by dedication, and operate as an estoppel against him. Although the statute of frauds requires lands to be transferred by writing, exception is made where the transfer is by operation of law. The owner need not part with the title which he has; but the effect of the dedication is that, while it is in force, it estops, or prevents, in law, a party from exercising the right of exclusive possession and enjoyment of property which is generally incident to ownership. The doctrine of dedication extends to all realty, and particularly ways, streets, highways and places both of a public and private nature, and to easements generally. A dedication may, of course, be made through a direct grant, as well as by acts which have the effect and force of a grant, and the grant may be made subject to conditions, which may determine the estate.

Vide supra, "Conditional Estates," Chapter V, Title III. Washburn, Easements (3d ed.), 184, 186.

Distinction between a Dedication and a Reservation of Land.

— There is a distinction between a dedication and a reservation of land. The former is generally irrevocable. The latter imposes no obligation on the owner; his control over the property continues as fully as before, especially if there has been no adoption of the act by the persons claiming. There must be a renunciation of a right, and an acquisition of it by others, before title and estate in land can be varied by estoppel. The actual application to public use, therefore, of land, as, for example, the site of a market, courthouse, etc., especially when the reservation is by a municipal corporation does not deprive the owners of the right of resuming the entire control and disposition of the property when it is no longer wanted for the purpose to which it was originally applied.

Vide Woodyear v. Hadden, 5 Taunt. 127; Pitcher v. N. Y. & Erie R. R., 5 Sandf. 587; Gowan v. Phila. Exchange, 5 W. & S. 141; Irwin v. Dixion, 9 How. (U. S.) 10; Matter of Curran, 38 App. Div. 82.

General Principles of Dedication.— There is no particular form or act necessary in the dedication of land to the public; all that is required is the action or assent of the owners of the land, and the fact of its being used for the public purposes intended by the appropriation. The right to land dedicated need not be vested in any corporate or other body. It may exist in the public generally, and have no other limitation than the wants of the community at large. A dedication of a street or a part of a street to the public will be presumed and established from acts of the owner, although no proceedings have been taken to divest his title. None but the owner of the fee can make a dedication that is absolute and final. The bresumption of dedication will be created in law by a twenty years uninterrupted use by the public. A lesser time will not raise the presumption or be sufficient evidence of dedication unless accomparied by some act of dedication. The act of the owner from which the dedication is inferred must be clear and unequivocal, and intended to be irrevocable, and accompanied or immediately followed by public use, or acceptance in order to prevent a revocation. Acts are more strongly construed as effecting a dedication, if purchases have been made on the faith the act was meant to induce.

The Trustees, etc. v. Merryweather, 11 East, 375; Regina v. Petrie, 30 Eng. L. & Eq. 207; Denning v. Roome, 6 Wend. 651; The President, etc., of Cincinnati v. Lessee of White, 6 Pet. 437; Ward v. Davis, 3 Sandf. 502; Carpenter v. Gwynn, 35 Barb. 395; McMannis v. Butler, 51 id. 436; Wiggins v. Talmadge, 11 id. 457; Curtis v. Koeler, 14 id. 511; see 1d. 328; Bissell v. The N. Y. Central R. R. Co., 23 N. Y. 61; Barclay v. Howell, 6 Pet. 498; The Mayor of New Orleans v. The United States, 10 id. 662; Hunter v. Trustees, etc., 6 Hill, 407; Niagara Falls Bridge Co. v. Bachman, 66 N. Y. 261; People v. Loehfelm, 102 id. 1; Matter of Dept. of Public Works, 48 Hun, 488. The intent to dedicate irrevocably is important between vendor and vendee as well as with regard to the public. Grinnell

Public Works, 48 Hun, 488. The intent to dedicate irrevocably is important between vendor and vendee as well as with regard to the public. Grinnell v. Kirtland, 2 Abb. N. C. 387; Klug v. Jeffers, 88 App. Div. 246; Newton v. City of Dunkirk, 121 id. 296; and see generally 11 Abb. Cy. Digest, 56, 57. Before a street can be deemed public from five years user, under Laws of 1862, Chap. 63, there must be clear intention of the owner, evinced by an affirmative act that his land should be permanently subject to such use. Strong v. City of Brooklyn, 68 N. Y. 1. This act of 1862 had reference to Brooklyn, Williamsburg and Bushwick and was amended, L. 1863, Chap. 431

Chap. 431.

The title may pass without any specific grantee in esse at the time. Town of Paulet v. Clarke, 9 Cranch. 292; McConnell v. Town of Lexington, 12 Wheat. 584; Mayor v. U. S., 10 Pet. 662; Cincinnati v. White. 6 id. 431; Watertown v. Cowen, 4 Paige, 510; Pearsall v. Post, 20 Wend. 111, affd., 22 id. 425; Hobbs v. Lovell, 9 Pick. 405.

The dedication must be to a public use, but not necessarily to the advantage of the public at large. Ward v. Davis, 3 Sandf. 502; Tallmadge v. East River Bank, 26 N. Y. 105; Irwin v. Dixion, 9 How. (U. S.) 10. Only clear and unequivocal acts may make a dedication immediate. Carpenter v. Gwynn, 35 Barb. 395; Holdane v. Trustees, etc., 21 N. Y. 475; Klug v. Leffers, 88 App. Div. 246

Klug v. Jeffers, 88 App. Div. 246.

There must be acts, as well as words of intention. Pitts v. Hall, 2 Blatch.

In general, no certain period of time is necessary, if the acts of the parties make the intention manifest (but see supra, Laws of 1862, Chap. 63); parties make the intention manifest (but see supra, Laws of 1862, Chap. 63); user, alone, however, is not in itself sufficient, except perhaps in the case of streets and ways. Pearsall v. Post, 20 Wend. 111, affd., 22 id. 425; Hunter v. Trustees, etc., 6 Hill, 407; Munson v. Hungerford, 6 Barb. 265; Curtis v. Keesler, 14 id. 511. See also Harriman v. Howe, 78 Hun, 280. *

User, however, may be taken in connection with other evidence to prove actual dedication. People v. Loehfelm, 102 N. Y. 1; Pomfrey v. Village of Saratoga Springs, 34 Hun, 607, affd., 104 N. Y. 459.

Nonuser will not make a dedication. City of Boston v. Lecraw, 17 How.

(U.S.) 426.

As to what are acts of dedication, see further, Matter of Cooper, 6 Wkly.

Dig. 144; Matter of Ingraham, 4 Hun, 495, affd., 64 N. Y. 310.

The mere bounding of lots by the centre line of a street laid out through grantor's land upon city map, but never opened, does not amount to a dedication. Grinnell v. Kirtland, 6 Daly, 356. See also Avery v. N. Y. C., etc., R. R. Co., 106 N. Y. 142.

By a City.—A city may dedicate. Story v. N. Y. E. R. R. Co., 90 N. Y. 122.

By the State.—A dedication may be made by a State, through its legislature, the same as by an individual. City of Oswego v. Oswego Can. Co., 6 N. Y. 257.

Special Dedication.— There may be a partial or special dedication, as for foot passengers, or for horses, and not for carts, or for special vehicles. The dedication may be defined both as to time and as to the mode of use.

Pethbridge v. Winter, 1 Camp. 263; Marquis of Stafford v. Coyney, 7 B. & C. 259; Gowen v. Phil. Ex. Co., 5 Watts & Serg. 141; Poole v. Huskinson, 11 Mees. & W. 827; Agate v. Lowenbein, 4 Daly, 62, revd., 57 N. Y. 604.

Revocation. - Vide infra, Tit. II.

Rivers, Streams and Wharves.—As to those vide infra, Chap. XXXVI, "Prescription;" and Chap. XLIII, "Land under Water."

Religious and Charitable Uses .- Land may be dedicated to the public for pious and charitable purposes as well as for ways, commons, etc. *Vide supra*, Chap. X, Tit. VIII. And as to dedication for burial grounds, *supra*, Chap. XXIV, Tit. VIII, and Hunter v. Trustees, etc., 6 Hill, 407.

TITLE II. DEDICATION OF STREETS AND WAYS.

The doctrine of dedication is frequently applied in cases where lots are sold with reference to contiguous streets and places, designated on a map to which reference is made, and by which streets, etc., the lots are bounded or access is given. In such cases, all purchasers, buying with reference to the map, are held to have such a right, by dedication of the land, as will conclude the owner of the street bed, etc., from asserting his former title; and a covenant will be implied that the purchasers are to have an easement over such streets or places. This easement becomes appurtenant to, and a

servitude on all the land conveyed or so located; and, for that purpose, no acceptance of the street, etc., as a highway, by the public. is necessary.

Bissell v. N. Y. C. R. R., 23 N. Y. 61, revg. 26 Barb. 630; Holdane v. Trustees, etc., 21 N. Y. 474; Cox v. James, 45 id. 557; Smiles v. Hastings, 24 Barb. 44, affd., 22 N. Y. 217; Irwin v. Dixion, 9 How. (U. S.) 10; Fonda v. Borst, 2 Keyes, 48; Bridges v. Wyckoff, 67 N. Y. 130; Story v. N. Y. E. R. R. Co., 90 N. Y. 122; Matter of Eleventh Avenue, 81 id. 436; Tibbitts v. Cumberson, 39 Hun, 456, and the cases hereafter cited in this title. This, however, would apply only to streets which were necessary to give access to the highway, and would not apply to distant projected streets. Badeau v. Mead, 14 Barb. 328; Cox v. James, 59 id. 144, affd., 45 N. Y. 557; Hier v. N. Y. W. S. & B. R. W. Co., 40 Hun, 310.

Nor to a mere survey, without sale of the continuous lots. Irwin v. Dixion. 9 How. (U.S.) 10.

The above rule applies also to an alley-way. Cox v. James, 59 Barb. 144, affd., 45 N. Y. 557.

But not to parks or public places, unless expressly referred to in the deed. Johnston v. Shelter Island Assn., 47 Hun, 374.

Each lot-owner and grantee is bound by the map, and their lots become subject to the streets laid out as a servitude, which becomes appurtenant to all the land. Smiles v. Hastings, 24 Barb. 44, affd., 22 N. Y. 217; and see *infra*, Chap. XXXVI, "Prescription."

Dedication for purposes of streets binds the parties, though made by commissioners in partition; and lots conveyed by the map and streets take

title to the centre. The People v. City of Brooklyn, 48 Barb. 211.

The publishing of a map by the owner of ground proposed to be made the site of a town, does not conclude him to any extent. It is only when lots are sold with reference to such plan that other rights intervene. Logansport v. Dunn, 8 Ind. 378.

Act allowing abandonment of map filed as to all but the streets which had been thereby dedicated. Laws 1894, Chap. 713. This act was repealed by the Tax Law, and a similar provision enacted. See Tax Law, L. 1896,

Chap. 908, § 41.

A grantee whose deed bounds his land by a proposed road over other land of his grantor has a right of way over such land. Public formal acceptance or user is necessary to have the road opened. Fonda v. Borst, 2 Abb. App. Cas. 155; Bridger v. Pierson, 45 N. Y. 601; Grinnell v. Kirtland, 2 Abb. N. C. 386, affd., 68 N. Y. 629. See also DeWitt v. Ithaca, 15 Hun, 568; Matter of Mayor, 73 App. Div. 394.

A barn on a street laid out on a map by which lots were sold must be removed, although shown on the map. Taylor v. Hopper, 62 N. Y. 649. No record of dedication is required. Driggs v. Phillips, 103 N. Y. 77.

As to removal of fence not creating a presumption of dedication, see Rosselle v. Andrews, 103 N. Y. 150.

Facts showing dedication. See Newton v. City of Dunkirk, 121 App. Div. 296; Mark v. Village of West Troy, 151 N. Y. 453.

In order to make the street a public highway, however, there must be either an acceptance of the dedicated strip, or public user of the street as a highway; and the mere surveying and mapping of the street, and opening and selling lots on it, does not make it a public highway. (See also Chap. XXXVI, Tit. III.) These acts show an incipient dedication, but until the lots are sold, or some of them, the owner can recall the proposed dedication, and extinguish the claims of purchasers by release or otherwise. There must be either an express acceptance by a positive act, such as opening the street, etc., or a distinct and unequivocal user for at least a short time to effectuate the dedication.

Matter of Opening of Beck Street, 19 Misc. 571; Rudolph v. Ackerman, 30 id. 698; City of Buffalo v. D., L. & W. R. R. Co., 68 App. Div. 488; Niagara Falls Susp. Br. Co. v. Bachman, 66 N. Y. 261.

If there be dedication and acceptance the length of time during which

there has been use is immaterial. Cook v. Harris, 61 N. Y. 448.

If dedication is to be implied as complete, the acceptance must not be unduly postponed. People v. Kellogg, 67 Hun, 546.

A dedication to public use must be by unqualified and decisive acts or declarations. Mack v. Village of West Troy, 76 Hun, 162.

To constitute a public highway by dedication there must not only be an absolute dedication, but an acceptance and formal opening by the proper authorities, or a user. People v. Underhill, 69 Hun, 86; 144 N. Y. 316; Matter of Mayor, 73 App. Div. 394; Uhlefelder v. City of Mount Vernon, 78 id 340 76 id. 349.

As to ancient road claimed to be private, dedicated and accepted, based upon user. Iselin v. Starin, 71 Hun, 164, 144 N. Y. 453. See also Village

of Oxford v. Willoughby, 181 id. 155.

When an owner of land lays it out into lots with intersecting streets, and sells the lots with reference to such streets, his grantees or successors cannot afterward be deprived of the benefits of having such streets left open. Each grantee of a lot bounded on a street and his successors have an easement in the street, which is a property right. Lord v. Atkins, 138 N. Y. 184.

Until the acceptance, the street remains the property of the original proprietor, subject to the easement of right of way in purchasers of lots adjoining the street.

Holdane v. Trustees, etc., 21 N. Y. 474, revg. 23 Barb. 103; McMannis v. Butler, 49 id. 176; further decision, 51 id. 436; Fonda v. Borst, 2 Keyes, 48; Clements v. The Village of West Troy, 16 Barb. 251; City of Oswego v. The Oswego Canal Co., 6 N. Y. 257; Willoughby v. Jenks, 20 Wend. 96; Wohlee v. The Buffalo, etc., R. R., 46 N. Y. 686; Carpenter v. Gwynn, 35 Barb. 395; Chapman v. Swan, 65 id. 211; DeWitt v. Ithaca, 15 Hun, 568; Grinnell v. Kirtland, 2 Abb. N. C. 386, affd., 68 N. Y. 629.

Acceptance must be proved and is subject to all existing burdens, e. g., a railroad in the street. City of Cohoes v. Morrison, 42 Hun, 216, affd., 116 N. Y. 669.

116 N. Y. 662.

Removing obstructions or improving a street by the public authorities will make an acceptance. McMannis v. Butler, 51 Barb. 436; Vandemark v. Porter, 40 Hun, 396.

By user for twenty years or over an acceptance is implied. Wiggins v. Tallmadge, 11 Barb. 457; Gould v. Glass, 19 id. 179, criticised, 48 Hun,

435, doubted, 28 N. Y. Wkly. Dig. 446.

An acceptance of the thing dedicated is necessary to make a complete and irrevocable dedication. Bridges v. Wyckoff, 67 N. Y. 130; See Clements. v. Village of West Troy, 16 Barb. 251; contrary, s. c., 10 How. 199.

Action of common council recognizing that dedicated land is a public highway, held on acceptance. Uhlefelder v. City of Mt. Vernon, 76 App.

Div. 349.

It is held, also, that positive acts of dedication, accompanied by an open public user, will make the dedication complete and irrevocable, without other acts of acceptance. McMannis v. Butler, 51 Barb. 436; Denning v. Roome, 6 Wend. 651; Cook v. Harris, 61 N. Y. 448.

Roome, 6 Wend. 651; Cook v. Harris, 61 N. Y. 448.

Until acceptance, the dedication may be revoked so far as the public is concerned, and the land is subject to the control and enjoyment of the proprietors. Lee v. Village of Sandy Hill, 40 N. Y. 442; In re Brooklyn Heights, 48 Barb. 288; The City of Oswego v. Ošwego Canal Co., 6 N. Y. 257; Clements v. Village of West Troy, 16 Barb. 251; Bissell v. N. Y. C. R. Co., 26 id. 630, revd., 23 N. Y. 61; and see, infra "Revocation."

Where an owner dedicates land for a street, and then grants the land in fee, and the public takes no step as to the same for twenty-five years, all their right will be deemed to have ceased. Baldwin v. City of Buffalo, 29 Barb. 396: 35 N. Y. 375. Cook v. Harris, 61 id. 448. See also Grinnell

29 Barb. 396; 35 N. Y. 375; Cook v. Harris, 61 id. 448. See also Grinnell V. Kirtland, 2 Abb. N. C. 386. See also Matter of Mayor, 73 App. Div. 394. Acceptance of dedication by highway commissioners is provided for also by statute. Highway Law, L. 1890, Chap. 568, § 80 (as amended).

Dedication by Deed.— In the city of New York. See Greater New York Charter, § 992 (L. 1897, Chap. 378, as amd. by L. 1901, Chap. 466, L. 1904, Chap. 370); Matter of City of New York, 107 App. Div. 581; Matter of Westminster Heights Co., Id. 577.

Title to Streets in the City of New York.—See City of New York v. Knickerbocker Trust Co., 104 App. Div. 223.

Lease of part of sidewalk within the stoop line by the abutter held illegal

and void as contrary to ordinance. Romano v. Buck, 25 Misc. 406.

Streets Laid Down on a Public Map.—So far as relates to streets laid down on a public city, etc., map, it does not seem that the public bodies are to do anything, either by way of immediate ratification or acceptance, to complete the dedication to the public of a right of way where land is conveyed bounded upon streets designated on such a map. Any act of the proprietor amounting to a dedication of the easement, which the city has shown its desire to obtain, by planning the map with the street on it, is sufficient, and no affirmative action is necessary to give effect to the dedication, further than the use by the public, when they choose to use it, who, together with the purchasers, acquire a perpetual right of way over such street. On a subsequent opening of the street and taking the street bed by municipal proceedings, when the public officials see fit to take them, the easement is enlarged into a fee held by the municipal body as trustee for the public.

Vide the above cases and the cases cited, infra; See also as to procedure the commissioners may pursue. Highway Law, L. 1890, Chap. 568, Art. IV.

Effect of Boundaries by Streets and Dedication under a Public Law and Map .- The general tenor of the decisions as to lots so sold is, that if lots are sold by descriptions bounding them by public streets and avenues laid down on a public map, or if the owners of lots have by deed adopted or recognized such map, the land in the street or avenue laid over the land of such owners is considered dedicated to the public use. If the grant runs up to the center line, the grantee takes subject and with reference to the map line, but takes the legal title to the street-bed, subject to a perpetual public easement, with a right only to nominal damages on the street opening; and with a further right to have the street permanently kept open. The damage, however nominal, should be paid to vest the title in the public under the proceedings subsequently to be taken to open the street. If the grantor had not conveyed so as to transfer land to the center to the grantee, then he, and not the grantee, would be entitled to the damages as owner of the fee taken. Prior to the actual proceedings opening the street, therefore, any dedication transfers immediately the easement or right of way to the surrounding lot-owners and the public - the mere naked fee remaining in the owner of the soil, or his grantees, which subsequently becomes transferred to the public, on compensation being made under the acts opening the street and taking the street-bed, if that is done. The following cases sustain the above views and establish other points bearing upon them:

Where one bounds by a space called a street laid down on a public map, he dedicates his land in the site of the street to the public use, of the map, he dedicates his land in the site of the street to the public use, of the width as specified, so that he would be entitled only to nominal damages therefor on the street being opened. Matter of 39th Street, 1 Hill, 191; Wyman v. Mayor, 11 Wend. 486; Matter of Lewis Street, 2 id. 472; Matter of Furman Street, 17 id. 649.

He is still held to have the actual fee, however, until divested by the proceedings; an easement being implied in the lot-owners in the vicinity as well as in those immediately bounded on the street, until the street becomes a public one. Coe v. Bearup, 14 Wkly. Dig. 246; Smith v. Hastings, 24 Barb. 44; Matter of 17th Street, 1 Wend. 262; Wyman v. Mayor, 11 id. 486; Matter of 32d Street, 19 id. 128.

The value of the fee, however, on the opening of the street, is held merely

The value of the fee, however, on the opening of the street, is held merely nominal, whether vested in the former owner or a purchaser, as it is subject nominal, whether vested in the former owner or a purchaser, as it is subject to a perpetual right of way in the public, and the interest is a mere reverter, dependent upon the contingency of that public use ceasing. See the cases above, and Livingston v. The Mayor, 8 Wend. 85; Matter of 32d Street, 19 id. 128; Matter of 29th Street, 1 Hill, 189; 16 Abb. 66; Wetmore v. Story, 22 Barb. 414; Cox v. James, 45 N. Y. 557; Matter of Brooklyn, 73 id. 179; Matter of Fox Street, 54 App. Div. 479; Matter of Mayor, 84 id. 455.

Sometimes a right of user in the public may be a mere license and not

Sometimes a right of user in the public may be a mere license and not a dication. Sherman Lime Co. v. Village of Glens Falls, 101 App. Div.

269; 91 N. Y. Supp. 994.

Mere filing of a map showing proposed public street gives no rights to purchaser of lots thereon. In re Trustees of Village of Olean, 14 N. Y.

Supp. 54; Darker v. Beck, 11 id. 94.

The original owner of a platted tract of land cannot, after the conveyance of a lot abutting on a street, cut down the graded and establish roadway so as to render his grantee's right of egress more difficult, where the change made is not for the benefit of the street at the point in question, but for the benefit of other localities; and it is immaterial that the grantee knew, when he purchased, that a plan for the general improvement of the lots and streets was contemplated. Cunningham v. Fitzgerald, 138 N. Y. 165. As to whether bounding on a designated street, but one not opened, would convey to the center, it was held, in Bissell v. N. Y. Cen. R. R., 23 N. Y. 61, that it would. To the contrary were Matter of 17th Street, 1 Wend. 262; Livingston v. The Mayor, 8 id. 85; Willoughby v. Jenks, 20 id. 95; Bartow v. Draper, 5 Duer, 730.

Where the owner of a tract lays out streets and sells lots, on annexation of the territory by a city which does not continue such streets, it was held there had been no public dedication and the abutters were not entitled to compensation in a proceeding to open a street laid out on the permanent plan. Matter of The Mayor, 41 App. Div. 586.

The land should be kept open, though public does not accept. Allen v.

Lester, 81 App. Div. 376.

Executors cannot thus dedicate by virtue of a power of sale. Bloomfield v. Ketcham, 25 Hun, 218. See also Matter of 67th Street, 60 How. Pr. 264. And see *supra*, Chap. XX, Tit. IV, as to boundaries by a street or highway.

Where no Dedication has been Made under a Public Map.— Where there has been no dedication of any land laid down as a street or place on a public map, or adoption of the map by an abutting land-owner, doubtless both the right of way and the fee remain undisturbed in him or his grantee, and he would be entitled to full compensation for the land when taken for the public use.

Speir v. Town of New Utrecht, 121 N. Y. 420.

The use of land as a private road for twenty years does not make it a highway under a statute providing that land used by public as highway for that period shall be a highway. Culver v. City of Yonkers, 80 App. Div. 309.

Revocation.—As a general rule, where a dedication has been accepted and acted on by the public, it cannot be revoked by the owner so long as the land remains in public use as a street. If a tract, however, is laid out into lots and streets, but the plan is not accepted by a municipal corporation, but other streets are adopted by them sufficient for adjoining lot-owners, the owner is not obliged to keep his original streets open, but may close them if the act does not disturb any private rights or interests that may have arisen, based on the proposed dedication.

Underwood v. Stuyvesant, 19 Johns. 181; In the Matter of Mercer Street, 4 Cow. 542.

Filing of a map of a parade-ground, within which the act under which the map was filed provides that all streets shall be closed, will not affect dedicated streets within the area. Matter of Munson, 29 Hun, 325.

Therefore, where the acceptance has never been made, nor any rights raised, nor private interests concerned, nor a common user established or acted on by the public for a sufficient time, the dedication may be revoked and the streets closed.

See above, remarks as to lots sold by a public map; and Badeau v. Mead, 14 Barb. 328; Baldwin v. City of Buffalo, 29 id. 396; 35 N. Y. 375; Holdane v. Trustees of Cold Spring, 21 id. 474; Lee v. Village of Sandy Hill, 40 id.

442; Williams v. N. Y. C. R., 16 id. 97; The City of Oswego v. Oswego Canal Co., 6 id. 257; Clements v. Village of West Troy, 16 Barb. 251; Bissell v. N. Y. C. R. R., 23 N. Y. 61, revg. 26 Barb. 630; Niagara Bridge Co. v. Bachman, 66 N. Y. 261; Rudolph v. Ackerman, 30 Misc. 698.

The question of revocation is one of fact. McMannis v. Butler, 51

Barb. 436.

The owner cannot revoke, so long as the street continues in use. Adams

v. Saratoga, etc., 11 Barb. 414; Newman v. Nellis, 97 N. Y. 285.

But he may revoke by satisfying private claims to the easement, if the dedication has not been accepted by the public. Bissel v. N. Y. C. R. R., 26 Barb. 630, reversed on other grounds, 23 N. Y. 61; Holdane v. Trustees, etc., 21 id. 474.

Failure to accept within a reasonable time held to entitle owner to recall dedication. Matter of Opening of Beck St., 19 Misc. 571; Matter of Fox St., 54 App. Div. 479; City of Buffalo v. D., L. & W. R. R. Co., 68 id. 488.

No one can have adverse possession against the public where his deed expressly recognizes the public right. Bridges v. Wyckoff, 67 N. Y. 130.

Use of streets on a map of sale by purchaser until opened by the town not a revocation, where his deed bounds by the streets on the map. Rathgaber v. Village of Tonawanda, 13 N. Y. Supp. 937.

There cannot be revocation, however, where the rights of others have intervened. Niagara Falls v. N. Y. C. & H. R. R. R. Co., 41 App. Div. 93.

Abandonment.— Every highway not opened or worked within six years after dedication or after it is laid out, shall cease to be a highway, time during which an action or proceeding is pending as to same being excluded; and every highway and right of way not traveled or used for six years shall cease to be a highway or shall be deemed abandoned as a right of way. Provision is also made for the filing and recording of descriptions of such abandoned ways, and the same are thereupon discontinued.

Highway Law, L. 1890, Chap. 568, § 99 (as amd.). See 1 R. S. 520, § 99; L. 1853, Chap. 174, § 15; L. 1861, Chap. 311, §§ 1, 2.

Land dedicated and accepted remains a street until it ceases to be such by the action of the general public in no longer traveling upon it, or action of the public authorities formally closing it. City of Buffalo v. D., L. & W. R. R. Co., 190 N. Y. 84.

As to ownership of the road on the discontinuance of the street, vide infra,

Chap. XXXVI, Tit. III.

Fee of Streets where Dedication has been Made. Where a municipal corporation has acquired title by a mere dedication of the original owner, it has no right to the streets except for improving and regulating. The owner who dedicates his land to the public use for a street or highway, does not give to the public an unlimited use, and the nature of the public easement cannot be materially enlarged or changed. In cases, therefore, where the fee of the land was vested in the State, and by charter or legislation has been transferred to a city, or where a city has acquired title to the fee by proceedings to open, or by cession or other legal means, the city may devote the streets to such purposes as would be unjustifiable and

illegal in cases where the streets merely existed by dedication, the original or contiguous owners or their successors in title still holding the fee. In cases of dedicated streets, a municipal corporation could erect no structure thereon, its title being limited to the controlling and enjoyment of the easement according to the intentions of the dedication. And neither the Legislature nor a municipal body, could create an obstruction nor authorize any appropriation of the street bed of a dedicated street, except for the ordinary purposes of a street, without obtaining the consent of, or making due legal compensation, to the owners thereof. The public acquires by a dedication only such interests in land appropriated by dedication to the uses and purposes of a highway, as will entitle it to use it for that object, and subject to the right of easement; the persons making the dedication and their representatives, having the fee of the land, may cause those obstructing or appropriating the streets otherwise than for the ordinary uses and purposes of streets, to respond in damages.

Williams v. N. Y. Cen. R. R. Co., 16 N. Y. 97, revg. 18 Barb. 222; Knox v. The Mayor, 55 id. 406; Kelsey v. King, 32 id. 411, affd., 33 How. Pr. 40; Wendell v. Mayor, 39 Barb. 329, affd., 4 Keyes, 261.

Therefore it seems that where land has been dedicated and not opened, it

can only be used for a street easement; but when it has been opened and can only be used for a street easement; but when it has been opened and paid for, the corporation may construct sewers, and otherwise use the roadbed for municipal purposes. Kelsey v. King, 32 Barb. 410, affd., 33 How. Pr. 40; Trenor v. Jackson, 15 Abb. N. S. 115; Chapman v. Swan, 65 Barb. 214. See also, supra, Chap. II, "Eminent Domain"; and fully on this subject, Story v. N. Y. Elevated R. R. Co., 90 N. Y. 122.

There is a presumption that the fee to the soil of the highway is in the abutter, subject to the public easement. Van Winkle v. Van Winkle, 184

N. Y. 193.

Dedicated streets cannot be closed without condemnation and compensation. Matter of Munson, 29 Hun, 325. See as to altering and discontinuing highways, Highway Law, L. 1890, Chap. 568, Art. IV. See also City of New York v. Sattler, 166 N. Y. 495; Reis v. City of New York, 112 App. Div. 464; Matter of Morris Ave., 56 id. 122. Closing street at a viaduct where passage around is left held no ground for compensation. Matter of Grade Crossg. Commrs., 166 N. Y. 69.

As to highways, see Chap. XXXVI.

Use of Dedicated Streets for Railroads.—In accordance with the above principles, the authorizing of a street railroad, with cars drawn by horses, to be constructed over a dedicated street, was at first held illegal and invalid, without provision for compensation to the owners of the street-bed. The following later cases, however, take a contrary view, holding that the construction and operation of a street railroad is only another way of using the easement. Dolan v. N. Y. & Harlem R. R., 74 App. Div. 434; Drake v. Hudson R. R., 7 Barb. 508; Wetmore v. Story, 22 Barb. 414; see Pratt v. Buffalo, etc., Co., 19 Hun, 30.

Held, however, that the owner of the fee of the street is entitled to recover damages sustained from the occupation and use of the street by & corporation maintaining and operating a trolley road. Clark v. Middletown-Goshen Traction Co., 10 App. Div. 354; Peck v. Schenectady Ry. Co., 170

N. Y. 298.

The dedication of land to the use of the public as a street or highway does not preclude the owner in fee, subject to the public easement from maintaining an action against a railroad company which, without his consent or an appraisal of his damages, enters upon and occupies such street or highway with the tracks of its road. The Syracuse Salt Company v. The Rome Railroad Company, 67 Hun, 153.

A party not owning the road-bed could not claim compensation for use

of the road by a steam railway, if the usefulness of the road was not impaired. Corey v. Buff., etc., R. R., 23 Barb. 482.

But it was held, in Williams v. N. Y. C. R. R. Co., 16 N. Y. 97, that the owner of a fee of a dedicated street has a right to compensation. This case owner of a fee of a dedicated street has a right to compensation. has often been distinguished, but not directly overruled.

Ownership of fee not requisite in case of suit against an elevated railroad. Phillip v. Metropolitan El. R. Co., 12 App. Div. 283.

See fully as to railroads over public streets and highways, supra, Chap. II, Title IV; also Chap. XXXVI.

Use of Dedicated Streets by Telephone Companies.—This can be enjoined by the owner of the fee to the middle of the street, as not being consistent with the grant for street purposes. Osborne v. Auburn Tel. Co., 189 N. Y. 393; see Johnson v. N. Y. & Penn. T. & T. Co., 76 App. Div. 564; Gray v. N. Y. State Tel. Co., 41 Misc. 108.

The change from poles to conduits held no extra burden. Castle v. Bell

Tel. Co., 49 App. Div. 437.

Viaduct.—The abutters are not entitled to compensation for an elevated viaduct for street purposes over street of which the city owns the fee. Sauer v. City of New York, 90 App. Div. 36. .

Drains .- Owner of fee held entitled to compensation on removal of old drains on installation of new. Wright v. City of Mt. Vernon, 44 App. Div. 574.

Trees.—Abutter who has planted trees in sidewalk, though he does not own fee, has right to damages for injury to same by negligence. Lane v. Lamke, 53 App. Div. 395.

In General.—There is a common law right to use a city street for the purpose of moving buildings. Hinman v. Clarke, 121 App. Div. 105.

Mandamus to open street, see Coleman v. City of New York, 70 App. Div.

Right of purchasers to have street kept open to their full width. Collins

v. Buffalo Furnace Co., 73 App. Div. 22. Vault built under street in New York city may be ordered removed, if built without permit. Deshong v. City of New York, 74 App. Div. 234, affd., 176 N. Y. 475.

To Declare a Dedication Through Instruments Recorded, Invalid .- See Real Property Law, § 276 (revised from L. 1880, Chap. 530, § 1).

Highways .- Vide Chap. XXXVI, Tit. III, infra.

TITLE III. PUBLIC PLACES.

The principles above laid down as to streets apply equally to public places. The following cases may also be desirable for reference, as to public squares or places, and the rights of adjoining owners or the public therein.

The Trustees v. Cowen, 4 Paige, 510; City of Cinicinnati v. White, 6 Pet. 431; The Mayor of New Orleans v. The U. S., 10 id. 662: Mayor v. Stuyvesant, 17 N. Y. 34; Green v. N. Y. Cen. R. R. Co., 12 Abb. N. C. 124.

A law authorizing land, which had been dedicated by its owner for the purpose of a public square, to be used for a different purpose, impairs the obligation of a contract, and is void. Warren v. Lyons City, 22 Iowa, 351.

Purchase of lot by a map gives no rights in parks or public places shown thereon, unless expressly mentioned in the deed. Johnson v. Shelter Island

Assn., 47 Hun, 374.

It has been seen heretofore that where lots are bounded by a space giving access to them which is called a "park," grantees of lots bordering thereon would take to the center, supra, p. 551. Perrin v. N. Y. C. R. R., 36 N. Y. 121, revg. 40 Barb. 165; said to be affirmed, 41 N. Y. 619, but no comment is made. The principle of the decision appears to be, that if the space allotted is a "park," in the proper and full sense of the term, abutting grantees would not take to the center by construction.

The appropriation of public grounds for a certain time for a public use does

not make a dedication of it. Pitcher v. N. Y. & E. R. R., 5 Sandf. 587.

As to the dedication and appropriation of a strip of ground in front of a

row of dwellings, vide Maxwell v. E. Riv. Bank, 3 Bosw. 124.
As to dedication of a "Village Green," vide Cady v. Couger, 19 N. Y. 256.

One adjoining owner cannot enjoin another from planting and enclosing a public place, not needed for a highway, by permission of the city authorities, unless it be done for a private purpose. Burnett v. Bagg, 67 Barb. 154.

What constitutes dedication of lands of residence park association, see

Thousand Island Park Assn. v. Tucker, 173 N. Y. 203.

CHAPTER XXXVI.

TITLE BY PRESCRIPTION, EASEMENTS, LICENSES, SERVITUDES, AND OTHER INCORPOREAL HEREDITAMENTS.

TITLE I.— PRESCRIPTION.

II .- RIGHTS OF WAY.

III .- HIGHWAYS.

IV .- RIGHTS OF COMMON.

V .- LICENSES.

VI .- PARTY WALLS AND DIVISION FENCES.

VII .- OTHER RIGHTS AND SERVITUDES.

TITLE I. PRESCRIPTION.

A title may, by the common law, be made to incorporeal hereditaments through prescription, that is, such a continued peaceful occupancy or user as causes a legal inference of title or right. period adopted in this State is twenty years (formerly twenty-five vears). Immemorial usage was requisite by the English law. prescription may be a personal right, or one annexed to a particular estate. Title by prescription is restricted to such rights as might have been created by grant. If, by law, no grant of a right could be rightfully made, no presumption of grant arises from user, and the right cannot vest in prescription. Prescription is a right annexed to the person, while dedication is a public right. The public cannot acquire a right by prescription. The doctrine is inapplicable to the public, for it supposes a grant, and in the case of the public there can be no grantee. The occupancy or user must be open, continuous peaceable and under claim of a right, and not by permission or indulgence, to make it effectual as a prescriptive interest. It must be a lawful continuation for the required time of the possession from one to another, and any interruption of the enjoyment by an adverse claim and possession destroys the prescription. The investigation of these rights involves curious and intricate law that can be here only generally reviewed. In connection with this subject, the preceding chapter on "Title by Dedication" is to be considered.

Bremer v. Manhattan Ry. Co., 191 N. Y. 333; Taggart v. Manhattan Railway Co., 57 Misc. 184.

As to an easement to use spring water. Carr v. Springfield Water Works Co., 134 N. Y. 118. To flood lands. Hall v. State of New York, 92 App.

Div. 96.

Munson v. Hungerford, 6 Barb. 265; Stiles v. Hooker, 7 Cow. 266; Corning v. Gould, 16 Wend. 531; Hoyt v. Carter, 16 Barb. 213; Colvin v. Burnett, 17 Wend. 568; Miller v. Garlock, 8 Barb. 153; Rose v. Bunn, 21 N. Y. 275; and see 3 Washburn R. P. 51; Hinckel v. Stevens, 1 App. Div. 5; Browning v. Goldenberg, 36 Misc. 438; Goldstrom v. Interborough R. T. Co., 115 App. Div. 323; Winne v. Winne, 40 Misc. 435.

Possession and user may be insufficient to establish a title by adverse possession and yet, it seems, sufficient to indulge a presumption under certain circumstances of a lost grant of even corporeal hereditaments. Jackson v. Lunns, 3 Johns. Cas. 109; Roe v. Strong, 119 N. Y. 316; De Lancey v. Piepgras, 138 id. 26; Mission, etc., v. Cronin, 50 St. Rep. 641; s. c., 143 N. Y. 524; Lewis v. N. Y. & H. R. R. Co., 162 N. Y. 202; although that presumption is usually confined to incorporeal hereditaments. 3 Washburn R. P. 51; Heiser v. Gaul, 39 App. Div. 162.

As prescription supposes a grant, it is not applicable to a case where there

can be no grantee. Munson v. Hungerford, 6 Barb. 265.

The occupation or user too, to be valid, must have been with the acquiescence and knowledge of the owner. Parker v. Foote, 29 Wend. 309; Flora v. Carbean, 38 N. Y. 111; Miller v. Garlock, 8 Barb. 153. As to degree of knowledge, see Ward v. Warren, 82 N. Y. 265.

No prescription can operate against a public right. Pierson v. Edgar, Cranch C. C. 454; Patton v. N. Y. E. R. R. Co., 3 Abb. N. C. 307; St. Vincent

Asylum v. Troy, 76 N. Y. 108.

A license even for thirty years, unless irrevocable, confers no prescription. Boyce v. Brown, 7 Barb. 80; St. Vincent Asylum v. Troy, 76 N. Y. 108; Cronkhite v. Cronkhite, 94 id. 323.

Desultory use by public of open plot of land adjoining a highway for twenty years under no particular claim of right does not establish it. White

v. Whiley, 13 N. Y. Supp. 205.

The enjoyment must be for twenty years adverse, and with the owner's knowledge. Sweeney v. St. John, 28 Hun, 634; see also Cronkhite v. Cronkhite, 94 N. Y. 323.

Actual knowledge of the owner, however, held not required. Ward v.

Warren, 82 N. Y. 265.

Prescription only applies to incorporeal hereditaments. Ferris v. Brown, 3 Parb. 105.

Uninterrupted possession is prima facie evidence that it is adverse. Uninterrupted possession is prima facie evidence that it is adverse. The prescription, also, must be certain and reasonable; and an easement established by prescription, or inferred from user, is limited to the actual user. Gayetta v. Bethune, 14 Mass. 40; Hart v. Vose, 19 Wend. 365; Brooks v. Curtis, 4 Lans. 283, affd., 50 N. Y. 639; Miller v. Garlock, 8 Barb. 153. Actual daily use not necessary, as in case of an easement by prescription to flood lands. Hall v. State of New York, 92 N. Y. 96. See as to the public not acquiring a right by prescription, Curtis v. Keesler, 14 Barb. 511; Harriman v. Howe, 78 Hun. 280. There can be no prescriptive right to use property a grant of which would have been illegal—e. g., as waters of the Erie canal. Burbank v. Fav. 65 N. Y. 57.

Fay, 65 N. Y. 57.

Nor to commit a legal nuisance. Campbell v. Seaman, 2 Supm. 231,

affd., 63 N. Y. 568.

Prescription cannot run against the public in land used for a highway. Driggs v. Phillips, 103 N. Y. 77; Morrison v. N. Y. El. R. R. Co., 74 Hun, 398; St. Vincent Orphan Asylum v. City of Troy, 76 N. Y. 108; Slattery v. McCaw, 44 Misc. 426.

The extent of the easement is fixed by user. No unnecessary interference with servient estate allowed. Tyler v. Cooper, 47 Hun, 94, affd., 124 N. Y.

626; Taylor v. Millard, 118 id. 244.

A right in the nature of an easement cannot be created by a parol agreement for the partition of land. Taylor v. Millard, 118 N. Y. 244.

To What it Applies .- The doctrine of prescription is most usually applied to certain rights, which are not, strictly speaking, land or real estate; although they are, from their very nature or usual appropriation, rights attached to or flowing out of land or corporeal inheritances, such as easements generally, rights of way, rights of common and piscary, riparian rights and privileges, and ancient air and lights. Among these rights "Franchises" have been adverted to in a previous chapter. (Chap. III.) The right to "pews" has been considered under the subjects "Title by Descents" (Chap. XIV) and "Title by Deed" (Chap. XX). The right of piscary will be briefly reviewed in a subsequent chapter, as also prescriptive rights over waters and in water-courses. Easements are rights annexed to the estate of the dominant tenement and pass with such estate; and they are a charge upon the estate of the owner of the servient tenement, and follow such estate.

Vide above cases and Hills v. Miller, 3 Paige, 254.

Easements are estates in land. Nellis v. Munson, 108 N. Y. 453, revg. 24 Hun, 575; see Real Property Law, § 205; 1 R. S. 750, § 10.

The various classes of easements are fully discussed in Parsons v. Johnson, 68 N. Y. 62.

Purchase of a cemetery lot under parol agreement held an easement, and

void. Matter of O'Rourke, 12 Misc. 248.

Deed of same held an easement. Went v. Meth. Ch., 80 Hun, 266, affd., 150
N. Y. 577; see (distinguishing), Ex parte Deansville Cem. Assn., 66 N. Y. 569.

Easement, how Extinguished or Lost.—An easement created by deed cannot be lost by mere disuser. In general, it may be lost by an abandonment for twenty years continuously, or an actual adverse user by the owner of the servient land for that period.

Jewett v. Jewett, 16 Barb. 150; Smiles v. Hastings, 24 id. 49, affd., 22 N. Y. 217; Corning v. Gould, 16 Wend. 531; Miller v. Garlock, 8 Barb. 153; Wiggins v. McCleary, 49 N. Y. 346; Snell v. Levitt, 39 Hun, 227, revd., 110 N. Y. 595; White's Bank of Buffalo v. Nichols, 64 id. 65.

Nonuser does not affect the right to an easement, unless the circumstances

show an inference of abandonment. Hall v. State of New York, 92 App. Div. 96; Marshall v. Wenninger, 20 Misc. 527.

A nonuser for twenty years, accompanied by some act inconsistent with the right, will raise the presumption of a release or surrender. Reg. v. Chorley, 12 Jurist R. 822; Ward v. Ward, 14 Eng. L. & E. 413; Hoffman v. Savage, 3 Mass. 130; Miller v. Garlock, 8 Barb. 153; Moore v. Rawson, 3 Barn. & C. 332. Or even for a less time, where abandonment has been acted upon by the owner of the servient tenement. Snell v. Levitt, 110 N. Y. 595.

Abandonment, also, may be inferred by acts in pais at any time. Crain v. Fox, 16 Barb. 184; Taylor v. Hampdon, 4 McCord, 96; Farrar v. Cooper, 34 Maine, 394; Zimmerman v. Wingert, 31 Pa. 401.

It may be inferred from failure to reserve. Scrymser v. Phelps, 33 Hun,

Or as result of merger. Smith v. Smith, 120 App. Div. 278; see Korn v. Campbell, 119 App. Div. 401.

Right of way by grant may be lost by nonuser and adverse user, which is exclusive of grantee's interest and hostile to it. Andrus v. Nat. Sugar R.

Co., 93 App. Div. 377.

An casement is not destroyed by a division or sale of part of the estate to which it is appurtenant. Hills v. Miller, 3 Paige, 254. But will enure to all the parts, if the burden on the servient estate be not thereby increased. Outerbridge v. Phelps, 13 Abb. N. C. 117; and see infra, Tit. II, as to loss of right of way.

Foreclosure of a mortgage preceding the instrument creating the easement against the mortgaged premises held to cut off the easement. Rector, etc., Christ Church v. Mack, 93 N. Y. 488, revg. 25 Hun, 418.

But permission to do some act inconsistent with the continued enjoyment of

the easement will extinguish. Cartwright v. Maplesden, 53 N. Y. 622.

An easement created by grant cannot be lost by mere nonuser. A writing under seal affecting it is within the recording acts and does not bind a purchaser without notice of the dominant tenement, unless recorded. Whether adverse possession, not hostile, will extinguish the easement. Snell v. Levitt, 39 Hun, 227, revd., 110 N. Y. 595; Tyler v. Cooper, 47 Hun, 94, affd., 124 N. Y.

Easement of light and air held not extinguished by nonuser, as on destruction of building. Remsen v. Wingert, 112 App. Div. 234; Kahn v. Hoye, 61 App. Div. 147; Baker v. The Mayor, 31 App. Div. 112.

The effect of an abandonment as to others. White v. Man. R. Co., 139

A cessor to use, accompanied by an act clearly indicating an intention to abandon the right, has the same effect as a release without reference to time. Suydam v. Dunton, 84 Hun, 506.

An easement acquired by grant cannot be lost by mere nonuser, though it may be by nonuser coupled with an intention of abandonment.

As to the inference of an estoppel. Welsh v. Taylor, 134 N. Y. 450, explaining Snell v. Levitt, 110 N. Y. 595, supra.

See further as to easements under the more particular heads of "Rights of Way" and "Other Rights and Servitudes" (Titles II and VII), infra.

TITLE II. RIGHTS OF WAY.

The most usual class of easements to which the doctrine of prescription is applied is rights of way. The easements of a right of way, or of private passage over the ground of another, may arise either by a grant of the owner of the soil, by reservation from a former grant, or by prescription, which supposes a grant, or from necessity. Such rights, when arising by prescription, are stricti juris. A right of way for one purpose, does not necessarily include a right of way for another purpose; and it cannot, by implication, be enlarged or extended to adjoining lands; nor can the way be enlarged, varied or changed at the option of the one having the right. These rights can be created only by the owner of the land; and one tenant in common cannot establish them upon the common property, without the consent of his cotenant. They may be attached to a house, lot, gate, or city lot, as well as to a rural tract of land.

An easement may exist over a highway. Irwin v. Fowler, 5 Rob. 483, but such an easement cannot rise by prescription. Burbank v. Fay, 65 N. Y. 57; Driggs v. Phillips, 103 id. 77.

The purposes for which a private way created by grant may be used depend upon the terms of the grant. Arnold v. Fee, 87 Hun, 502. Not upon the

extent of the user. Id.

It may be created by reference to a map. Huttemeier v. Albro, 18 N. Y. 48.

A right of way appurtenant to land attaches to every part of it, although it may go into the possession of several persons. Underwood v. Carney, 1 Cush. (Mass.) 285; Lansing v. Wiswall, 5 Den. 213; Child v. Chappell, 9 N. Y. 246; Lampman v. Milks, 21 id. 505; Huttemeier v. Albro, 2 Bosw. 546, affd., 18 N. Y. 48.

Dominant owner can only pass and repass over right of way and must The latter has no duty but to let him pass. protect servient from injury. Brill v. Brill, 108 N. Y. 511.

By User or Prescription.—The user, which will create an easement over the lands of another by prescription, must be open, notorious, visible, uninterrupted and undisputed, exercised under a claim of right adverse to the owner, acquiesced in by him, and must have thus existed for a period of at least twenty years.

After a user which complies with these requirements the owner is charged

with notice and his acquiescence is implied.

There can be no prescriptive right to pass over another's land in a general manner, and where a right of way by prescription is claimed, a certain and well-defined line of travel must be shown. Bushey v. Santiff, 86 Hun, 384.

The right of way may be established through a prescription, or through its existence from time immemorial. Parol evidence of twenty years' uninterrupted continuous use, adverse or in hostility to the owner of the land, will authorize the inference of a grant. Hamilton v. White, 4 Barb. 61, affd., 5 N. Y. 9; Lansing v. Wiswall, 5 Den. 213; Williams v. Safford, 7 Barb. 309, 313; Corning v. Gould, 16 Wend. 531; Miller v. Garlock, 8 Barb. 153; Chapman v. Swan, 65 id. 210; Combs v. Vigotty, 12 Wkly. Dig. 432; Hey v. Coleman, 78 App. Div. 584.

A right of way to one plot is not good for another plot adjoining. Rexford v. Marquis, 7 Lans. 250.

Nor will a right of way to a plot be construed to extend any farther than

will give such access. Spencer v. Weaver, 20 Hun, 450.

The burden of the easement must be the same during the whole time that the right by prescription is being gained; if increased, the right to the increased burden must be gained by the full prescriptive period. Prentice v. Geiger, 74 N. Y. 341.

All agreements with reference to easements, as conferring interests in lands, should be in writing. Wolfe v. Frost, 4 Sandf. Ch. 72; Pitkin v. Long Island R. R. Co., 2 Barb. Ch. 221; Day v. N. Y. C. R. R., 31 Barb. 548.

They cannot be created by parol. Cayuga R. R. Co. v. Niles, 13 Hun, 170. The owner of land cannot close a new passage where there is a prescriptive right of way without restoring the old one. Hamilton v. White, 5 N. Y. 9.

The locality of a right of way may be established by usage and length of the control of

time, and changed in the same manner. Wynkoop v. Burger, 12 Johns. 222.

The purchaser of a servient tenement does not take it subject to an ease-

ment not disclosed by deeds or apparent use. Taylor v. Millard, 42 Hun, 363, affd., 118 N. Y. 244.

The statutory rule (Code Civ. Proc., § 372) which prescribes either a substantial inclosure or usual cultivation or improvement as a necessary condition of adverse possession by a person claiming title to land not founded upon a written instrument, has no application to the case of an easement,

as, e. g., that of a right of passage.

Not only does the presumption of a grant arise from the fact of open, notorious, uninterrupted, undisputed and adverse user of an easement of right of way, but every such user is presumed to have been under claim of title and adverse; and the burden is upon the party alleging that the user was by virtue of a license or permission to prove that fact by affirmative evidence. See Colburn v. Marsh, 68 Hun, 269.

By Reservation.—As to instance of an easement created by reservation. vide Rose v. Bunn, 21 N. Y. 275; Rexford v. Marquis, 7 Lans. 250; Lewisohn

v. Lansing, 119 App. Div. 393; O'Beirne v. Gildersleeve, 116 id. 902.

Where an owner of two lots has been accustomed to use a way first created by himself over one to the other, no reservation of the easement is implied in a grant of the servient lot. Shoemaker v. Shoemaker, 11 Abb. N. C. 80.

Nothing but a reservation or clear marks of its existence will create the

easement. Outerbridge v. Phelps, 45 Super. 555.

A right of way by prescription can never be inferred in a person to any part of his own land; but when he sells a part the right of way may continue over the part sold in favor of the remainder, if it be necessary for ingress, but not for convenience. Wheeler v. Gilsey, 35 How. 139; Huttemeier v. Albro, 2 Bosw. 546, affd., 18 N. Y. 48.

Assignment.— If the right be a mere personal one, it cannot be assigned or transmitted by descent; but if the right is appendant or annexed to an estate, it may pass by assignment when the land is sold. Child v. Chappell, 9 N. Y. 246; Smiles v. Hastings, 24 Barb. 44, affd., 22 N. Y. 217; Huttemeier v. Albro, 18 id. 48.

A right of way over a proposed avenue, upon which lots are sold, granted in the deed, is appurtenant and not in gross, and passes, though some of the subsequent deeds omit reference to it with a view to extinguishment.

Potter v. Îselin, 31 Hun, 134.

An easement of right of way, established by such user, passes under the term "appurtenances" in a deed of the dominant estate. Colburn v. Marsh, 68 Hun, 269; see Ennis v. Grover, 53 Misc. 66.
It will enure to the benefit of a landlord if acquired by a tenant. Dempsey v. Kipp, 61 N. Y. 462.

And vide infra, "Highways," and supra, "Dedication," Chap. XXXV, and Cox v. James, 59 Barb. 144, affd., 45 N. Y. 557.

Limitation.—The exercise of these and other easements and servitudes may be general or limited to certain times. The right of using a well, or a right of passage, may be confined to certain hours as well as to a certain place.

Query, whether the knowledge by a purchaser of the servient estate of the fact that a right of way is used in a manner different from that specified in the recorded grant thereof is sufficient to put him upon inquiry as to whether any subsequent unrecorded grant or agreement between the owners of the land has been made. Hill v. Bartholomew, 71 Hun, 453.

To exclude a grantee from the perpetual beneficial use of an open way in front of the premises granted, the language of the deed should clearly express such an intention. Holloway v. Southmayd, 139 N. Y. 390, citing Wheeler v. Clark, 58 id. 267; Kings Co. Ins. Co. v. Stevens, 101 id. 411; Kings v. Mayor, etc., 102 id. 171, 175; Fearing v. Irwin, 55 id. 486, 490; Jackson v. Hathaway, 15 Johns. 447, distinguished.

Tenants in Common.— One tenant in common cannot acquire or grant an easement over the common property. Lampman v. Milks, 21 N. Y. 505; Crippin v. Morss, 49 id. 63.

Covenant of Warranty.—A covenant of warranty is broken by the existence of an easement. Rea v. Minkler, 5 Lans. 196.

Obstructions.—The owner of a right of way has a right to remove all obstructions placed on it, and to repair it. Williams v. Safford, 7 Barb. 309; Boyce v. Brown, 7 id. 80; Taylor v. Whitehead, 2 Doug. 748; McMillan v. Cronin, 75 N. Y. 474; Denning v. Sipperly, 17 Hun, 69; Loeffler v. Fox, 11 Wkly. Dig. 217; s. c., 23 Hun, 149.

But an obstruction put up by the owner of the easement permanently

extinguishes it. 3 Kent, 448.

Bars or gates may be put up for protection, in a proper case, by the owner of the servient estate. The necessity is to be decided by a jury. Bakeman v. Talbot, 31 N. Y. 366; Huson v. Young, 4 Lans. 64. See also Rose v. Bunn, 21 N. Y. 275, and infra, "Highways."

Repairs to the Way may be made if no unnecessary inconvenience be caused to the owner of the fee. McMillan v. Cronin, 13 Hun, 68, appeal dismissed, 75 N. Y. 474.

See as to reservation of a stable way and its limitations, and to build over the same. Grafton v. Moir, 130 N. Y. 465; Hollins v. Demorest, 129 id. 676. As to right of construction over a right of passage. Gillespie v. Weinberg, 6 Misc. 302.

Temporary Right of Way.— A temporary right of way would also exist over adjoining land, if the highway be out of repair, or be otherwise impassable, as by a flood. This right would not arise by the impeding of a mere private way, unless the private way were one of necessity.

Williams v. Safford, 7 Barb. 309; Boyce v. Boyce, id. 80; Taylor v. Whitehead, 2 Doug. 748; 3 Kent, 424.

Way by Necessity.—A grantee of land without access to the highway may have a right of way, be necessity to the highway, over the remaining land of the grantor or of a tenant in common. The latter persons may designate the way in the first instance. The way is considered a necessary incident to the grant, without which the grant would be useless, and passes with the land. The right to such a way exists as well where there is a mere equitable grant to the title with the right of possession, as where the fee is granted. If a road is designated on a map, it is to be considered as the locus of the easement.

Smiles v. Seely, 9 Wend. 507; N. Y. Life Ins. Co. v. Milnor, 1 Barb. Ch. 353; Holmes v. Selly, 19 Wend. 507; Smiles v. Hastings, 24 Barb. 44; 22 N. Y. 217; Wheeler v. Gilsey, 35 How. Pr. 139; Huttemeier v. Albro, 2 Bosw. 546, affd., 18 N. Y. 48; Simmons v. Lines, 4 Abb. Ap. Cas. 246; Bloomfield v. Ketcham, 25 Hun, 218; Carbonic Acid Gas Co. v. Geyser Gas Co., 72 App. Div. 304; Palmer v. Palmer, 150 N. Y. 139.

Right of way over grantor's lands will be retained without express grant, only in cases of necessity and consequent implied intention. Mere convenience is insufficient. Dales v. Ceas, 5 Wkly. Dig. 400; Ogden v. Jennings, 62 N. Y. 526; Outerbridge v. Phelps, 45 Super. 555.

A right of way by necessity, however, is considered terminated with the

A right of way by necessity, however, is considered terminated with the necessity. N. Y. Life Ins. Co. v. Milnor, 1 Barb. Ch. 354; Viall v. Carpenter, 14 Gray, 126; Holmes v. Goring, 2 Bing. 76; Hines v. Hamburger, 14 App.

A right of way which has long existed as a convenience is not a way of necessity. Huttemeier v. Albro, 2 Bosw. 546, affd., 18 N. Y. 48; Proctor v. Hodgson, 29 Eng. L. & Eq. 453; 3 Kent, 323.

The grantor has the right to designate the track of way. Palmer v. Palmer,

150 N. Y. 139.

Rights of way of necessity may exist temporarily, as, if a structure, pipes, etc., have been erected on another's lands by license or other right, there is a presumed right of entry for repairs or other purpose incident to the full enjoyment of the license. Pompel v. Ricroft, 1 Sandf. 321; Doty v. Gorham, 5 Pick. 487; Chambers v. Furry, 1 Yeates, 167; Cooper v. Smith, 9 Serg. & Rawle, 26; Roberts v. Roberts, 55 N. Y. 275.

Such rights are not lost or extinguished by mere nonuser, but only by a

holding strictly adverse for the period of twenty years. Smiles v. Hastings,

24 Barb. 44; 22 N. Y. 217.

In a conveyance of a pier the word "appurtenances" includes reasonable access over land under water of grantor, and so, if the land under water be afterward granted, it passes subject to the servitude. Knick. Ice Co. v. 42d St., etc., R. R. Co., 48 Super. 489.

A grantee of land acquires no right of way of necessity over the land of the grantor, where the land conveyed can be reached through and by a

public highway.

By furnishing a shorter and more convenient entrance to lands of the grantee, the grantor extinguishes a right of access over his lands. Palmer v. Palmer, 71 Hun, 30, reversed on the facts, 150 N. Y. 139.

Private Roads.— The Constitutions of 1846 and 1894, provide that private roads may be opened in a manner to be prescribed by law; necessity thereof and damages, etc., to be assessed by a jury, and paid by the person to be benefited.

Const. 1846, Art. I, § 7; Const. 1894, Art. I, § 7.
The law of 1801, re-enacted in 1813, 2 R. L. 276, provided for laying out private roads, damages to be assessed and paid as above. See also 1 R. S. 517. Later laws on the subject were passed in 1848, Chap. 77; 1853, Chap. 174, repealing the Act of 1848, amended by Law of 1859, Chap. 373, and Laws of 1860, Chap. 468. As to proceedings under the Act of 1853, vide Satterly v. Winnie, 101 N. Y. 218. The Law of 1853 was repealed by the Highway Law, G. L., Chap. XIX, L. 1890, Chap. 568, which now regulates the whole subject, vide Highway Law, §§ 106-123, as amended.

As to the fencing of such roads, vide Herrick v. Stover, 5 Wend. 580; Lam-

bert v. Hoke, 14 Johns. 383; Brout v. Becker, 17 Wend. 320, 322; and Highway Law, § 122; also Laws of 1853, Chap. 174.

If a private road is laid over a person's lands without consent, or due process of law, he may obstruct it. Dempsey v. Kipp, 62 Barb. 311, revd. on the facts, 61 N. Y. 462.

What user will be presumed to be adverse. Hey v. Collman, 78 App. Div.

A public highway should not be laid out where the main purpose is to furnish access to the lot of an individual. Matter of Lawton, 22 Misc. 426.

The use of a private road for twenty years does not make it a highway.

Culver v. City of Yonkers, 80 App. Div. 309; see also Hamilton v. Village of Owego, 42 id. 312.

See also Provisions as to Private Roads, infra, Tit. III, "Highways."

Extinguishment.—Rights of way, as well as all other subordinate rights and easements, are extinguished by the unity of possession, both the servient land and the easement being owned by the same person. But a right of way existing from necessity would not be extinguished by the unity of possession; such as a right of way to a church or market, or a right to a gutter carried through an adjoining tenement; or to a water-course running over adjoining lands to a highway. Such a right would be revived by a severance.

Proctor v. Hodgson, 29 Eng. L. & Eq. 453; 1 Saund. 323, note 6; Hazard v. Robinson, 3 Mason, 276; 3 Kent, 423; Buckby v. Coles, 5 Taunt. 311; Cruise's Digest, Tit. XXIV, Ways; Huttemeier v. Albro, 2 Bosw. 546, affd., 18 N. Y. 48; Parsons v. Johnson, 68 id. 62.

As to what will support an inference of abandonment, see Crain v. Fox,

16 Barb. 184.

The right is not lost by a union of the two estates, unless there is an intent to abandon it. White v. Nichols, 64 N. Y. 65; Mott v. Mott. 8 Hun, 474, modified in 68 N.Y. 246.

Rights of way created by deed are not lost by mere nonuser. Wiggins v. McCleary, 49 N. Y. 346; but a parol agreement therefor, if partially performed, may be effectual as an estoppel. Pope v. O'Hara, 48 N. Y. 447; see Snell v. Leavitt, 110 id. 595; Welsh v. Taylor, 134 id. 450.

Neither can a right of way acquired by dedication be lost by nonuser, although this may be evidence of extinguishment. Wiggins v. McCleary, 49 N. Y. 246.

N. Y. 346.

A right of way by prescription over lands formerly part of a public highway which has been discontinued, cannot be based on their user previous to the closing of the highway, as in order to give such right the user must be while all persons concerned in the estate are free to resist it. Wheeler v. Clark, 58 N. Y. 267.

Abandoning a lane by adjoining owners and dividing the land by a middle fence is an extinguishment. Hennesey v. Murdock, 17 N. Y. Supp. 276, revd., 137 N. Y. 317.

Rights of Way and Prescription in Streams and over Water .- Vide infra, Chap. XLIII, and Meyer v. Phillips, 97 N. Y. 485; Law v. McDonald, 9 Hun,

TITLE III. HIGHWAYS.

Highways are referred to herein as distinguished from "streets" opened under acts by which the land for the streets is in terms transferred to the city. Highways were established, both in the cities and in the State generally, under a system of laws different from that which laid out and regulated streets; and the title to and rights in the same are regulated by different principles.

It is a general principle of law that the Legislature has the right to establish and improve public highways as it pleases.

People v. Flagg, 46 N. Y. 401. See also Const. 1894, Art. VII, § 12;

Art. III, § 18.

The first general act was passed in 1890. This is the Highway Law, G. L., Chap. XIX, L. 1890, Chap. 568. This provides for the powers and duties of highway officers, the laying out, altering and discontinuing of highways, for bridges, ferries, etc. There are miscellaneous provisions and repealing and other clauses superseding practically former laws on the subject. This act has been amended variously from year to year since its passage and reference should be lad to it, as amended.

This Law of 1890, supra, practically abolishes all prior special laws on the subject of highways, which are hereafter given.

The Law of 1890, Chap. 566, being the Transportation Corporations Law, alluded to supra, Chap. XXIV, makes provision for the incorporation of turnpike, plank road and bridge corporations, for the purpose of constructing the road, etc., its location and restriction upon location, agreements for the use of the highways, laying out the road by commissioners, possession and title to real estate, etc. See Transportation Corporations Law, L. 1890, Chap. 566, Art. IX, as amended.

General principles of Law Applicable to Highways. - By the rules of the common law, when a highway is laid out over the land of a private person, the public acquires no more than a right of way or easement, and the power and privileges incident to such right. The title of the original proprietor is not divested, but still continues. He may use the land, above or below, in any manner not inconsistent with the public right, and may maintain trespass or ejectment in relation to it; and while it is used as a highway, he is entitled to any productions which may grow upon the surface, and to all minerals, and to damages for any interference with the roadbed. If the road should be vacated by the public, he resumes the

exclusive possession and ownership of the ground, and he may have damages for any use or occupation of the land other than the easement inconsistent with his right to the soil..

Dovaston v. Payne, 24 Blacks. 527; In re John St., 19 Wend. 659; 12 id. 371; Sidney v. Earl, Id., 98; People v. Law, 34 Barb. 494; Dygart v. Schenck, 23 Wend. 446; Congreve v. Smith, 18 N. Y. 79; Jackson v. Yates, 15 Johns. 447; The Trustees of Presbyterian Ch. v. The Auburn, etc., R. R. Co., 3 Hill, 567; Pearsall v. Post, 20 Wend. 111, 131; Barclay v. Howell's Lessee, 6 Pet. 498; People v. The Board, etc., of West'r Co., 4 Barb. 64; Etz v. Daily, 20 id. 32; Kelsey v. King, 33 How. 39; McCarthy v. City of Syracuse, 46 N. Y. 194; Mangam v. Village of Sing Sing, 11 App. Div. 212.

As to the considerable rights of the owner of the fee of the highway in it, see Sweet v. Perkins, 115 App. Div. 784.

As to the constitutionality of the Law of 1867, Chap. 697, giving road-bed of closed highway to adjoining owners, the original owner of the road-bed having the title. See Fearing v. Irwin, 4 Daly, 385, affd., 55 N. Y. 486; Holloway v. Southmayd, 139 N. Y. 390, and cases cited.

Gas-pipes cannot be laid in a highway without additional compensation. Bloomfield, etc., Co. v. Calkins, 64 N. Y. 65.

As to what obstruction of a highway is liable to abatement, see Strickland v. Woodworth, 3 Supm. 286.

v. Woodworth, 3 Supm. 286.

A conveyance of land to a municipal corporation for a highway conveys the fee, not a mere easement. Vail v. L. I. R. R. Co., 106 N. Y. 283.

As to railways over highways, vide Chaps. II and XXXV, Tit. II; and infra, p. 845. As to compensation for highways taken under the law of eminent demain, vide supra, Chap. II.

The Sea-shore, though open to all, is not a highway. Murphy v. Brooklyn, 98 N. Y. 642. Vide infra, Chap. XLIII, Tit. III., "Tide Water and Arms of the Sea."

Rivers as Highways.—Various rivers in the State have by special acts been made public highways. See Matter of Thompson, 86 Hun, 415.

Highways by User .- By the Highway Law all lands which shall have been used by the public for twenty years shall be a highway. Highway Law, L. 1890, Chap. 568, § 100; see 1 R. S. 521, §§ 100, 101. The contrary was theretofore the law. Harriman v. Horne, 78 Hun, 280, but compare People v. Cunningham, 84 Hun, 441, as to the efficacy of the said Law of 1890 in

The use of a private road, however, for twenty years does not make it a highway. Culver v. City of Yonkers, 80 App. Div. 309; see also Hamilton v.

Village of Owego, 42 id. 312.

Highway by Dedication and Prescription. Supra, Title II.
What constitutes dedication of highway. Town of Corning v. Head, 86
Hun, 12. See also Chap. XXXV. As to prescription, vide Specie v. New
Utrecht, 49 Hun, 295; Culver v. City of Yonkers, 80 App. Div. 309.

Transfer of Title in Highways.— Land in a highway may pass not only by special description in a conveyance, but constructively. It has been seen above (Chap. XX) that if a person over whose land a highway is laid out, convey the land on either side of it, but describing the land by such special boundaries as not to include the road or any part of it, the property in the road would not pass to the grantee by the deed, nor would it pass as an incident or appurtenance. If, however, lots are conveyed by descriptions, bounding them "by" or "along" roads or streets, in which the grantor has an interest or estate, the respective grantees will take the fee of the land in front of their respective lots to the center of the streets. This applies equally to city lots as to rural property. The rule is otherwise when the land is so bounded by feet, etc., as to exclude the street, or is bounded by a specific line or side of the street; or probably if a municipal corporation were to grant land bounded by a public street. So also if a strip of land were the only means of access to lots, and they were bounded on that, they would be probably considered as bounded to the center, unless words were used showing an intention to restrict the grant.

Perrin v. The N. Y. C. R. R. Co., 36 N. Y. 120, affg. 20 Barb. 65; Herring v. Fisher, 1 Sandf. 344; Sherman v. McKeon, 38 N. Y. 266; Jackson v. Yates, 15 Johns. 447; Jones v. Cowman, 2 Sandf. 234; Hammond v. McLachlan, 1 id. 323; 23 N. Y. 68; Adams v. Saratoga & Wash. R. R., 11 Barb. 414, revd., 10 N. Y. 328; The People v. Law, 34 Barb. 494; Wetmore v. Story, 22 id. 486; Anderson v. James, 4 Rob. 35; Wetmore v. Law, 34 Barb. 515; Dunham v. Williams, 36 id. 136, and 37 N. Y. 251; see also supra, Chap. XX, Title IV, and the cases cited.

The Presumption as to Ownership.—The legal presumption both as to grantor and grantee, as respects a highway or road, is that one who owns both sides of a highway is presumed entitled to the fee of the road, subject to the public easement. Upon the discontinuance of a road, therefore, the fee is not in the public, but presumptively in the owners of the adjoining land, until proof is made showing other ownership.

Matter of John, etc., Street, 19 Wend, 659; Van Amringe v. Barnett, 8 Bosw. 358; Mott v. Mayor, 2 Hilton, 358; Herring v. Fisher, 1 Sandf. 344, 350; Wetmore v. Story, 22 Barb. 487; Bissell v. N. Y. C. R. R., 23 N. Y. 61; The People v. Law, 34 Barb. 494; Dunham v. Williams, 37 N. Y. 251; Williams v. N. Y. C. R. R., 16 id. 97.

The claim of an absolute title to the center of the street does not of itself work an abandonment of the easement therein. Lewisohn v. Lansing, 119 App. Div. 393.

Turnpike Companies.—A turnpike company formerly was held merely to have authority to obtain land for the purpose of its road, i. e., the easement; and on closing the road, the land would revert to the original owner, in whom or his privies the title might be. Dunham v. Williams, 36 Barb. 136, reversed on other grounds, 37 N. Y. 251; but see, as to present law, L. 1890, Chap. 566, § 125, authorizing such companies to take and hold lands for the purpose of their incorporation, and § 148, vesting the road in the people on dissolution, supra, p. 671.

Turnpike Roads and Toll-Bridges.—When the corporation owning such is dissolved, the road or bridge was to be a highway. Law of 1838, Chap. 262. See, as to the ownership of such roads after abandonment, People v. Newburgh, etc., Co., 86 N. Y. 1; Kings Co., etc., Co. v. Stevens, 101 *id.* 411; and *supra*. This Law of 1838 was repealed by said Transportation Corporations Law, L. 1890, Chap. 566, which makes provision to the same effect.

Abandonment of a Highway. - Every highway not traveled or used as a highway for six years shall cease to be a highway. Highway Law, L. 1890, Chap. 568, § 99, repealing L. 1861, Chap. 311; Mangam v. Village of Sing

Sing, 11 App. Div. 212.

See as to this and the repealed law. Amsbry v. Hinds, 48 N. Y. 57; City of Buffalo v. D., L. & W. R. R. Co., 68 App. Div. 488; Lyon v. Munson, 2 Cow. 426; Walker v. Caywood, 31 N. Y. 51; 46 Barb. 317; People v. Marlette, 94 App. Div. 592; Del. & H. C. Co., 134 N. Y. 397. See also Lewisohn v. Lansing Co., 51 Misc. 274; People v. Delany, 120 App. Div. 801.

The Act of 1890 held to apply to a highway laid out in 1800. Townsend

v. Bishop, 61 App. Div. 18.

An abandonment of a highway can be only by the public by some act of obstruction or other unequivocal act, or by nonuser. Amsbry v. Hinds, 46 Barb. 622, affd., 48 N. Y. 57.

Title to a portion of a highway used by the public cannot be acquired by

adverse possession. Morison v. New York El. R. R. Co., 74 Hun, 398.

As to user of a highway making a dedication, vide supra, "Dedication;" Chap. XXXV; also, Barclay v. Howell, 6 Pet. 498.

No user by the public of land adjoining a navigable stream will raise presumption of a grant. Post v. Pearsall, 22 Wend. 425.

Where a portion of a city street, the fee of which has not been acquired, is not opened or worked, but remains closed for six years, such portion ceases to be a street. City of Buffalo v. Hoffeld, 6 Misc. 197; see also City of Buffalo v. D., L. & W. R. R. Co., 68 App. Div. 488.

The extinguishment of the public easement by discontinuance in accordance with statutes leaves the private easements of light, air and access alive.

Matter of Mayor, 95 App. Div. 533.

Abandonment of Parks.- Owners of land fronting on a park will be protected. Foster v. City of Buffalo, 64 How. Pr. 127. Distinguished as to land not directly fronting. Green v. N. Y. Cen. R. R. Co., 65 How. Pr. 154. See also Chap. XX.

Roads Opened under the Dutch Government.—The civil laws prevailing under the Dutch government established a different rule as to the taking and ownership of land used for highway. The title to the bed of highways laid out under that dominion, is in the public, and not in the original or adjoining owners or their privies. See Dunham v. Williams, 37 N. Y. 251, revg. 36 Barb. 136; Wetmore v. Story, 22 id. 433; Rewthorp v. Bourgh, 4 Martin (La.) 97, 137; Fowler, Real Prop. Law, 63, 64.

The fee of the old Dutch roads in Brooklyn is in the city. Canimez v. Goodman, 119 App. Div. 484; Paige v. Schenectady R. Co., 38 Misc. 384.

Various acts Establishing Public Highways .- At an early period of the Colonial rule ordinances were made and acts passed laying out and regulating highways in the province, and in the cities. In May 6, 1691 (1 S. & L. 3, 1 V. S. 3) an act was passed regulating and laying them out in the towns in the province, through overseers, on agreement and direction by freeholders, to be registered in the town books, and subject to approval of the next Court of Sessions of the Peace. On May 11, 1697, an act was also passed authorizing, laying out, regulating and amending the highways. On June 19, 1703, an act was passed for laying out public highways in the colony.

The above Act of 1703 was renewed in 1707 and 1708, 1713, 1720 and 1773.

Local acts were also passed from time to time.

Laws of March 19, 1813.—The Law of March 19, 1813 (2 R. L. 270, § 47), in repealing other acts relative to highways, states that those relating to the city and county of New York shall not be repealed by the act, and provides generally as to laying out highways.

Revised Statutes.—By the Revised Statutes, commissioners of highways of towns were to regulate and alter highways, and to cause those laid out, and those used for twenty years as such, to be described and recorded in the town

clerk's office, and to lay out new and to discontinue old roads if deemed unnecessary, on the oath of twelve freeholders. Surveys are to be made of discontinued or new roads, and recorded. Provision was made against laying out private or public roads (without the consent of owners) through orchards or gardens (of four years' growth), or through buildings or fixtures or erections for trade or manufacture, or yards or enclosures necessary for use or enjoyment; and no highway was to be laid out through improved or cultivated ground, unless certified as necessary by twelve town freeholders. The law further provided that the highway was to be laid out on application and assessment of damages. 1 R. S. 509 to 521, based on Laws of 1813, 283; Laws of 1826, 228. See also as to the above. People v. Supervisors of Richmond Co., 20 N. Y. 252; People v. Commrs. of Salem, 1 Cow. 23; 10 How Pr. 209; 6 Barb. 607; 19 id. 179; People v. Goodwin, 5 N. Y. 568; 6 Barb. 607; Ex parte Clapper, 3 Hill, 458; Mohawk & Hudson R. R. Co. v. Artcher, 6 Paige, 83; Lansing v. Caswell, 4 id. 519; Clark v. Phelps, 4 Cow. 190; Carris v. Commrs. of Highways of Waterloo, 2 Hill, 443. The Revised Statutes were amended by Law of May 3, 1834, Chap. 267; 1836, Chap. 122; 1845, Chap. 180; 1847, Chap. 455; 1853, Chap. 174; 1855, Chap. 235; 1857, Chaps. 491, 615; 1858, Chap. 103; 1859, Chaps. 268 and 273; 1862, Chap. 243; 1868, Chap. 507; 1869, Chaps. 24 and 397; 1870, Chap. 125; 1873, Chaps. 313, 395 and 773; 1874, Chap. 615; 1875, Chap. 431, also repealing Chap. 315 of 1873 and Chap. 615 of 1874; 1876, Chap. 271; 1877, Chap. 465, also repealing the Act of 1876; 1880, Chap. 114; 1881, Chap. Willages As to Larica and the content of the cont and assessment of damages. 1 R. S. 509 to 521, based on Laws of 1813, 283;

Villages.—As to laying out village streets, see the Village Law, G. L., Chap. XXI, L. 1897, Chap. 414, Art. V (as amd.).

For former laws see L. 1870, Chap. 291, as amd. by L. 1871, Chap. 870; see also People v. Pres., etc., of Whitney Point, 102 N. Y. 81; People v. Haverstraw, 137 N. Y. 88.

As to opening highways under L. 1881, Chap. 696, see Buckley v. Drake, 41 Hun, 384. The said act was repealed by the Highway Law, L. 1890, Chap. 568. As to highways and streets in incorporated villages, see also Laws 1883, Chap. 113, and Laws 1884, Chap. 281, amd. Laws 1894, Chap. 172.

Apart from the statute, a mere dedication would not make a public highway. It becomes so on being legally laid out as such. Trustees of Jordan v. Otis, 37 Barb. 50.

Nor a mere user, when the road has not been accepted and opened; and the commissioners cannot proceed for an encroachment. Doughty v. Brill, 36 Barb. 488, affd., 3 Keyes, 612. See as to acceptance by the public authorities, fully, supra, p. 823, "Dedication."

As to roads through vineyards, vide Law of 1869, Chap. 24; 1883, Chap.

99; Highway Law, L. 1890, Chap. 568, § 90.

Through graveyards. Laws of 1868, Chap. 843; 1869, Chap. 708; Highway Law, L. 1890, Chap. 568, § 91.

Counties .- As to laying out highways in counties, see County Law, L., Chap. XVIII; L. 1892, Chap. 686, Art. IV.

As to highways, sewers and drains in counties having over 300,000 inhabitants, other than New York and Kings counties; see L. 1895, Chap. 816, amd. L. 1900, Chap. 507; L. 1901, Chap. 663.

As to these latter vide Laws 1892, Chap. 493; repealed L. 1893, Chap. 419;

also Trainer v. Eichorn, 74 Hun, 58.

Highways in some counties. Laws 1890, Chap. 555.

See also as to provisions for adoption of county road system, the Highway Law, §§ 54-59.

Towns .- See the Town Law, G. L., Chap. XX, Laws of 1890, Chap. 569. § 15, as amended.

As to necessity of new roads in a town. Matter of Oakley Ave., 85 Hun, 446.

Closing of Streets, Avenues, Roads, Places, etc., in N. Y. City.— Consolidation Act, July 1, 1882, amd. Laws 1892, Chap. 129. See now Greater New York Charter, L. 1897, Chap. 378, § 436, as am'd. L. 1901, Chap. 466, § 442:

also Matter of Brook Ave., 40 App. Div. 519.

See also L. 1890, Chap. 495, as to streets in the 23d ward, New York city. Matter of Morris Avenue, 56 App. Div. 122; Matter of Mayor. etc.. of New York, 166 N. Y. 495.

Assessments for Highway Labor. See Highway Law, L. 1890, Chap. 568.

Trees on Highways.—Trees belong to the owners of the highway-bed, and they may remove them at pleasure, but they cannot plant them so as to obstruct the highway. The Village of Lancaster v. Richardson, 4 Lans. 137. As to damages for cutting down. McCruden v. Rochester R. Co., 5 Misc. 59. As to damages to abutter not owning the fee against a gas company for their destruction. Donohue v. Keystone Gas Co., 181 N. Y. 313.

Vide, as to shade trees and their removal for repairing the highway or bridges, 1 R. S. 525, §§ 126, 127; Laws of 1853, Chap. 573; Laws of 1863, Chap. 93; 1869, Chap. 822; also as to planting trees, Laws of 1869, Chap. 322; 1870, Chap. 595; 1874, Chap. 570. Partly repealed by Laws of 1886, Chaps. 593, 595; vide also Higgins v. Reynolds, 31 N. Y. 151.

See Laws 1800 Chap. 568, 88, 42 and 186 part required the relationship.

See Laws 1890, Chap. 568, §§ 43 and 156, now regulating the subject.

Pipes and Sewers in Highways. Laws of 1873, Chap. 63; 1886, Chap. 452. See also Transportation Corporations Law, L. 1890, Chap. 566, Art. V, and

Highway Law, L. 1890, Chap. 568, § 14 (as amd.).
Highway may be used to lay water pipes in an unincorporated village under Laws 1890, Chap. 566, § 82, by a private corporation having consent of the village. Witcher v. Holland Waterworks Co., 20 N. Y. Supp. 560. See also Rochester & L. O. W. Co. v. City of Rochester, 176 N. Y. 36, affg. 84 App.

Drains and Sewers in Villages, Towns, Etc. See Laws 1889, Chap. 375; 1891, Chaps. 306, 316; 1892, Chaps. 349, 564; 1893, Chaps. 422, 545, amd. Laws 1894, Chap. 328. This subject is now regulated as to villages by the Village Law, L. 1897, Chap. 414, Art. X, and as to towns, by L. 1901, Chap. 348.

Discontinuance.— See Laws of 1873, Chap. 69; 1878, Chap. 114; Highway Law, L. 1890, Chap. 568; vide supra, p. 843, as to city of New York. See also Matter of Mayor, 95 App. Div. 533; as to compensation in New York city. People v. Delany, 120 App. Div. 801.

Telephones.—Placing telephone poles and wires along a country highway is an invasion of abutters' rights. Gray v. New York State Telephone Co., 41 Misc. 108; Palmer v. Larchmont Electric Co., 6 App. Div. 12, revd. 158 N. Y. 231; and this is so even as to city streets, Osborn v. Auburn Telephone Co., 189 N. Y. 393; Powers v. State Line Telephone Co., 116 App. Div. 737; cf. Johnson v. New York, etc., T. Co., 76 id. 564; Castle v. Bell Telephone Co., 49 id. 438; 30 Misc. 38; Gannett v. Independent Telephone Co., 55 id. 555, unless authorized by law. State Telephone Co. v. Ellison, 121 App. Div. 499.

Laws 1848, Chap. 265, amd. Laws 1853, Chap. 471, held not to give authority to erect telephone poles in highway opposite abutting owner who also owns fee of highway, except on his consent had. Eds v. Am. Telephone and Tel. Co., 143 N. Y. 133.

Telephone company with franchise has no right to erect poles in highway, the fee of which is in the abutting owner, without his consent or instituting condemnation proceedings. Hudson R. Tel. Co. v. Forrestal, 56 Misc. 133.

Obstructions.—Neither the owner nor any one else may obstruct by excavation or obstacle. Wright v. Saunders, 65 Barb. 214, affd., 36 How. Pr. 136; Trenor v. Jackson, 15 Abb. N. S. 116.

Noxious weeds, etc., to be destroyed. See Highway Law, L. 1890, Chap.

568, §§ 70, 71. Removing fences. See L. 1890, Chap. 568.

Adjoining owners of the highway whose title presumptively extends to the center thereof have a right to all ordinary remedies for the freehold; and the unauthorized erecting of a wall in front of their premises on the sidewalk and street by the board of trustees of a village constitutes a nuisance. Hyland v. Pres., etc., of Ossining, 57 Misc. 212.

Private Roads .- Vide supra, Tit. II.

The use of Highways for Railroads.—(Vide more fully, supra, Chap. II.,

Title IV, as to streets.)

See also Law of 1864, Chap. 582. Railroads authorized to cross highways by consent of the commissioners of highways. Laws of 1835, Chap. 300; see Davis v. Mayor, etc., of New York, 14 N. Y. 506. As to highways over railroad tracks, vide Laws 1853, Chap. 62.

A fee in the street is not necessary to entitle an abutting owner to damages for injury by a railroad in a street. Pond v. Met. E. R. R. Co., 112 N. Y. 186.

See also the Railroad Law, L. 1890, Chap. 565.

Extent and Effect of Owner's Consent to allow elevated railroad, where he is an abutting owner. White v. Man. R. Co., 139 N. Y. 19; Shaw v. N. Y. El. R. R. Co., 187 N. Y. 186.

Railroads in Streets.-As to consents necessary to operation. Laws of 1890, Chap. 565, § 91, as amd.

When another road is already in operation there. Laws of 1890, Chap. 565,

§ 102, as amd.

Change of direction. Buckholz v. N. Y., L. E. & W. R. Co., 21 N. Y.

Supp. 503; s. c., 66 Hun, 377.

As to loss of abutting owner's rights after lapse of twenty years. Goldstrom v. Interborough R. T. Co., 115 App. Div. 323; cf. Bremer v. Manhattan Ry. Co., 191 N. Y. 333.

Rights of Abutting Owners.—As to embankments.—Rauenstein v. New York, L. & W. Ry. Co. 136 N. Y. 528.

Change of grade of street. Whitmore v. Tarrytown, 137 N. Y. 409;

Cunningham v. Fitzgerald, 138 N. Y. 165.

As to land conveyed on a proposed street never opened. Matter of Brook Ave., 40 App. Div. 519.

Liability of City for change of grade once established. In the absence of statute no compensation is required; though where abutter owns the fee he

may recover damages for an illegal act with reference to same. Folmsbee v. City of Amsterdam, 142 N. Y. 118.

If a majority of the commissioners determine that the highway discontinuation or alteration is necessary they shall assess damages and make duplicate certificates to that effect. Highway Law, L. 1890, Chap. 569, § 86,

as amd.

The laws on the subject of highways are very voluminous and have been amended to such an extent that the subject cannot be further followed in a work of this nature.

TITLE IV. RIGHT OF COMMON.

The right of common is a right of infrequent occurrence in this State. It is that right which persons have in the lands of another. generally existing for purposes of pasturage or piscary, or for obtaining wood for fuel or otherwise. It may exist by prescription. Lands may also be dedicated or appropriated in common. Common appendant is a right annexed to the ownership of arable land as such. Common appurtenant arises by grant or prescription; common in gross is annexed to the person, and not the land. There are a few cases on the subject in the early reports in this State, some of which are cited below.

Watts v. Coffin, 11 Johns. 495; Livingston v. Ten Broeck, 16 id. 14; Layman v. Abeel, Id., 30; Van Rensselaer v. Radcliff, 10 Wend. 639; Livingston v. Ketcham, 1 Barb. 592.

The general principles established by the above cases are that common of pasturage is apportionable, but that common of estovers cannot be, and becomes extinguished if apportioned or divided; that common in gross may be aliened and descends, but that it must be exercised or transferred jointly by the various grantees or heirs, and cannot be separately used by

The right of rural residents to pasturage on the public highway, under regulation of the town authorities, has been a matter of some discussion in the State. Prior to the highway acts, under the Revised Statutes, the right was held not to exist. Vide Hallady v. March, 3 Wend. 147; Jackson v. Hathaway, 15 Johns. 453; Gedney v. Earle, 12 Wend. 98; Tonawanda R. R.

Co. v. Munger, 5 Den. 255, 264.

Under the more recent highway acts, where the use of the entire highway-bed is taken from the owner, the right is held to exist. Griffin v. Martin, 7 Barb. 297; doubted, 18 N. Y. Supp. 251; Hardenburgh v. Lock-

wood, 5 Barb. 9: contra, White v. Scott, 4 id. 56.

Extinguishment of Right of Common.—This may be done by release, by unity of possession, or by a severance of the right. If a part is released, it is considered that the whole right is extinguished. The unity of possession necessary to extinguish the right requires the union of an estate equal in duration and right with that to which the right belongs. The right is extinguished by severance, when the estate is conveyed free from the right.

TITLE V. LICENSES.

A license is an authority to do a particular act or series of acts upon another's land, without possessing an estate therein. A license by parol to enjoy a certain privilege is not an interest in land, within the statute of frauds requiring a writing. It is founded on personal confidence and is not assignable. If an actual interest in land is transferred, however, it is no longer a mere license, but comes within the statute of frauds, and requires a writing.

Prince v. Case, 10 Conn. 375; Kerr v. Connell, Birton (N. B.), 133; Woodbury v. Parshley, 7 N. H. 237; Mumford v. Whitney, 15 Wend. 380; Cook v. Stearns, 11 Mass. 533; Ricker v. Kelly, 1 Greenl. 117; Clement v. Durgin, 5 id. 9; Wedenhall v. Klinck, 51 N. Y. 246; Cayuga R. R. Co. v. Niles, 13 Hun, 170.

An instrument giving a right to enter and take oil on payment of a royalty is a license, and does not convey title to the oil. Shepherd v.

McCalmont Oil Co., 38 Hun, 37.

A license by parol to use a way is revocable; also, any licenses which, if given by deed, would create an easement. Foster v. Browning, 4 R. I. 47; Cocker v. Cowper, 1 Cromp. Mees. & Ross. 418; Wallis v. Harrison, 4 Mees. & W. 538; Morse v. Copeland, 2 Gray, 302; Jamieson v. Milleman, 3 Duer, 255; Coleman v. Forster, 37 Eng. L. & Eq. 489; Eckerson v. Crippen, 39 Hun, 419, revd. of the facts, 110 N. Y. 585.

And no right by prescription can be gained. Cronkhite v. Cronkhite, 94 N. Y. 323; White v. Sheldon, 35 Hun, 193; Wiseman v. Lucksinger, 84 N. Y. 31; Eckerson v. Crippen, supra; White v. Sheldon, 8 N. Y. Supp. 212; Staples v. Cornwall, 114 App. Div. 596.

But a license to do some act which has been acted on, and rights of property created under it, would be sustained, in equity, on the ground of estoppel, and would not be revocable, if, when revoked, the licensee would not be in statu quo. Wilson v. Chalfant, 15 Ohio, 248; Collins v. Marcy, 25 Conn. 239; Winter v. Brockwell, 8 East, 308; Le Fevre v. Same, 4 Serg. & R. 241; Resick v. Kern, 14 id. 267; Bridges v. Blanchard, 3 Nev. & Marm. 691; Wood v. Manley, 11 Adol. & Ell. 34; Androscoggin Bridge v. Bragg, 11 N. H. 102; Liggins v. Inge, 7 Bing. 682; Addison v. Hack, 2 Gill, 221; Brown v. Bowen, 30 N. Y. 519; and see the New York cases fully reviewed in note to Babcock v. Utter, 1 Abb. App. Cas. 28. This case also holds that adverse possession cannot arise under a license, and even after twenty years it may be revoked. See also Burhans v. Van Zandt, 7 N. Y. 523; Troup v. Hurlburt, 10 Barb. 354; Vrooman v. Shepherd, 15 id. 441; Cronkhite v. Cronkhite, 94 N. Y. 323.

If land to which water is conveyed by pipes from land of another, under a license, be sold, no right to the water passes to the grantee. Root v. Wadhams, 107 N. Y. 384.

But such license, even if granted for a valuable consideration, is revocable. Cronkhite v. Cronkhite, 94 N. Y. 323; White v. Sheldon, 8 N. Y. Supp. 212.

The English cases on the subject were extensively reviewed in the case of Wood v. Leadbitter, 13 Mees. & W. 838; and the court held that a right to enter and remain on land of another for a certain time could be created only by deed, and that a parol license to do so was revocable at any time; and that a right of common or right of way, or right in the nature of an that a mere license passed no interest; but that a license, coupled with an interest, was not revocable. The courts of this State also hold that a license is revocable by parol; although an interest in land cannot be so revoked or transferred, nor can a license, when it is annexed to and a part of the grant. Vide Jamieson v. Milleman, 3 Duer, 255; People v. Fields, 1 Lans. 224, and cases infra.

A parol license of right of way to a railroad company, even when acted on, can be revoked at pleasure. Murdock v. Prospect Park & Coney Island

R. R. Co., 73 N. Y. 579.

If a license has been granted for a temporary purpose, it terminates when the purpose of the license has been fulfilled. Hepburn v. McDowell, 17 Serg. & Rawle, 383.

An agreement to set a house at a given distance from the street is an interest in lands and void, unless in writing. Wolfe v. Frost, 4 Sandf. Ch. 72.

A parol license may be given to enter land and remove the soil. Syron v. Blakeman, 22 Barb. 336.

A person giving a parol license, when it should be in writing, cannot object to acts done under it, before revocation. Pierrepoint v. Barnard, 6 N. Y. 279. A parol license to a tenant to remove buildings is valid. Dubois v. Kelly, 10 Barb. 496, approved, 125 N. Y. 350.

Or to divert a water-course. Rathbone v. McConnell, 20 Barb. 311, affd.,

21 N. Y. 466.

A license to do a thing is to do it with all its natural consequences. Winchester v. Osborne, 62 Barb. 338, revd. on the facts, 61 N. Y. 555;

Ryckman v. Gillis, 57 id. 68.

A parol license to cut trees held a sale of interest in lands and void under the Statute of Frauds. McGregor v. Brown, 10 N. Y. 114; Torrey v. Black, 65 Barb. 414, revd. on another point, 58 N. Y. 185; see Carpenter v. Otley, 2 Lans. 451; see also Miller v. The Auburn, etc., R. R. Co., 6 Hill, 61, as to license by parol.

A grant of a license is not retrospective. Calkins v. Bloomfield &

Rochester Natl. Gas Lt. Co., 1 Supm. 541.

A parol license to erect sheds on wharves in New York city is invalid.

People v. Macy, 22 Hun, 577.

It seems that an easement to do some act of a permanent nature upon the lands of another cannot be created by a license, even when in writing executed upon a good consideration; it can be created only by a deed or

conveyance operating as a grant. White v. Man. R. Co., 139 N. Y. 19.

Deed of cemetery lot creates an easement. Went v. Meth. Ch., 80 Hun, 266,
Parol agreement for cemetery lot, coupled with part payment, and followed
by interment, held void under the Statute of Frauds. Matter of O'Rourke, 12 Misc. 248.

Revocation.—A license while executory is revocable. Until notice of revocation, a party may act under it. As a general rule. a transfer of the land, as to which a license has been given, is a revocation.

Dubois v. Kelly, 10 Barb. 496; Winne v. Ulster Co. Svgs. Inst., 37 Hun, 349; Shepherd v. McCalmont Oil Co., 38 id. 37.

A license, coupled with and forming part of a grant, would be irrevocable. Winchester v. Osborn, 62 Barb. 338, revd. on the facts, 61 N. Y. 555; Jamieson v. Milleman, 3 Duer, 255.

The fact that it was given for a consideration does not make it irrevocable.

Cronkhite v. Cronkhite, 94 N. Y. 323; Wiseman v. Lucksinger, 84 N. Y. 31. Nor that the time fixed was indefinite. Duryee v. Mayor, etc., of N. Y. 96 N. Y. 477.

As to revocation of license to lay gas pipes, vide Poughkeepsie Gas Co. v.

Citizens' Gas Co., 89 N. Y. 493.

License to lessor to enter and repair is revocable till acted on. Fargis v. Walton, 107 N. Y. 398.

License, even when acted upon in regard to building wall, held revocable.

Crosdale v. Lannigan, 129 N. Y. 604, rev'g 13 N. Y. Supp. 31.

License to do an act of a permanent nature is a sufficient protection to the licensee while it lasts; it may be revoked at any time, and after its revocation it may not be used as a protection for any future acts. White v. Man. R. R. Co., 139 N. W. 19.

A parol license to lay water mains held revocable. Jayne v. Cortlandt Water Works Co., 42 Misc. 263.

TITLE VI. PARTY WALLS AND DIVISION FENCES.

As a general rule, adjoining proprietors have each an easement in the land of the other covered by a party wall; and the title of each owner is qualified by the easement to which the other is entitled. This right to the mutual easement is an appurtenance passing with the title to the land. The right exists so long as the wall continues sufficient for the purpose, and the respective buildings remain in condition to need and enjoy the support.

It has been held in England, that the owners of a party wall built at joint expense and standing partly on the lands of each, are not tenants in common, but each party continues owner of his land, and has a right to the use of the wall, and a remedy for the disturbance of that right. But common use of a wall separating adjoining lots belonging to different owners is prima facie evidence that the wall, and the land on which it stands, belong equally to the different owners in equal undivided moieties, as tenants in common. Watts v. Hawkins, 5 Taunt. 20; Cubitt v. Porter, 8 Barn. & Cress. 257.

In this State it is held that there is no obligation in the owners of adjacent lots to unite in building a party wall. If one owner place half the wall on an adjoining lot, the owner of the lot is not liable to contribute on subsequently using the wall on his own land. The respective owners of a

party wall are not tenants in common; each owns in severalty the portion of the wall on his own land, though neither has the right to pull it down without the other's consent. Sherred v. Cisco, 4 Sandf. 480; Potter v. White, 6 Bosw. 644; Brown v. McKee, 57 N. Y. 684.

When a wall is made a party wall by the establishment of a boundary line through its center, each owner owns in severalty so much of the wall as stands upon his lot, subject to the easement of the other owner for its support and the equal use thereof as an exterior wall of his building; and no other use of the adjoining owner's portion of the party wall is permissible. Nat. Com. Bk. v. Gray, 71 Hun, 295.

A party wall is not an incumbrance under the covenant against incum-

brances. Hendricks v. Stark, 37 N. Y. 106; Mohr v. Parmelee, 43 Super. 320;

but see supra, p. 509.

A party wall may be so constituted by long acquiescence or by parol. Lewis v. Gollner, 129 N. Y. 227; Nat. Com. Bk. v. Gray, 71 Hun, 295; Maxwell v. E. R. Bk., 3 Bosw. 124; Schile v. Brokhahus, 80 N. Y. 614; or by its description as such by owner of both lots. Heartt v. Kruger; 121 N. Y. 386; Brooks v. Curtis, 50 id. 639, 642; or by grants from one who built and conveys by line running through such wall. Heartt v. Kruger, 121 N. Y. 386; see also p. 852.

When it Runs with the Land.— A right to use a part of a lot for a party wall is an incorporeal hereditament, and a covenant thereof runs with and binds the lands. Kettletas v. Penfold, 3 E. D. Smith, 122; Brown v. McKee, 57 N. Y. 684; Cutting v. Stokes, 72 Hun, 376.

But an agreement to contribute to the cost of a party wall when used does not run with the land, though the party assume to bind his grantee. Cole v. Hughes, 54 N. Y. 444; Scott v. McMillan, 76 id. 141; Hart v. Lyon, 90 id. 663; Weeks v. McMillan, 13 Daly, 139; Crawford v. Krollpfeiffer, 122

App. Div. 848.

Where a covenant to pay in a party wall agreement runs to one of the parties, it is a personal covenant and cannot be enforced by his grantee, although such agreement states that this agreement shall be perpetual, and at all times be construed as a covenant running with the land. Sebald v. Mulholland, 6 Misc. 349; Frohman v. Dickinson, 11 id. 9; Schwenker v. Picken, 91 App. Div. 367.

Where, however, a party-wall agreement expressly provides that the covenants thereof shall run with the land, it will be construed as running with and charging the land, the effect of the covenants being to grant or create an interest in the premises. Mott v. Openheimer, 135 N. Y. 312. See also Sebald v. Mulholland, 6 Misc. 349, distinguished, Mott v. Openheimer, supra.

The right of a party who erects the wall to compensation is undisputed,

however. Guentzer v. Juch, 51 Hun, 397.

User of the Wall.—As to what use of the wall will create a liability under

such a contract, vide Kingsland v. Tucker, 44 Hun, 91, revd., 115 N. Y. 574. It is a servitude on both lots, irrespective of their ownership. Rogers v. Sinsheimer, 50 N. Y. 646; Hendricks v. Stark, 37 id. 106; Partridge v. Gilbert, 15 id. 601; Eno v. Del Vecchio, 4 Duer, 53.

The only restriction upon the use of a party wall by either of the adjoining owners is that such use shall not be detrimental to the other. Negus v. Becker, 143 N. Y. 303.

A party wall in common between two houses is of common property, and if taken down by one must be reinstated by him as before in a reasonable time, Partridge v. Gilbert, 15 N. Y. 601.

It cannot be taken down except by mutual consent, if sound. Potter v.

White, 6 Bosw. 644; Sherred v. Cisco, 4 Sandf. 480.

Where a party wall had become ruinous one owner might repair it, although to do so might require that it be entirely rebuilt; unless thus dilapidated, no right existed in one owner to remove a party wall which was sufficient for the uses of the adjoining owner. Partridge v. Lyon, 67 Hun, 29; see also "Rebuilding and Repairs," p. 850.

Nor can either adjoining owner do anything which will weaken it perpendicularly. Earl v. Beadleston, 42 Super. 294.

It can be used for no other purpose than the one agreed on, nor in any

other way. Fettretch v. Leamy, 9 Bosw. 510.

Either adjoining owner is liable for damages caused by any different use. Brooks v. Curtis, 50 N. Y. 639, affg. 4 Lans. 284.

He may not cover more than his half of the wall with facing stone, if he

can properly secure it thus. Nash v. Kemp, 12 Hun, 592.

Either party may increase the length of the wall, if done without detriment to the strength of the wall, or to the adjoining property, or so as to make a different use of the wall. Negus v. Becker, 72 Hun, 479; Sebald v. Mulholland, 6 Misc. 349; as to height, see Negus v. Maney, 68 Hun, 293; Mittnacht v. Slevin, 67 Hun, 315, affd., 142 N. Y. 683.

A change of beams, if safe in se, may be made, and the owner is not liable

for negligence of a contractor. Keller v. Abrahams, 13 Daly, 188.

If either party refuse to carry out the agreement, the other may build the

wall alone and recover half the cost. Rindge v. Baker, 57 N. Y. 209.

The construction of an independent wall, which touches a party wall at several points, but which is of sufficient strength to stand alone and fulfill all the requirements of the wall, is not such a use of a party wall as is contemplated by an agreement between adjoining owners that one should use the party wall built by the other for the support of the beams of a house then standing on the lot, but whenever he should make use of the wall in the erection of a new building he should pay for one-half of its value. Kingsland v. Tucker, 115 N. Y. 574.

Assignability. See Cutting v. Stokes, 72 Hun, 376; Frohman v. Dickinson, 11 Misc. 9.

Windows cannot be cut unless agreed upon. People v. Ward, 59 How. Pr. 175. When they may be closed. Nat. Com. Bank v. Gray, 71 Hun, 295; Cutting v. Stokes, 72 Hun, 376.

Remedies. - Specific performance of a parol contract to build a party wall may be decreed in case of part performance by other party, if the contract be sufficiently certain as to particulars, or one party may build and hold the other for his share. Rindge v. Baker, 57 N. Y. 209.

Remedy, damages when. Mott v. Oppenheimer, 135 N. Y. 312.

As to damages, see Negus v. Becker, 68 Hun, 293, revd., 143 N. Y. 303; Hamman v. Jordan, 129 id. 61.

Rebuilding and Repairs.—Repairs must be contributed ratably, but extra expense for the advantage of one must be borne by him alone. White, 6 Bosw. 644; Campbell v. Meiser, 4 Johns. Ch. 334; 6 id. 21.

There is no right in either party to compel the other to rebuild in case of destruction of the wall, or to claim half compensation, should one rebuild; Sherred v. Cisco, 4 Sandf. 480, limiting Campbell v. Meiser, supra; Partridge v Gilbert, 15 N. Y. 601. The parties are remitted to their original status. Heartt v. Kruger, 121 N. Y. 386.

If the wall becomes dilapidated, either may take it down, and he is not responsible in damages for injury or loss to the other, if done on reasonable notice, and with proper diligence and skill. 601; also Schile v. Brokhahus, 80 N. Y. 614. Partridge v. Gilbert, 15 N. Y.

Taking land subject to a party wall agreement is like assuming a mortgage. Stewart v. Aldrich, 8 Hun, 241.

The covenant to repair runs with the land. Hart v. Lyon, 90 N. Y. 663; Fowler, Real Prop. Law, 709.

One of the joint owners of a party wall, who desires to erect a new building, requiring a deeper foundation than his old building, has no right, against the objection of the other owner, to tear down the party wall, and rebuild it, merely because so doing would render it more convenient and less expensive for him in putting in the foundation for his new building, where it appears that such party wall is not ruinous or dilapidated, and that it affords a sufficient support for his present building, as well as for the building of the other owner. Partridge v. Lyon, 67 Hun, 29.

City of New York.— By Law of April 1, 1857, Chap. 225, provision was made as to making an increase of thickness of party walls erected prior to the building act of April 15, 1846. Vide said acts. Repealed, Laws of 1881,

See the Consolidation Act of the city of New York (Laws of 1882, Chap. 410, § 476), and various building acts relative to said city; particularly Law of 1889, Chap. 297; also Greater New York Charter, L. 1897, Chap. 378, as amd. by L. 1901, Chap. 466, § 49, authorizing the board of aldermen to make, amend and repeal ordinances, rules, regulations and by-laws in relation to partition fences and walls.

Division Fences.—At common law the owner of a close was not bound to erect a division fence, unless by force of prescription. He was bound, however, to keep his cattle on his own grounds, and prevent them from escaping, and was liable in trespass for their migration elsewhere. Any legal obligation to fence arises either from special prescription or statutory enactment. See as to the necessity of maintaining fences in this State, and damages for not so doing. Wells v. Howell, 19 Johns. 385; Holloday v. Marsh, 3 Wend. 143; Clark v. Brown, 18 Wend. 213; also Laws of 1838, Chap. 261, repealed and superseded by the Town Law, L. 1890, Chap. 569, § 108; The Tonawanda R. R. Co. v. Munger, 5 Den. 255; Deyo v. Stewart, 4 id. 101; Stafford v. Jugersol, 3 Hill, 38.

By the Revised Statutes, adjoining owners were bound to maintain each a fair proportion of a division fence, where one-half or more of each adjoining farm is cleared or improved. The same rule applied to all adjoining owners, unless one should choose to let his land lie open to the public. If he afterward enclosed it, he was to refund a just proportion of the cost of the fence erected by the other. If one-half his farm lay open, one-half being cleared or improved, he was to refund one-half, or else build his proportion. Disputes were to be settled by "Fence Viewers," as provided. 1 R. S. 353, §§ 30, 31, 33, as amended Laws of 1866, Chap. 540, which contains other provisions as to valuation and ownership of the fence on a sale of lands and as to removal of fences, etc.; further amended by Laws of 1871, Chap. 635, and Laws of 1872, Chap. 377; see also 22 Barb. 579; 18 id. 400; 11 id. 412; 9 How. Pr. 455; Bronk v. Becker, 17 Wend. 320; 35 Barb. 16; 41 id. 159; 44 id. 136; 3 Supm. 638; Laws of 1860, Chap. 267. This matter is all now regulated by the Town Law, L. 1890, Chap. 569, §§ 100, 103. See infra.

As to fences by railroad companies, and as to "Virginia or crooked fence," vide Ferris v. Van Buskirk, 15 Barb. 397; Davis v. Townsend, 10 Barb. 333; Guilfoos v. N. Y. C. & H. R. R. Co., 69 Hun, 593. As to barbed wire fence, vide The Town Law, L. 1890, Chap. 569, § 109, as amended.

There may be valid prescription binding a party to maintain a division fence. In such cases, fence viewers have no jurisdiction. No such prescription arises presumptively since the statutes requiring fencing. Adams v. Van Alstyne, 25 N. Y. 232, affg. 35 Barb. 9. See also Laws of 1872, Chap. 377, repealed and re-enacted in the Town Law, § 100, as to fences on lands bounded by a stream.

Division Fences in Towns now regulated by The Town Law, L. 1890, Chap. 569, §§ 100-108, as amended.

As to what constitutes a division fence, see Rowland v. Baird, 18 Abb. N. C. 256.

Division fences, how to be constructed. Higgins v. Kingsley, 82 Hun, 150.

Fence Viewers.- See The Town Law, L. 1890, Chap. 569, (as amd.), Art. I, § 22; Art. V, § 104; Art. VI, § 125, etc.

See also as to fence viewers in villages. The Village Law, L. 1897, Chap. 414, § 88, as amended.

Parol Agreement.—A parol promise by a railroad company to maintain a particular kind of fence along its right of way, is not an agreement that runs with the land. Guilfoos v. N. Y. C. & H. R. R. R. Co., 69 Hun, 593.

Fences in New York City .- By statute of March 19, 1813, Chap. 35, the corporation was authorized to make regulations for partition and other fences. An ordinance was passed in 1833 relative to the subject, and see Laws of 1882, Chap. 410 (Consolidation Act), § 86; also Greater New York Charter, L. 1897, Chap. 378, as amd. by L. 1901, Chap. 466, § 49, authorizing ordinances by the board of aldermen.

TITLE VII. OTHER RIGHTS AND SERVITUDES.

There are other rights in the nature of easements, which allow one person certain advantages or rights in the land of another, and which arise by grant or the prescription which presumes a grant.

Rights of Support.—Among incorporeal and prescriptive rights are those falling under the technical head of "servitudes," or rights to the use of another's land under certain circumstances, as the right that one has to rest the timbers of his house in an adjoining wall of another. This may arise by grant or prescription, and if a new wall is built the right is restored and continued. Vide Hyde v. Thornborough, 2 Carr. & P. 250; Bonomi v. Backhouse, 1 Ell. B. & Ell. 622; Browning v. Goldenberg, 36 Misc. 438.

A license to insert beams for support may be held not an interest in lands required to be in writing. McLarney v. Pettigrew, 3 E. D. Smith, 111.

Also where one erects two or more houses adjoining, and so constructed as to mutually support each other, a right is created which continues after division of ownership. Richards v. Rose, 24 Eng. L. & Eq. 406; Eno v. Del Vecchio, 6 Duer, 53; s. c., id. 17.

And neither can remove the support without the consent of the other. Id., and Webster v. Stevens, 5 Duer, 553. Reversioners, however, are not bound

and Webster v. Stevens, 5 Duer, 553. Reversioners, however, are not bound by such constructions. *1d.* See further as to rights of support, *supra*, "Party

If a building having one wall upon land of the grantor not covered by the deed be sold, see as to grantee's right to have the wall remain there. Reiners v. Young, 38 Hun, 335, revd., 109 N. Y. 648. See also infra, p. 855, and

supra, p. 849.

If the owner of two adjoining lots erects a house on each with a party wall between them, and conveys them on the same day to two different purchasers, but one of the deeds excludes the party wall, the purchaser of the other house is, nevertheless, charged with having the wall stand as a support to the other house, at least as long as the building will endure. Rogers v. Sinsheimer, 50 N. Y. 646.

If the owner of a house finds it necessary to pull it down, he must give due notice to adjacent owners, and remove his walls with reasonable and ordinary care. People v. Can. Board (No. 2), 2 Supm. 275. The same rule would apply to the digging and grading of a street. Jones v. Bird, 5 B. & Ald. 837; Richards v. Scott, 7 Watts, 460; Lasala v. Holbrook, 4 Paige, 169; Radcliff's Exec'rs v. The Mayor, 4 N. Y. 195.

One who "reserves" the right to dig clay upon a part of land granted need not protect the adjacent soil. Ryckman v. Gillis, 57 N. Y. 68.

Excavations.—As to use of land which is injurious to another, vide Cogswell v. N. Y. & N. H. R. R. Co., 103 N. Y. 10.

A landlord is not bound to protect his tenant from the effects of an excavation adjoining. Sherwood v. Seaman, 2 Bosw. 127.

It has been held in this State, following the English rule, that a person may dig on his own land, but not so near that of one adjoining as to cause the land of the latter to fall into the pit dug, and lose its support. Farrand v. Marshall, 21 Barb. 410; former decision, 19 id. 380; Lasala v. Holbrook, 4 Paige, 169; Ludlow v. H. R. R. Co., 6 Lans. 128; but see further decision, 4 Hun, 239. This view, however, does not clearly appear to be sustained by the general current of opinions in this State, and it is held in other cases that a man may dig so near his neighbor's land as to unsettle his foundations and

precipitate his soil, provided he uses ordinary care; and that no person is entitled by law to a lateral support of his land. Radcliff's Ex'rs v. The entitled by law to a lateral support of his land. Radcliff's Ex'rs v. The Mayor, 4 N. Y. 195; Panton v. Holland, 17 Johns. 92; Gardner v. Heart, 1 N. Y. 528, revg. 2 Barb. 165; Auburn, etc., Co. v. Douglass, 9 N. Y. 444.

He is not bound to support the additional weight of buildings. Trans. Co. v. Chicago, 9 Otto, 635; Ryckman v. Gillis, 57 N. Y. 68; Schile v. Brokhahus,

80 N. Y. 614. See Haverstraw v. Eckerson, 192 N. Y. 54.

New York City and Brooklyn.—By the Consolidation Act, L. 1882, Chap. 410 (as amd. by L. 1885, Chap. 456; L. 1887, Chap. 566), in the city of New York if an excavation be intended to be carried more than ten feet below the curb, the party making it could support adjoining walls if accorded the necessary license to enter (§ 474). By said law also the building superintendent may enter in case of any excavation and support. As to Brooklyn, see Laws of 1855, Chap. 6. Neither said statute nor any other rule of law gives the party making the excavation liberty or license against the mill of the gives the party making the excavation liberty or license against the will of the owner of the adjacent lot to commit a trespass upon his premises. Ketchum v. Cohn, 2 Misc. 427.

Where the right of entry to protect the premises in case of adjoining excavations is not reserved to the landlord in the lease, his permit alone is not sufficient to authorize such an entry by contractors doing the work, and the giving of such permit will not constitute an eviction which will relieve the lessee from the payment of rent; nor will the landlord be liable for the acts of such contractors, if they enter by force, without the lessee's consent. McKenzie v. Hatton, 141 N. Y. 6.

The owner of a leasehold has such an interest in the premises as entitles him to maintain an action for damages against one violating Laws 1882, Chap. 410 (Consolidation Act), § 474, which provides that any person excavating to a depth of more than ten feet shall protect his neighbor's wall.

Under Law of 1882, Chap. 410 (Consolidation Act), § 474, the adjoining owner is required to grant such license to enter his premises only when requested. Cohn v. Simmons, 21 N. Y. Supp. 385. See as to when a license has been given, and licensee removes a party wall. Ketchum v. Newman, 116 N. Y. 422.

Under these laws a person is not bound to protect the adjoining building, unless he have full explicit license to enter on the land. Sherwood v. Seaman, 2 Bosw. 127; Johnson v. Oppenheim, 55 N. Y. 280.
In the case of Dorrity v. Rapp, 11 Hun, 374, it was held that in order to

compel the excavator to support a contiguous wall a license must be tendered him without demand, but the Court of Appeals reversed this and held the excavator bound to request a license. See Dorrity v. Rapp, 72 N. Y. 307; see also Cohn v. Simmons, 21 N. Y. Supp. 385.

The consent of the lessees is also necessary as against parties entering under the Law of 1882, supra; McKenzie v. McKenzie, 141 N. Y. 6, reported below, 70 Hun, 142. As to the above statute, see also Wynkoop v. Van Buren, 11 N. Y. Supp. 379, as to an injunction; also Brenheimer v. Kilpatrick, 6 N. Y.

Supp. 858.

The Greater New York Charter, L. 1897, Chap. 378, as amd. by L. 1901, Chap. 466, continued the Building Code as then in force. See L. 1897, Chap. 378, § 647; L. 1901, Chap. 466, § 407, and said Building Code, as amended.

Vaults Under a Street .- See, as to these in the city of New York, Carter v. Peters, 5 Robn. 192. As to rights of a tenant. Spies v. Damm, 54 How. Pr. 293. See also "Dedication," Chap. XXXV.

Right of Deposit.-A right to use another's ground for deposit may be gained by prescription, e. g., to deposit logs for a saw mill. It would pass by a conveyance of the mill as an appurtenance, even though there might be the parol evidence of a contrary intent. Voorhees v. Burchard, 6 Lans. 176, affd., 55 N. Y. 98. This decision was distinguished in Parsons v. Johnson, 68 N. Y.

Placing sand on a lot against a neighbor's wall injuring the same, held

actionable. Davis v. Evans, 13 N. Y. Supp. 437.

Right to Flood .- See Hall v. State of New York, 92 App. Div. 96.

Right of Drain, etc.—Another servitude is the right of drainage over another's land. This gives no right to the owner of the land to use the drain, unless the right be reserved. It may arise where an owner conveys to different parties two houses with a drain under each leading into a common sewer. The grant of such a right is the grant of an easement and not of a title to land. Pyer v. Carter, 40 Eng. L. & E. 410; Lea v. Stevenson, 1 Ell., B. & Ell. 512; Butterworth v. Crawford, 3 Dal. 57; Munsion v. Reid, 46

It cannot be granted by parol. Wiseman v. Lucksinger, 84 N. Y. 31.

As to conveyance subject to this right, vide Flint v. Bacon, 13 Hun, 454.

As to drainage commissioners under Laws of 1869, Chap. 888, for the draining of swamp lands, farms, etc., see Olmsted v. Dennis, 77 N. Y. 378; see also Laws of 1880, Chap. 360; Laws of 1882, Chap. 326; Laws of 1886, Chap. 636; L. 1895, Chap. 384, relative to drainage of agricultural land, and other amendments.

Further as to drains, see Chap. XLIII; as to procedure, see Burk v. Ayers, 19 Hun, 17; also 5 Hun, 116; People v. Jefferson County Court, 55 N. Y. 604; Olmsted v. Dennis, 77 N. Y. 378.

The existence of a right of drain is an "incumbrance," but not a breach of

covenant for quiet enjoyment. McMullin v. Wooley, 2 Lans. 394.

The rule of law giving the easement where an owner sells adjoining houses, is confined to cases where there is an apparent sign of servitude. So held in the case of a drain. Butterworth v. Crawford, 46 N. Y. 349.

As to right to repair drain, vide Roberts v. Roberts, 7 Lans. 55, affd., 55

N. Y. 275.

Surface water may be drained into a stream which is a natural outlet, though the stream be swollen and do damage to lands below. Waffle v. N. Y. C. R. R. Co., 53 N. Y. 11.

Municipal corporation liable for drainage on and overflow of an individual's land when. Anchor Brewing Co. v. Dobbs Ferry, 84 Hun, 274; Schreiber v. Mayor, etc., of New York, 11 Misc. 551.

The owner of the highway-bed may build drains connecting with sewer. Barton v. City of Syracuse, 37 Barb. 292, affd., 36 N. Y. 54. See this case as to the obligations of a municipality in constructing and repairing sewers.

Increase in the use not beyond the capacity of the drain will not work a

forfeiture. Flint v. Bacon, 13 Hun, 454. Removal of drains in cities. See Laws 1892, Chap. 410.

If one lays pipes from a spring on one lot to another lot of his own, and sells the latter with the water on it, it carries no easement to use it, and a subsequent grantee of the spring lot may cut it off. Root v. Wadhams, 107 N. Y. 384.

Measure of damages for diversion of water, under exercise of Eminent Domain. Matter of Thompson, 85 Hun, 438. See also Chap. II.

Right of Drip.—There is also a servitude of drip, by which falling water from the house or land of one is allowed to drip over on another's land. See as to an action for damages for injuries by "drip," Bellows v. Sackett, 15 Barb. 96, distgd. and criticised, 115 N. Y. 227.

It has been held in Maryland, that the owner of land, the eaves of whose house extend over the adjoining lot without objection, for twenty years,

acquires an easement in such lot. Cherry v. Stein, 11 Md. 1.

Such easements and servitudes as the above may be created by reservation but not by parol, although they may arise by prescription or dedication. Hills v. Miller, 3 Paige, 256; Child v. Chappell, 9 N. Y. 246; Rose v. Bunn, 21 id. 275; Day v. N. Y. C. R. R., 31 Barb. 549.

Except in case of a water-course no man is bound to let water falling on adjacent land run through a natural depression on his own land. Barkley v. Wilcox, 86 N. Y. 140.

One is not bound to prevent the drip of his house from running upon the sidewalk. Moore v. Gadsden, 87 N. Y. 84; Wenzlick v. McCotter, Id., 122.

To alter a highway so as to throw surface water upon the land of another is a trespass, for which damages may be recovered. Mairs v. Manhattan, etc., Ass'n, 89 N. Y. 498.

So of erecting a dam which sets water back upon another's land. Rothery v. N. Y. Rubber Co., 90 N. Y. 30. See Hall v. State of New York,

92 App. Div. 96.

So of a sewer. Seifert v. Brooklyn, 101 N. Y. 136.

Vide infra, "Water-courses," as to the running of surface water.

Agreements as to Buildings .- Owners of lots on a block may be mutually bound in equity by a plan, established by parol and acted on, as to setting back buildings from the street line, if they purchase with notice. Tallmadge v. E. Riv. Bk., 26 N. Y. 105.

See also, as to agreements as to buildings, Clark v. N. Y. Life, etc., Co.,

64 N. Y. 33, revg., 7 Lans. 322; Williams v. Silberman Realty & Construction Co., 111 App. Div. 679.

As to occupation. Trustees v. Lynch, 70 N. Y. 440.

Air and Light.— Neither light, air nor prospect can be the subject of a direct grant. They can be secured only by covenant, agreement or condition. The doctrine of prescription is also often invoked on questions of "air and light" to edifices. The law has been here, and still in a measure elsewhere exists, that ancient lights of twenty years' standing cannot be obstructed by the erection of another, even on his own land. It has been decided, however, and is now well established that prescription is not applicable to conditions in this country in cities and villages, as far as light, air and prospect are concerned. Parker v. Foote, 19 Wend. 309. See also 10 Barb. 537; Mahan v. Brown, 13 Wend. 263; Banks v. The Am. Tract Soc., 4 Sand. Ch. 464; 9 Alb. L. J. 403; 10 id. 65. See also Mitchell v. Reid, 118 App. Div. 641.

The views of the courts in the above cases are that no grant of such

right may be presumed, but that it may exist if found as a fact.

Such right may be implied from circumstances connected with a lease. Doyle v. Lord, 64 N. Y. 432.

As to enforcement by action, vide Applegate v. Morse, 7 Lans. 59.

Foreclosure of a prior mortgage will cut off an easement of light and air reserved in a subsequent deed. Rector, etc. v. Mack, 93 N. Y. 488.

As to damages on cutting off light and air in streets, see Glover v. Manhattan Ry. Co., 51 Super. 1, approved, 16 Daly, 356; and supra, p. 57.

As to obstruction of light, see also 6 Alb. L. J. 234. For cases also see Kieffer v. Imhoff, 26 Penn. 438; Burwell v. Hobson, 12 Gratt. 322.

The Legislature has no power to permit any structure for private use to be erected within the lines of a street, which would substantially interfere with the light and air coming to any house. Wormser v. Brown, 72 Hun, 93. See also Story v. N. Y. El. R. R. Co., 90 N. Y. 122. When entry becomes adverse. Hudley v. Manhattan Ry. Co., 103 App. Div. 504.

Right of property entitles owner to so much light and air as falls perpendicularly on his land. O'Neil v. Breese, 3 Misc. 219. But not, it seems, horizontally. Levy v. Brothus, 4 Misc. 48.

As to overhanging wall and right of adjoining owner to whole of his land, see Lyle v. Little, 83 Hun, 532; Harter v. Westcott, 11 Misc. 180.

See fully as to cases of elevated roads obstructing light and air, supra

Chap. II, Title IV.

Easements of light, air and access appurtenant to property abutting on a public street are inseparable from the dominant estate, and pass to the grantee, notwithstanding attempted reservation of rights of action for invasion or destruction of same. McKenna v. Brooklyn U. El. R. R. Co., 184 N. Y. 391.

Burdens may be implied from acts of owners of the whole land. Where a common owner builds and the wall encroaches a little on adjoining lot, sale of the first lot carries with it to the purchaser the right to have the support of the wall upon the adjoining land. Rogers v. Sinsheimer, 50 N. Y. 646; Reiners v. Young, 38 Hun, 335, revd., 109 N. Y. 648. See also pp. 554, 852. A five foot encroachment has been held to be stretching the rule too far. Griffith v. Morrison, 106 N. Y. 165.

Same rule applied as to easements of room to swing shutters, light, air.

etc. Havens v. Klein, 51 How. Pr. 82; Hamel v. Griffith, 49 id. 305; distgd. in Shipman v. Beers, 2 Abb. N. C. 435.

On this subject see also Trustees of Columbia College v. Lynch, 70 N. Y. 440; Trustees of Columbia College v. Thacher, 10 Abb. N. C. 235, as to notice of the easement to grantee. See also p. 852, supra, as to right of supporting beams.

Pipes.—Creation of right to lay pipes over lands, see Nellis v. Munson, 24 Hun, 575; 108 N. Y. 453; Hamel v. Griffith, 49 How. Pr. 305.

As to increasing size of pipe later, see Outhank v. L. S. R. R. Co., 71

N. Y. 194.

As to measure of damage for pipe in a highway opposite land of plaintiff. Hartman v. Tully Pipe Line Co., 71 Hun, 367. See also the Transportation Corporations Law, L. 1890, Chap. 566, as amended, as to pipe line corporations.

Streets and Highways .- The preservation of lateral support to a highway is an obligation to the community which rests upon the adjacent land owner: it is an absolute right whether the fee of the street or highway, or a lesser title, is in the municipality, and equity may properly be invoked by the municipality in restraint of acts affecting or threatening such lateral support on the part of the abutting land owner. Village of Haverstraw v. Eckerson, 192 N. Y. 54, affg. 124 App. Div. 18.

CHAPTER XXXVII.

THE LIEN OF JUDGMENTS.

TITLE I .- THE LIEN OF JUDGMENTS OF THE COURTS OF THIS STATE.

II .- SATISFACTION AND DISCHARGE OF JUDGMENTS.

III .- JUDGMENTS IN THE UNITED STATES COURTS.

IV .- JUDGMENTS MISCELLANEOUS.

TITLE I. THE LIEN OF JUDGMENTS OF THE COURTS OF THIS STATE.

The existing statutory provisions creating the lien of judgments are founded upon those of the Revised Laws of 1813, the Revised Statutes of 1830, the Law of 1840, Chap. 386, the Code of Procedure, and the Code of Civil Procedure. The provisions of the Revised Statutes and of the Codes are given separately, as a distinct reference may be desirable to each. The provisions of the Revised Statutes were not repealed directly by any provisions of the Code of Procedure, but were repealed by Laws of 1877, Chap. 417.

Judgment a Lien.— The Code of Civil Procedure enacts that except as otherwise specially prescribed by law, a judgment thereafter rendered, which is docketed in a county clerk's office as prescribed, binds and is a charge upon, for ten years after filing the judgment-roll, and no longer, the real property and chattels real, in that county, which the judgment debtor has at the time of so docketing it, or which he acquires at any time afterward, and within the ten years.

Code Civ. Proc., § 1251.

Code Civ. Proc., § 1251.

The former provisions, which were substantially similar, are found in 2 R. S. 359, § 3, providing also that such real estate and chattels real should be subject to be sold upon execution to be issued on such judgment. See also L. 1840, Chap. 386, § 25; Code Proc., § 282.

The above provisions held not to apply to judgments in rem, which are settled by the judgment, e. g., in a partition suit. Van Orman v. Phelps, 9 Barb. 500; Lynch v. The Rome Co., 42 id. 591.

Nor to a suit to recover real property. Sheridan v. Andrews, 49 N. Y. 478. They prevent the common law lien of a judgment from attaching until the docketing. Buchan v. Sumner, 2 Barb. Ch. 165.

Docketing is not notice to a mortgagee under a previously recorded mortgage for future advances. Ackerman v. Hunsicker, 85 N. Y. 43.

Vide Hogan v. Kavanaugh, 138 N. Y. 417, as to the right of a creditor to resort to the real estate of his deceased debtor for the payment of his claim; the right, having been conferred by statute, must be asserted and proved in the manner prescribed by statute.

Filing and Minute Necessary.—The clerk must make a minute, upon the back of each judgment-roll, filed in his office, of the time of filing it, specifying the year, month, day, hour and minute. A proceeding to enforce or collect a final judgment cannot be taken, until the judgment-roll is filed.

Code Civ. Proc., § 1239; 2 R. S. 360, § 11, as amd.

Judgment Not to be Lien Until Docketed.—A judgment required to be docketed neither affects real property or chattels real, nor is entitled to a preference until the judgment-roll is filed and the judgment docketed.

Code Civ. Proc., § 1250; 2 R. S. 360, § 12.

Until the judgment-roll is made up and filed and docketed, there is no judgment or lien under it; and the docketing, until the judgment-roll is made up and filed, is void, and creates no lien. Townsend v. Wesson, 4 Duer, 342, criticised, 43 Hun, 584; Blydenburgh v. Northrop, 13 How. Pr. 289.

Where on foreclosure the order of confirmation was entered October 4, held that the deficiency judgment was not a lien upon land conveyed by defendant October 2, by a deed recorded October 4, it not becoming a lien until the amount was ascertained. French v. French, 107 App. Div. 107.

Assignments.—Assignments are to be filed and noted in the docket. Code Civ. Proc., § 1270.

Foreign Corporations.—A judgment against a foreign corporation entered in an action authorized by Code Civ. Proc., § 1780, service being made in accordance with § 432, is valid and binding on property in the State. Pope v. Terre Haute, etc., Co., 87 N. Y. 137.

Surviving Partner.—A judgment against a surviving partner held not to bind real estate which belonged to the deceased partner. Bennett v. Crain, 41 Hun, 183.

Lien on Trust Estate.—The lien of a judgment does not in equity attach on the mere legal title to lands existing in the defendant, when the equitable title is in another. Lounsbury v. Purdy, 18 N. Y. 515, affg. 16 Barb. 376, which affd. 11 id. 490; Averill v. Loucks, 6 id. 19.

Effect of Power of Sale.—The interest of a devisee who takes the fee or a remainder in an undivided part of land, subject to a power of sale, is subject to the lien of a judgment recovered against him. Sayles v. Best, 140 N. Y. 368. See also as to the effect of power of sale. Harvey v. Brisbin, 143 N. Y. 151.

On Leases.—Judgments are a lien on all estates for years or chattels real, supra, p. 857, but do not become liens on leasehold premises, unless or until the judgment debtor lessee, is entitled to possession. Crane v. O'Connor, 4 Edw. 409. See also Mason v. Lord, 40 N. Y. 477, and infra, "Sales on Execution," Chap. XXXVIII.

On Estates for Life.— The lien is lost, if the estate determines on breach of condition. Moore v. Pitts, 53 N. Y. 85.

On Vested Remainders.— Where there is a power of sale by the life-tenant, the lien of the judgment is divested by the exercise of the power and attaches to the proceeds. Ackerman v. Gorton, 67 N. Y. 63. See also Sayles v. Best, 140 N. Y. 368, and Harvey v. Brisbin, 143 id. 151, supra.

On Land Purchased by Pension Money.—Held not a lien. Tyler v. Ballard, 31 Misc. 540.

Transient Seizin.—Where there is merely transient seizin in the judgment debtor, the lien does not attach. O'Donnell v. Kerr, 50 How. Pr. 334.

Conveyance before Judgment .- An unrecorded deed, if executed before the judgment, will, in the absence of fraud prevent the lien from attaching. Trenton, etc., Co. v. Duncan, 86 N. Y. 221; vide also supra, p. 703.

Revival.—The revival of a judgment by scire facias under the old practice did not continue or extend the lien of judgment beyond the ten years, as against purchasers or incumbrancers subsequent to the original judgment. Mower v. Kip, 2 Edw. 165; 6 Paige, 88. Judgment after expiration of lien is junior to later judgment. Ex parte The Peru Iron Co., 7 Cow. 540; Tufts v. Tufts, 18 Wend. 621.

Extinguishment.—One judgment recovered on another extinguishes the

Lich guisnment.—One judgment recovered on another extinguishes the lien of the first. Purdy v. Doyle, 1 Paige, 558.

If a judgment debtor proves his debt in bankruptcy, he loses his lien against real estate of his bankrupt debtor. Briggs v. Stevens, 7 Law R. 281.

A judgment does not lose its lien on realty because an execution lies dormant in the sheriff's hands. Muir v. Leitch, 7 Barb. 341.

Proceedings under the right of eminent domain supersede the lien of a judgment. Watson v. N. Y. C. R. R., 47 N. Y. 157.

a judgment. Watson v. N. Y. C. R. R., 47 N. Y. 157.

A stay of proceedings does not take away the lien of a judgment. Cowdrey v. Carpenter, 17 Abb. 107; s. c., 2 Rob. 601.

The lién is general, not specific, and the judgment creditor cannot bring an action of waste and he is subject to all prior liens or claims. Lansing v. Carpenter, 48 N. Y. 408; Rodgers v. Bonner, 45 id. 379.

A statute depriving a party of the benefit of his judgment on a contract is unconstitutional. Hadfield v. The Mayor, 6 Rob. 501.

Tender of payment, if not accepted, does not discharge the lien. People v. Beebe, 1 Barb. 379.

Filing Transcripts - Docketing Judgments Thereon. - Transcripts obtained from clerks with whom the judgment-roll is filed, upon a judgment docketed as prescribed, may be filed and the judgment must be docketed by county clerks to whom same is presented. the judgment thereby becoming a lien in such counties.

Code Civ. Proc., §§ 1247, 1251; see L. 1840, Chap. 386.

Superior Court of New York City, and Mayor's Court.- By Laws of 1840, Chap. 386, § 28, judgments in said courts had to be docketed with the county clerk where rendered, in order to be a lien. Repealed by Laws of 1880, Chap. 245.

Forfeited Recognizances .- By Law of May 7, 1844, Chap. 315, Art. IV, forfeited recognizances (in the city of New York), filed by the district attorney, with a certified order of the court forfeiting the same, in the office of the county clerk, were to be of the same effect as judgment records. Such judgments were, in good faith, to be liens on the real estate of the persons entering into such recognizances, from the time of filing and docketing the same. Executions might be issued thereon. By Laws of 1845, Chap. 229, these judgments were made subject to the control of the New York Common Pleas. By Laws of 1855, Chap. 202, the provisions of the Code of Procedure were made applicable to forfeited recognizances. By § 30, subd. 12, of Code of Procedure, County Courts might remit forfeited recognizances, as might Courts of Common Pleas. As to when the district attorney should prosecute them in New York county, vide Law 1839, Chap. 343. The provisions of the Revised Statutes as to recognizances, were in Part III, Chap. VIII, Tit. 6, Art. 2, §§ 43, 44 and 45, and were repealed by the Act of 1839. This act of 1839 made the provisions of the Revised Statutes applicable to New York county. Those statutes allowed judgments and execution to be entered on action of debt for the penalty, on breach of the recognizance. 2 R. S. 485, By Law of 1861, Chap, 333, they were to be filed with the clerk

of any court within ten days after the same were taken. See Law of 1865, Chap. 563, as to extension of powers to special sessions in New York city. See also as to certain recognizances therein, Law of 1860, Chap. 508. Code Civ. Proc., § 1965, the entry of an order of the court, directing the prosecution of the recognizances, is sufficient forfeiture thereof; and an action must then be brought. § 1966. See also as to recognizances in New York City under the "Consolidation Act," Laws of 1882, Chap. 410, § 1469, et seq. No action need be brought. Id., § 1480. As to vacation of judgments entered thereon. Id. §§ 1482-1483. By said § 1480, such recognizances when filed with the clerk of the county of New York with orders showing their forfeiture are to be liens on real estate.

See for the regulation of this subject now the above provisions of the Code of Civil Procedure, §§ 1965, 1966; also Code of Criminal Procedure, § 595; also as to vacating of judgments on forfeited recognizances, People v. Weber, 11 N. Y. Supp. 53.

Priority. Judgements have priority according to the time of filing them or docketing. Judgments filed and docketed out of office hours take effect at the next office hour, and become a lien only from that time. France v. Hamilton, 26 How. Pr. 180; Wardell v. Mason, 10 Wend. 573; Code Civ. Proc., § 1250. As to the time when county clerks and clerks of courts of record should keep their office open, vide the County Law, L. 1892, Chap. 686, § 165, as amd. L. 1860, Chap. 276.

Where the lien of a judgment is suspended by an order vacating the

judgment, when such order ceases to have any validity by being vacated, the lien is revived, as though it never had been suspended, where no new rights have been acquired by others. King v. Harris 34 N. Y. 330, affg. 30 Barb. 471. Cf. also Code Civ. Proc., §§ 1256-1259, as to suspension on

appeal, and see infra, p. 863.

Priority of judgments defined. Matter of Townsend, 83 Hun, 200.

Under Code Civ. Proc., § 1251, where there are several judgments docketed against the judgment debtor at the time he acquires property, the judgment first docketed is not a prior lien on such after-acquired property, but all the judgments are entitled to rank equally. Matter of Hazard, 73 Hun, 22, affd., 141 N. Y. 586.

Control over Dockets and Amendments.—A court of record has the same power over the county clerk's docket of its judgments as over that of its own clerk. It may docket the judgment nunc pro tunc or amend the docket. Code Civ. Proc., § 1269; L. 1844, Chap. 104, § 7.

The court may correct mistakes in the docket, and amend it. v. Hoyt, 7 How. 265; Aylesworth v. Brown, 10 Barb. 167; Roth v. Schloss,

6 id. 308.

The clerk acts ministerially, and his erroneous entries cannot conclude Williams v. Wheeler, 1 Barb. 48.

Indexing.—The clerk must index alphabetically the names at length of the judgment debtors, their residence, etc., the names of the judgment creditors, and note the amount and time of entry of judgment, and of docketing, with various other particulars. Code Civ. Proc., § 1246. For the former law, vide 2 R. S. 361, § 13.

Unless properly indexed the docket creates no lien, if a party would be prejudiced by the mistake. v. Burnham, 17 N. Y. 445. Buchan v. Sumner, 2 Barb. Ch. 165; Sears

Where a judgment recovered against two defendants is indexed only against one, it is not a lien against the real estate of the other, and in case of his death a general execution cannot be issued against his property under the provisions of section 1380 of the Code. Le Fevre v. Phillips, 81 Hun, 232.

Judgments of New York Superior Courts and Common Pleas .- By the above Law of 1840, § 29, transcripts of judgments of Superior Court of New York city and of any Common Pleas, might be docketed in any other county, so as to be a lien there, with the like effect as provided as to judgments of the Supreme Court. Repealed by Laws 1880, Chap. 245. Code Civ. Proc., §§ 1245, 1247 covered all Superior City Courts and the City (then Marine) Court of New York. The Superior City Courts were abolished by the Constitution of 1894. Const. 1894, Art. VI, § 5, and Code Civ. Proc., § 1245, amended accordingly. L. 1895, Chap. 946. The said § 1245 now provides for the keeping of docket books by each county clerk and the clerk of the City Court of the city of New York. The amendment took effect January 1, 1896.

Surrogate's Decrees .- By the Law of 1837, Chap. 460, § 64, certificates of surrogates' decrees for the payment of money, had to be filed with the clerk of the Supreme Court, and were thenceforth to be a lien on the lands, This section was reetc., of the person against whom they were entered. pealed by Law of April 1, 1844, Chap. 104, and provision made for the filing of the certificate with the county clerk. The docket was to have the same effect as a judgment of the Court of Common Pleas; the same to be a lien, from the time of docketing, on lands in the county where the certificate was filed of any person against whom the decree was entered. By the Law of April 1, 1844, also, the word "decrees," as used in the Law of May 14, 1840, Chap. 386, supra, was to mean surrogates' decrees for the payment of moneys by executors, administrators, or guardians, as well as decrees in chancery.

All these acts were repealed by Laws of 1880, Chap. 245. Now a transcript is to be filed with the county clerk and the whole proceeding as well as its effect is assimilated to that in case of a judgment. Code Civ. Proc.,

§ 2553.

Award of Arbitrators .- Judgment may be entered thereon to have the same force and effect as a judgment in an action. Code Civ. Proc., §§ 2378,

2380; see 2 R. S. 543, §§ 14, 16, as amended.

A judgment cannot be rendered upon an award of arbitrators where such award is not acknowledged, proved or certified as required by Code Civ. Proc.,

§ 2372. Matter of Grening, 74 Hun, 62.

Justices' Judgments.—As to the law before the Code of Procedure, and sales under the judgment, vide Waltermire v. Westover, 14 N. Y. 16, over-ruling Young v. Remer, 4 Barb. 442.

Since the Code of Procedure, a justice's judgment is held to stand on the same footing as a judgment in the Supreme Court, so far as the statute

of limitation is concerned. Nicholls v. Atwood, 16 How. 475.

The transcript and docketing are all that is necessary to establish the

judgment as a lien. Dickinson v. Smith, 25 Barb. 102.

The Code of Procedure was repealed by Laws of 1880, Chap. 245, and its provisions as to justices' judgments have been much changed. By Code Civ. Proc., § 3017, as amended, transcripts of any such judgments, unless rendered in an action to recover a chattel, may be filed with the county clerk of the county in which the judgment was rendered. When a transcript has been filed within the period prescribed (six years) the judgment becomes a judgment of the County Court, but execution can only be issued by the county clerk and the judgment is not a lien, unless it is for more than twenty-five dollars, nor can a judgment for a less amount be enforced against real estate. Code Civ. Proc., § 3017, as amd. L. 1894, Chap. 307.

The transcript must be filed before action on the judgment is barred by

time. Davidson v. Horn, 47 Hun, 51, criticised, 31 N. Y. St. Rep. 21, disapproved, 10 N. Y. Supp. 399.

Transcripts may be furnished by the county clerk and filed, and the judg-

ment docketed in other counties. Code Civ. Proc., § 3022.

Justices' Courts of Cities, Marine Court, and Justices' Courts in New York, etc.—By Code Proc., § 68 (amd. in 1849 and 1851), the provisions relative to the liens of justices' judgments were made applicable to the justices' courts of cities, to the Marine Court, and the justices' courts in New York city, except that in the city and county of New York, a judgment for twenty-five dollars or over, exclusive of costs, the transcript whereof was docketed with the clerk of that county, was to have the same effect as a lien, and be deemed a judgment of the Court of Common Pleas for said city. Repealed

by the Laws of 1880, Chap. 245.

The Code of Civil Procedure included the Marine (now the City) Court of New York in the provisions made for judgments in the Superior City Courts. Code Civ. Proc., §§ 1245, 1246, 1247, supra. Vide, as to abolition of

these courts, supra.

District Courts in New York City.—By the Code of Civil Procedure, §§ 3017-3022 (regulating justices' judgments), were to apply to the District Courts, except that the clerk was to furnish the transcript; the judgment was to be deemed a judgment of the Supreme Court (formerly a Court of Common Pleas), and execution might be issued by the county clerk to the sheriff, or by the District Court clerk to a marshal. Code Civ. Proc., § 3220, amd. L. 1895, Chap. 946. To the same effect was § 1392 of the "Consolidation Act," L. 1882, Chap. 410.

Municipal Court of the City of New York.—These provisions have been superseded by the Municipal Court Act, L. 1902, Chap. 580 (as amended), which provides for the filing of transcript with the county clerk of the county in which the judgment was rendered, and the docketing of the judgment, whereupon it is deemed a judgment of the Supreme Court, and is a lien for ten years after filing the judgment roll, in that county.

Mun. Ct. Act, L. 1902, Chap. 580, §§ 261, 263.

See also the provisions as to the Municipal Court of the City of New York

in the Greater New York Charter, L. 1897, Chap. 378, as amended by L. 1901, Chap. 466, §§ 1350 et seq.

As to Justices' Courts in cities (as in Albany and in Troy), vide Code

Civ. Proc., § 3225, making §§ 3017-3022 as to docketing, etc., of judgments applicable to such courts.

Jury Fines.—By Laws of 1870, Chap. 539, unpaid jury fines might be entered as judgments in the Supreme Court, in the county clerk's office, and were thereupon to be liens on real estate. Repealed by Laws of 1877, Chap. 417.

The Code of Civil Procedure requires such fines to be entered as judgments, and makes them liens in like manner in New York and Kings counties. Code Civ. Proc., §§ 1117, 1156.

Decrees in Chancery.— Decrees in chancery were to be docketed in the Court of Chancery, in the same manner and with like effect as judgments of the Supreme Court, and were required to be docketed with the county clerk where the land lay, to be liens thereon. 2 R. S. 181, § 93; 182, §§ 95, 96; Laws of 1840, Chap. 386. All repealed by Laws of 1880, Chap. 245.

Tribunals of Conciliation. - By Laws of April 23, 1862, Chap. 451, establishing tribunals of conciliation in the sixth judicial district, the judgment of such tribunals are made liens on real estate when docketed in the clerk's office thereof, and on the docketing of a transcript with the county clerk. This tribunal was abolished by Laws of 1865, Chap. 336.

City Court of Brooklyn. - By Laws of 1849, Chap. 125, which went into operation on May 1, 1849, it was provided relative to "The City Court of Brooklyn," that every judgment of said court may be docketed, and shall be a lien in the like manner and to the same extent, as judgments recovered in the Supreme Court. Repealed by Laws of 1877, Chap. 417.

The City Court of Brooklyn being a "Superior City Court" (Code Civ. Proc., § 3343), its judgments as liens were governed by Code Civ. Proc., Chap. XI, Tit. I, Art. 3. This court was abolished by Constitution of 1894.

1894, Art. VI, § 5.

Common Pleas of New York City.- By Laws of 1844, Chap. 104, no judgment recovered in said court should be a lien on lands in said county, until a transcript thereof was filed with, and the judgment docketed by, the clerk of said county; in which case, if such transcript were filed within ten days after the docketing in said Court of Common Pleas, it was to be a lien from the time of its rendition, except as against mortgagees and purchasers in good faith who had become such before the filing of such transcript. If not filed within that time, it was to be a lien only from the time of filing and docketing with the clerk of said county. § 6.

This portion of this Act was repealed by Laws of 1877, Chap. 417.

These judgments are now governed by the general provisions of the Code of Civil Procedure, Chap. XI, Tit. I, Art. 3. This court was also abolished by the Constitution of 1894. Const. 1894, Art. VI, § 5.

The Lien for Ten Years only.— Except as otherwise specially prescribed by law a judgment docketed as prescribed in the Code of Civil Procedure binds, and is a charge upon the property of the judgment debtor in the county for ten years after filing the judgment roll and no longer.

Code Civ. Proc., § 1251. So formerly, 2 R. S. 359, § 4.
Matter of Harmon, 79 Hun, 226; Garezynski v. Russell, 75 Hun, 497;
Gibson v. Blakely, 85 Hun, 305.

Law of 1840 as to Lien.—The Law of May 14, 1840, 335, altered the Revised Statutes, by providing that the lien of judgments and decrees should continue only five years from the day when judgment was perfected or the decree entered.

This alteration, however, was repealed by Law of May 7, 1844, 466, and the lien restored to ten years.

Provisions of the Code of Procedure.—Code of Procedure, § 282 (amd. L. 1851, Chap. 479; 1867, Chap. 781; 1869, Chap. 833), provided that on filing a judgment-roll upon a judgment directing in whole or in part the payment of money, it might be docketed with the clerk of the county where the judgment-roll was filed (1867, formerly "where it was rendered") and in any other county, upon the filing with the clerk thereof a transcript of the original "docket;" and should be a lien on the real property in the county where the same is docketed of every person against whom such judgment had been rendered which might have at the time of the docketing thereof in the county in which such real property was situated, or which he acquired at any time thereafter for ten years from the time of docketing the same in the county where the judgment-roll was filed (1867,—formerly "where it was rendered"). Repealed by Laws of 1877, Chap. 417.

Effect of Injunction or Appeal.—The time during which a judgment creditor is stayed by injunction or other order, or by operation of appeal or by express provision of law, is to be deducted from the ten years, if a notice to that effect is filed with the clerk of the court within the ten years. But the provision does not extend the time of the lien, as against purchasers, creditors or mortgagees in good faith. Code Civ. Proc., § 1255; see also 2 R. S. 359, which required in addition notice to the county clerk of the stay, and if it shall have ceased, the duration thereof.

See also for similar provisions of the Code of Procedure, Code Proc., § 282, as amended.

Suspension of Lien on Appeal.—Where an appeal has been perfected and an undertaking has been given sufficient to entitle appellant to a stay, without order for that purpose, the court may on notice to the attorney for the respondent and to the sureties make an order exempting from the lien of the judgment as against judgment creditors, purchasers and mortgagees in good faith the real property or chattels real, upon which the judgment is a lien or a portion thereof specifically described, and entry must be made by the clerk in whose office the judgment-roll is filed, on the docket, as to same. Code Civ. Proc., § 1256; see Code Proc., § 282.

The lien is thereupon suspended accordingly from the time when the order is entered and the proper entry made in the docket book.

Code Civ. Proc., § 1257; Code Proc., § 282.

How the lien may be suspended in another county. See Code Civ. Proc., § 1258; Code Proc., § 282.

When and How the Lien is Restored.—The judgment must be docketed anew, as it was originally docketed, but in the order of priority of the new docket, with the words "Lien restored by redocket," adding the date of redocketing; and transcripts may be furnished for other counties. The lien is thereupon restored for the unexpired period thereof, but with like effect only, as against judgment creditors, purchasers and mortgagees in good faith, as if the judgment had then been first docketed.

Code Civ. Proc., § 1259. See Wronkow v. Oakley, 133 N. Y. 505.

The provisions of the Codes make the docketing of a judgment with a county clerk necessary in all cases to make it a lien on lands in the county. It was supposed that the provisions of the Code of Procedure would control those of the Revised Statutes where there was any difference. According to the general principle of construing statutes, such interpretation should be given to diverse statutes on the same subject as that they should, if possible, stand together. No such question arises as to the Code of Civil Procedure. since the Code of Procedure and this part of the Revised Statutes are both repealed.

Effect of Judgment after Ten Years.— The judgment is a lien for ten years after filing the judgment-roll and no longer. Code Civ. Proc., § 1251.

This limitation applies to interest of judgment debtor and his heirs and devisees, as well as to purchasers and incumbrancers. Matter of Harmon, 79

The duration of the lien is limited by the law in force at the time judgment was rendered. Id. Judgment remains a lien for ten years on debtor's real estate or chattels real. Sumner v. Skinner, 80 Hun, 201: Garczynski v. Russell, 75 Hun, 497.

Lands purchased in good faith during the ten years are held free of the lien, if there be no sale within that time, even if the party had knowledge.

Tufts v. Tufts, 18 Wend. 621.

The ten years run from the original docket, and the lien is not saved by subsequent revivals. Id. See also Code Civ. Proc., § 1259.

And the title of a purchaser in good faith is not affected by a sheriff's sale upon an execution issued after the ten years. Pierce v. Fuller, 36 Hun, 179.

A purchaser from a judgment debtor more than ten years after docketing the judgment is deemed a purchaser in good faith, unless he purchased with fraudulent intent. Notice of the judgment will not render the purchase mala fide. Reynolds v. Darling, 42 Barb. 418.

A judgment cannot be attacked on the ground of want of jurisdiction in the court which rendered it after the lapse of ten years, where it has remained unquestioned during that time, and no fraud or mistake is alleged. Griggs ...

Brooks, 79 Hun. 394.

By the Revised Statutes the judgment after ten years ceased to be a lien only as against subsequent purchasers and subsequent incumbrancers in good faith. 2 R. S. 359, § 4: and this was so although the land was taken with full knowledge of the judgment. Waltermire v. Westover, 14 N. Y. 16; Little v. Harvey, 9 Wend. 157; Tufts v. Tufts, 18 Wend. 621; Lansing v. Vischer. 1 Cow. 431; Scott v. Howard. 3 Barb. 319; Muir v. Leitch, 7 Barb. 341; Chosier v. Archer, 7 Paige, 137. Except where there was actual fraudulent.

intent. Id.; Scott v. Howard, 3 Barb. 319, and continued a lien after ten years as against the judgment debtor and his heirs, devisees and grantees without value. Scott v. Howard, 3 Barb. 319; Ex parte Peru Co., 7 Cow. 540; Mower v. Kip, 2 Edw. 165; Pettit v. Shepherd, 5 Paige, 493, 498; Mohawk Bank v. Atwater, 2 Paige, 54.

A levy is provided for, however, by the Code of Civil Procedure after the ten years by execution and filing notice which constitutes a lien. See Code Civ. Proc., § 1252.

The judgment becomes a lien again only from the time of indexing and

recording the notice. Burch v. Burch, 51 Misc. 232.

As to the right of actions on the judgment after ten years.

Wilson, 186 N. Y. 403; Shepherd v. Shepherd, 51 Misc. 418.

TITLE II. DISCHARGE AND SATISFACTION OF JUDGMENT.

The docket of a judgment must be canceled and discharged by the clerk in whose office the judgment-roll is filed upon filing with him a satisfaction piece describing the judgment, and executed by the party in whose favor the judgment was rendered or his executor or administrator, or, if within two years, after the entry of judgment or after the entry of final judgment or order of affirmance by the attorney of record of the party. But where the authority of the attorney has been revoked, a satisfaction by him is not conclusive against the person entitled to enforce the judgment in respect to a person who had actual notice before payment or a purchase of property bound thereby was effected.

In case of an assignment of the judgment the satisfaction piece must be executed by the person who appears from the assignment, or the last of the subsequent assignments, if any, so filed, showing a continuous chain of title, to be the owner of the judgment, or his executor or administrator.

And if executed by an attorney in fact the power must be filed also, unless it has been recorded, in which event the satisfaction piece must refer to the record and evidence of same may be required to be filed.

The execution must be acknowledged before the clerk, or his deputy, and certified by him thereupon; or it must be acknowledged or proved and certified, as a deed.

Code Civ. Proc., § 1260; see 2 R. S. 362, §§ 22, 23, 24; L. 1834, Chap. 262; repealed, L. 1877, Chap. 417.

The person entitled to enforce a judgment must execute and acknowledge a satisfaction piece thereof, at the request of the judgment debtor or person interested in property bound by the judgment, upon presentation of a satisfaction piece and payment of the sum due upon the judgment and the fees allowed by law for acknowledgment of a deed.

Code Civ. Proc., § 1261; see 2 R. S. 362, § 25; repealed, L. 1877, Chap.

By one Party.-A judgment in favor of several may be discharged by a satisfaction-piece executed by one. People v. Keyser, 28 N. Y. 226; 17 Abb. 214, revg. 39 Barb. 587.

By Attorney.—An attorney, where the judgment is secured by levy, cannot discharge it without payment in full. Benedict v. Smith, 10 Paige, 126.

He has only authority to satisfy on payment of the judgment in full, as between plaintiff and defendant. Lewis v. Woodruff, 15 How. 539; Carstens v. Barnstorff, 11 Abb. N. S. 442; Beers v. Hendrickson, 45 N. Y. 665; Wood v. Mayor, etc., 44 App. Div. 299. The owners of the judgment could of course discharge it on the payment of any amount.

By Assignee.- Held he could not collect more than the amount he had paid, when he had so agreed with judgment creditor, even as against the mortgagee of property subsequently acquired by inheritance by judgment debtor. De Wandelaer v. De Wandelaer, 89 App. Div. 113.

Delivery.— A satisfaction piece of judgment is ineffectual if it is not delivered prior to the death of the person executing the same. Earley v. St. Patrick's C. Soc., etc., 81 Hun, 369.

Unauthorized Discharge. A discharge by the clerk, without the filing of the satisfaction-piece as required by law, is void, and the parties must see as to the clerk's authority to make an entry of satisfaction. Booth v. Farmers, etc., Bank, 4 Lans. 301; reversed, on the ground that a satisfaction-piece by a corporation, which shows that it was executed by the president in his official capacity, was binding on the corporation, although not executed in the name of nor under the seal of the corporation. Booth v. F. & M. Nat. Bank, 50 N. Y. 396.

Surrogate's Decrees .- By Law of April 25, 1867, Chap. 782, § 9, any decree or order of a surrogate for the payment of money may be discharged by filing with him a release of the amount, acknowledged or proved as deeds are required to be; and a surrogate's certificate of discharge may be filed with a county clerk, who shall enter it in his docket. Repealed by Laws of 1880, Chap. 245. Vide Code Civ. Proc., § 2553, which assimilates the practice to that on judgments of the Supreme Court. See also supra, p. 861.

The clerk of a county with whom a judgment has been docketed must cancel and discharge same upon filing with him a certificate of the clerk with whom judgment-roll is filed, showing that it has been reversed, vacated or satisfied of record.

Code Civ. Proc., § 1267; L. 1844, Chap. 104; repealed by L. 1877, Chap. 417.

Formerly on discharge of judgment in the Supreme Court, the clerk, where the record was filed, was to transmit a certificate of discharge to the other clerks of the court, who were to enter it in their dockets. 2 R. S. 363, § 27. Repealed by Laws of 1877, Chap. 417.

Vacation of the Satisfaction.— If the satisfaction is vacated, intermediate bona fide purchasers are protected. Taylor v. Renney, 4 Hill, 619.

It will be vacated by order of the court when there is fraud, mistake or McGregor v. Comstock, 28 N. Y. 237.

Other Discharges.—A judgment is also discharged by being satisfied under execution or otherwise, or released; or by valid discharge under bankrupt or insolvent laws.

When an execution is returned wholly or partly satisfied, the clerk must make an entry of the satisfaction, or partial satisfaction, in the docket of the judgment, and thereupon the judgment is deemed satisfied pro tanto, unless the return is vacated by the clerk.

Code Civ. Proc., § 1264; 2 R. S. 362, § 26.

A sheriff on being paid the full amount due on an execution must make a return of satisfaction thereof and deliver to the person making the payment, on his request and payment of fees, a certified copy of the execution and return, which may be filed with the clerk of the same county, who must thereupon cancel and discharge the docket, as if the judgment-roll was filed in his office, and the execution returned to him as satisfied. This does not exonerate the sheriff from his duty to return the execution to the clerk with whom the judgment-roll is filed.

Code Civ. Proc., § 1266; L. 1860, Chap. 6.

As in the case of a satisfaction piece, a certificate of the clerk of the county with whom a copy of the execution and of a return of satisfaction thereon have been filed, showing they have been filed, may be filed with the clerk of any county with whom a judgment has been docketed, and he must cancel and discharge the docket accordingly.

Code Civ. Proc., § 1267; L. 1844, Chap. 104.

Where the judgment has been paid, the court may, on motion, quash the execution, and enter satisfaction of record. U. S. v. McLennore, 4 How.

A mere levy does not operate as satisfaction unless it was defeated by the act or fault of plaintiff or his assignee. People v. Hopson, 1 Den. 574; McCain v. Duffy, 2 Duer, 645; Denvrey v. Fox, 22 Barb. 522; Ostrander v. Walter, 2 Hill, 329.

A levy on real estate is no satisfaction. Shepard v. Rowe, 14 Wend. 260. But if personal property is taken and lost or destroyed by the sheriff, it is

satisfaction. Peck v. Tiffany, 2 N. Y. 451.

The lien of the judgment is also removed by arrest and imprisonment on an execution against the body of the defendant as long as the imprisonment continues and during that period no action can be maintained by the judg-ment creditor against one standing as surety for the debtor or to enforce collateral securities held for payment of the judgment. Koenig v. Steckel, 58 N. Y. 475; see also Dininny v. Fay. 38 Barb. 18; Cooper v. Searles, 1 Cow. 56. Release of security by the judgment creditor may remove the lien rrom lands held by another. Barnes v. Mott, 64 N. Y. 397.

Discharge in Bankruptcy.—A valid discharge in bankruptcy also extinguished a judgment. Ruckman v. Cowell, 1 N. Y. 505.

Even if the judgment was recovered on a prior debt after petition filed. Clark v. Rawling, 3 N. Y. 216.

Any time after one year from discharge in bankruptcy cancellation and discharge of record may be ordered. Code Civ. Proc., § 1268; see L. 1875. Chap. 52, repealed by Laws of 1877, Chap. 417.

Effect of Discharge. - See as to effect of the discharge in bankruptcy upon a judgment. Boynton v. Ball, 121 U. S. 457.

When a judgment has been once paid, and the lien discharged, the parties cannot restore the lien to the prejudice of third persons who are then incumbrancers. Angel v. Bonner, 38 Barb. 425.

An execution cannot issue upon a judgment discharged of record. If wrongfully discharged, the discharge must be first vacated. Ackerman v. Ackerman, 14 Abb. 229.

Presumption of Payment.— A final judgment or decree for a sum of money rendered prior to L. 1894, Chap. 307, in a Surrogate's Court of the State, or any judgment or decree rendered in a court of record within the United States, or elsewhere, or docketed after said act of 1894, pursuant to § 3017 of the Code of Civil Procedure (as to transcripts of judgments by justices of the peace) is presumed paid and satisfied after twenty years from the time when party recovering it was first entitled to enforce it. This presumption is conclusive except as against person who within twenty years makes a payment or acknowledges an indebtedness of some part of the amount recovered, or his heir or personal representative, or a person whom he otherwise represents. Such acknowledgment must be in writing and signed by the person to be charged.

Code Civ. Proc., § 376; L. 1894, Chap. 307; see also 2 R. S. 301, § 47, repealed by L. 1880, Chap. 245.

As to the rebuttal of the presumption, vide Austin v. Tompkins, 3 Sandf. 22; As to the rebuttal of the presumption, vide Austin v. Tompkins, 3 Sandi. 22; 14 Barb. 15; 2 Duer, 1; Smith's Exor. v. Miller, 14 Wend. 188; Miller v. Smith's Exor., 16 id. 430; also, in cases of recovery of land for nonpayment of manorial rents. Van Rensselaer v. Wright, 121 N. Y. 626. Also the Code of Procedure, §§ 90, 110, as to actions on judgments, and new premises, while that Code was in force; and see also Code Civ. Proc., §§ 377, 378.

A presumption of payment of a judgment, it has been held, might arise from a great lapse of time since it was docketed, although less than twenty

years, and evidence that during such time the debtor was in good circumstances and the creditor in poor circumstances is admissible in support of that

presumption. Matter of Looram, 73 Hun, 177.

On the question of the satisfaction of a judgment by execution, raised as a defense to an action on the judgment, evidence of the value of property of the judgment debtor upon the premises where the execution sale took place, but not levied upon under the execution, or levied upon and not sold, and of which the judgment debtor had not been deprived by the act of the judgment creditor, is immaterial.

When an execution sale has been fairly conducted, the amount for which the property sold, and not its value is the only sum that can be applied on the judgment and with which the judgment creditor is chargeable in satisfaction of the judgment. Knight v. Church, 73 Hun, 314.

Where on an examination in supplementary proceedings on a judgment for \$3,321, the parties agreed to payment of \$400 to be paid out of defendant's salary exempt from execution to satisfy the judgment and same was paid, held no further action on the judgment could be maintained. Meeker v. Requa, 94 App. Div. 300.

TITLE III. JUDGMENTS IN UNITED STATES COURTS.

These judgments became liens under the Judiciary Act of 1789. By a law of the United States, passed July 4, 1840, (5 U. S. St. at L. 303, repealing the Act of March 3, 1839), as re-enacted in the United States Revised Statutes (§ 967), it is provided that judgments and decrees rendered in a Circuit or District Court within any State, shall cease to be liens on real estate or chattels real, in the same manner and at like periods as judgments and decrees of the courts of such State cease, by law, to be liens thereon.

By act of August 1, 1888 (25 U. S. St. at L. 357) it is provided that judgments or decrees rendered in a Circuit or District Court of the United States within any State shall be liens on property throughout such State in the same manner and to the same extent and under the same conditions only as if such judgment and decrees had been rendered by a court of general jurisdiction of such State, provided that in case the laws of any State require docketing, etc., this act is applicable only when the laws of such State authorize such docketing, etc., of judgments and decrees of United States Courts.

By this act also clerks of the several courts of the United States are required to keep complete and convenient indices and cross indices of the judgment records of such courts, which shall at all times be open to public inspection and examination.

Although judgments are now a lien against real estate in this State for ten years, at the time the said statute of July 4, 1840 was passed, and until May 7, 1844, judgments and decrees were liens on real estate in this State only for the period of five years from the time of their being docketed. Law of 1840, Chap. 386. From the strict reading of the law of the United States, supra, therefore, the lien would only be in force for five years. The Revised Statutes, supra, having been enacted in 1873, the lien of the United States judgments is now for ten years, as in the case of other judgments in the State.

As regards judgments where the United States is plaintiff, it has been questioned whether the lien would likewise cease as above provided, since as a general rule a sovereignty is privileged against any statute of limitations. Vide People v. Van Rensselaer, 8 Barb. 189. Inasmuch, however, as there is no exception made in favor of judgments obtained by the United States, it is possible that the lien ceases equally in judgments obtained by the United States, as it would in judgments where others are plaintiffs.

Extent and Nature of the Lien.-A judgment of a court of the United States is a lien upon real estate or chattels real of the debtor, in accordance with the local law of the place where the land lies. Williams v. Benedict, 8 How. (U. S.) 107; 2 Pa. 252; 2 Bl. C. C. 341; 2 Bl. 430. See also Act of August 1, 1888, 25 U. S. St. at L. 357, supra.

It is coextensive with the district of the court in which it is recovered. Tayloe v. Thomson's Lessee, 5 Pet. 358; Massingill v. Downs, 7 How. (U. S.) 760; Lellan v. Corwin, 5 Ohio, 398; Crandell v. Crapsey, 10 N. Y. Leg. Obs. 1; 2 Bl. C. C. 341; 2 McL. 78; Bayard v. Lombard, 9 How. (U. S.) 530; 4 McL. 607; Manhattan Co. v. Evertson, 6 Paige, 457.

No transcript Need be Filed .- No transcript need be filed with the clerk of any county of the district; nor is any compliance with the statutory requirements of the State necessary. Cropsey v. Crandall, 2 Bl. C. C. 341; Lombard v. Bayard, Wall. Jr. 196; Carrol v. Watkins, 1 Abb. U. S. Cas. 476. See, however, Act of Congress, August 1, 1888, 25 U. S. St. at L. 357, supra. It seems that a judgment recovered in a Federal court out of the State

is not a lien upon lands within it. Manhattan Co. v. Evertson, 6 Paige, 457.

State Laws May Not Impair the Lien .- Where a lien has attached in the courts of the United States, a State has no power by legislation or otherwise to modify or impair it. Massingill v. Downs, 7 How. (U. S.) 760. Held also that § 282 of Code of Procedure did not apply to United States judg-Massinger v. Downs, 10 N. Y. L. Obs. 1; Carroll v. Watkins, 1 Abb. U. S. Cas. 474.

Admiralty.—An admiralty decree for payment of money is a lien. 2 McL. 78; Ward v. Chamberlain, 2 Black. 430.

Might Formerly be Docketed in Other Counties .- By Laws of 1832, Chap. 210, and 1847, Chap. 470, § 39, transcripts of judgments rendered in this State, in any court of the United States, duly certified by the clerk of such court, may be filed and docketed by the clerk of any county in this State, in the same manner as judgments rendered in the Supreme Court of this State. By the Revised Statutes (2 R. S. 557, §§ 38 to 46), direction was given to the clerks of the Supreme Court at New York city, Albany and Utica, to procure certified copies of dockets of judgments from the United States Courts in the State, since January 1, 1830, and to enter them in books as also transcripts of future judgments. Sections 43, 46, were repealed by Laws of 1832, Chap, 210,

The above section of the Act of 1847 and this part of the Revised Statutes were repealed by Laws of 1877, Chap. 417. Provision for docketing these judgments was then made by Code Civ. Pro., § 1271, but this section was repealed by Laws of 1879, Chap. 542. See now Act of August 1, 1888, 25 U.S.

St. at L. 357, supra.

Suspension of Lien on Appeal.—United States Courts held to have no power to suspend the lien on appeal. Myers v. Tyson, 13 Blatch. 242.

TITLE IV. JUDGMENTS, MISCELLANEOUS.

It may be desirable to notice the following miscellaneous provisions and decisions with reference to the lien or discharge of judgments.

The Supreme Court has inherent power over its judgments and is not limited by the provisions of §§ 1290 and 724 of the Code of Civil Procedure. Matter of Cartier v. Spooner, 118 App. Div. 342. Cf. Furman v. Furman, 153 N. Y. 309; Ladd v. Stevenson, 112 id. 325.

Judgment after Decease of Defendant.—A judgment filed and docketed after the decease of the defendant does not bind real estate. Code Civ. Proc., § 1210; Nichols v. Chapman, 9 Wend. 452; Clark's Case, 15 Abb. 227; Borsdorff v. Dayton, 17 Abb. 36.

Decease after Verdict, etc .- The Code of Civil Procedure authorizes a judgment in the names of the original parties, where a party dies after verdict, accepted offer of judgment, report, decision, or interlocutory judgment, which are not set aside. Code Civ. Proc., § 763.

Mere signing of report before decease, held not within the above provision, even though notice had been given, where it had not been filed or delivered.

Clark v. Pemberton, 64 App. Div. 416.

Where the Record is Docketed after the Decease of the Defendant .- As to this and other points as to the entry of judgments after decease, see Code Civ. Proc., Chap. VIII, Tit. IV. See also as to continuance of lien, Code Civ. Proc. § 1380.

Misnomer.— See Bernstein v. Schoenfield, 81 App. Div. 171.

Judgments against Executors, etc.—Real estate of any deceased person is not bound by, and is not liable to be sold under, any judgment against his executors or administrators, unless expressly made by its terms a lien upon specific real property, or a sale expressly directed. Code Civ. Proc., § 1823; 2 R. S. 449, § 12 (repealed by Laws 1880, Chap. 245).

Nor upon lands acquired by foreclosure of a mortgage held by testator.

Cook v. Ryan, 29 Hun, 249.

Judgment against a Surviving Partner does not bind the real estate of the deceased partner. Burnett v. Crain, 41 Hun, 183.

Consideration Money Mortgages.—As to the lien of such mortgages having preference over judgments, vide supra, pp. 641, 708.

Unrecorded Mortgages.— Preference of, over a judgment, vide supra, p. 707.

Equitable Interests.— Equitable interests are not bound by a judgment. Jackson v. Chapin, 5 Cow. 485, and see supra, p. 319.

Equitable Claims.—An equitable claim on land, which existed prior to the recovery of a judgment, is preferred over a judgment docketed afterward. Cook v. Kraft, 41 How. Pr. 279.

The general lien of a judgment is subject to all equities existing against the real property of a debtor in favor of a third person, at the time of recovery of the judgment. White v. Carpenter, 2 Paige, 217; 2 Barb. Ch. 338; 7 Barb. 341; Buchan v. Sumner, 2 Barb. Ch. 165; Matter of Howe, 1 Paige, 125; Kersted v. Avery, 4 id. 9. Judgment creditors are entitled to only such rights in the premises as the judgment debtor rightfully possessed.

Voluntary Insolvent Assignments, under Art. 5, Chap. V, Tit. I, Part II of the Revised Statutes, for the purpose of exonerating from imprisonment did not destroy the lien of judgments. 2 R. S. 30, § 12 (repealed by Laws of 1880, Chap. 245).

A similar provision is in force as to assignments under Code Civ. Proc., Chap. XVII, Tit. I, Art. 2, which corresponds to these provisions in the Revised Statutes. Code Civ. Proc., § 2198.

Nor under Art. 3, Chap. V, Tit. I, Part II of the Revised Statutes, where the judgment creditor did not petition. Kelly v. Thayer, 34 How. Pr. 163. Said Article 3, having been repealed by Laws of 1880, Chap. 245, its place was taken by Chap. XVII, Tit. I, Art. 3, of the Code of Civil Procedure, which introduced great changes. This provision, however, is retained by § 2213. No petition by the creditor is now allowed. by § 2213. No petition by the creditor is now allowed.

Receiver.—A receiver appointed in supplementary proceedings held necessary party to an action to apply the debtor's land to the payment of the judgment, or to an action by the grantee of the debtor to discharge the land from the lien of the judgment. Moore v. Duffy, 74 Hun, 78.

Tenants in Common .-- As to recovery of moneys paid and redemption of lands sold for taxes owned conjointly and judgments therein, vide infra, Chap. XLVI.

Covenants in Deeds for Benefit of Creditors.-Where property of defendant passes during suit by a deed in which the grantee covenants to pay liabilities of grantor, the creditor after judgment may avail himself thereof. Schmid v. N. Y., L. E., etc., R. R. Co., 32 Hun, 335.

Mortgage for Advances.- Lien of judgment is postponed to subsequent payments made without notice under a previously recorded mortgage for future advances, and docketing is not notice to the mortgagee. Ackerman v. Hunsicker, 85 N. Y. 43.

Foreclosure Suits.—Between May 14, 1840, and May, 1844, it was not necessary to make judgment creditors subsequent to the mortgage parties to foreclosure suits. Laws of 1840, 289; Laws of 1844, 531. It is now necessary in order to bar their right to redeem. Vide supra, p. 733.

Lands under Contract.— It has been seen above, that under Code Civ. Proc., § 1253 (1 R. S. 744, § 4), the interest of a person holding a contract for the purchase of lands is not bound by the docketing of a judgment or decree. As to executions against such person affecting such contract, vide infra, Chap. XXXVIII. As to the effect of a judgment against the vendor, vide supra, p. 527.

The equitable right of one in possession of realty under a contract fully performed on his part is superior to that of the judgment creditors of the person in whom the legal title remained. N. Y. Water Co. v. Crow, 110 App.

Heirs and Devisees.—As to the effect and lien of judgments against them, vide supra, p. 401, and as to the practice of their being made parties. De Agreda v. Mantel, 1 Abb. 130.

Lien of Judgment on Land Descended. Vide supra, p. 400.

Judgments against Stockholders in Banking Corporations and Associations. -As to the lien, compromise and discharge of such judgments, vide Law of April 5, 1849, amended by Law of May 2, 1863, Chap. 372, and repealed by Laws of 1882, Chap. 402, being superseded by Laws of 1882, Chap. 409, which provided (§ 165) for the docketing and lien of these judgments. As to the present provisions see the General Banking Law 1892, Chap. 689, and its amendments, repealing § 165 of the Act of 1882, Chap. 409; and the Stock Corporation Act of 1890, Chap. 564, and its amendments. The old provisions as to liability are superseded by the Stock Corporation Law, L. 1890, Chap. 564, § 54, and various provisions in the Banking Law, L. 1892, Chap. 689. See also as to transcripts being filed, supra, p. 859.

Judgments Against Husband and Wife for a cause accruing after marriage. held not to bind the wife's separate estate. Tisdale v. Jones, 38 Barb. 523.

By Laws of 1853, Chap. 576, a judgment against husband and wife, for debts of the wife contracted before marriage, bound the separate estate of the wife only, and not that of the husband, except to the extent of the property he had acquired from her.

A judgment against husband and wife, for damages, etc., in ejectment, held

a lien on the real estate of the wife. Morris v. Wheeler, 45 N. Y. 708.

See also supra, Chap. III, Tit. III, as to actions against husband and wife.

Judgments for Future Advances.—Vide Truscott v. King, 6 N. Y. 147; revg. 6 Barb. 146; Hammond v. Bush, 8 Abb. 152; Averill v. Loucks, 6 Barb. 19, and supra, Chap. XXIII, Tit. I.

Actions on a judgment of any court in any of the States or the United States are to be brought within twenty years. 2 R. S. 301, § 47, repealed by Laws of 1877, Chap. 417; Code Civ. Proc., § 376, providing that judgments and decrees are presumed to be paid within twenty years.

Judgments and Liens in Favor of Department of Health in the City of New York.—These were made liens as the judgment states. They might be discharged by the court on motion. A lien was also created for expenses incurred in executing any order of said board, on the filing of the lien as mechanics' liens are filed. Law of May 25, 1867, Chap. 956. The powers of the Metropolitan Board transferred to the Health Department. L. 1870, Chap. 383. These acts were repealed by Laws of 1881, Chap. 537, but similar provisions are contained in Chap. II, Tits. V and VI of the "Consolidation Act," Laws of 1882, Chap. 410. See also Greater New York Charter, L. 1897, Chap. 378, as amd. L. 1901, Chap. 466, Chap XIX, Tits. V and VI; and infra, Chap. XLVII, Tit. II.

Judgments Against the City or County of New York.—As to such judgments and how enforced, vide Laws of 1865, Chap. 646; 1866, Chap. 887; 1867, Chap. 586; 1868, Chap. 854; 1869, Chap. 873; 1870, Chap. 382; 1871, Chap. 583. This last law held constitutional. Lowenthal v. The Mayor, Eass. 532. The Act of 1865 was partly and the Acts of 1867 and 1871 were wholly repealed by Laws of 1881, Chap. 537. Vide "Consolidation Act," Laws of 1882, Chap. 410; also the Greater New York Charter, L. 1897, Chap. 378, as amd. by L. 1901, Chap. 466, for the present law on this subject.

Validity of a Judgment Lien as Affected by Subsequent Statutes .- The lien is purely statutory and may be abolished at any time before rights become vested. Watson v. N. Y. C. R. R., 47 N. Y. 157. See also Gunn v. Barry, 15 Wall. 610.

Judgment entered on Sunday, held void. Ball v. United States, 140 U. S. 118,

CHAPTER XXXVIII.

TITLE THROUGH SALE ON EXECUTION.

I .- GENERAL PRINCIPLES AS TO JUDICIAL SALES. TITLE.

II .- THE EXECUTION.

III .- WHAT PROPERTY LIABLE TO SALE.

IV .- THE SALE.

V .- REDEMPTION.

VI .- THE DEED.

VII .- REMEDY ON FAILURE OF TITLE TO LANDS SOLD.

Title to real estate through execution arises by statute authorizing the sale of a defendant's lands on recovery of judgment.

Code Civ. Proc., §§ 1362-1404, 1430-1486.

Former Laws.—In 1732, the Statute of 5 George II., Chap. 7, was passed, making houses, lands, negroes, real estate, and other hereditaments, within any of the English plantations, subject to the like process of execution as personal estate. The law as it stood in 1813, by the statutes of this State, will be found in the Revised Laws of 1813; 1 R. L. 500. This made real estate of a judgment debtor liable to be sold on execution, and declared the judgment a lien for ten years from docketing. Subsequent acts were passed in 1820 (p. 167); 1828 (Revised Statutes), 1836 and 1847, relating to the subject. The Code of Procedure provided that the then existing provisions as to execution, sale and redemption, except where in conflict with any special provisions should continue in force. These provisions were repealed by L. 1877, Chap. 417.

TITLE I. GENERAL PRINCIPLES AS TO JUDICIAL SALES.

It may be stated as a general principle regulating judicial sales, that rights acquired thereunder, while the judgment is in force and unreversed, will be protected, even if the judgment or process be subsequently declared erroneous. But purchasers under such sales are only protected where the power to make the sale is clearly given. and the court has jurisdiction over the subject-matter and the parties, and the rule does not apply to sales made under interlocutory or conditional orders. Purchasers also would in any case be protected, unless there were prompt action to set aside the sales.

Vide Gray v. Brignardello, 1 Wallace, 627; Voorhees v. Bank of U. S. 10 Peters, 449; Grignon v. Astor, 2 How. U. S. 319; Bigelow v. Forrest, 9 Wall. 351; Holden v. Sacket, 12 Abb. 473; Wood v. Jackson, 8 Wend. 9; Woodcock v. Bennet, 1 Cow. 711, 734; Dater v. Troy T. & R. R., 2 Hill, 629; Blakely v. Calder, 15 N. Y. 617; Kissock v. Grant, 34 Barb. 144; McGoon v. Scales, 9. Well. 23, Thorn v. Shiel. 15 Abb. N. S. 81 Scales, 9 Wall. 23; Thorn v. Shiel, 15 Abb. N. S. 81.

Unless a purchaser have previous notice of defect, he may insist on a

good title. Fryer v. Rockfeller, 63 N. Y. 268.

But he gets no better title than the judgment-creditor would if he bought. Frost v. Yonkers B'k, 70 N. Y. 553.

If there be no stay, his title is not affected by reversal of judgment.

Hening v. Pudnett, 4 Daly, 542.

A valid deed prior to the judgment will defeat title by execution sale, though it be unrecorded. Lamont v. Cheshire, 65 N. Y. 30. See also supra,

p. 703, generally.

Only the interest which the judgment-debtor had at the time of docketing will pass. Snedeker v. Snedeker, 18 Hun, 355. This decision was reversed in Bergen v. Carman, in 79 N. Y. 146, on the ground that where the debtor has made a fraudulent deed the judgment-creditor may go on and sell under his execution, and the purchaser at such a sale may proceed to set aside the deed. The judgment-creditor is not bound first to bring a creditor's action.

The sale will not be set aside for mere inadequacy of price, unless so gross as to shock the conscience, but where the price is adequate slight evidence of fraud will do. Graffam v. Burgess, 117 U. S. 180.

See the case of Darwin v. Hatfield, 4 Sand. 468 (reversed Seld. Notes, 36), as to how far and when a purchaser may object to the regularity and validity of a judgment of sale; and also the above cases.

Irregularities, etc.- It is a principle, also, that if the court rendering judgment had jurisdiction, and the officer who sold had authority to sell, the sale will not be void by reason of errors in the judgment or irregularities in the officer's proceedings, which do not reach the jurisdiction of the one or the authority of the other. The title of a bona fide purchaser without notice, will not be affected by irregularities, if the execution and judgment are regular and subsisting. Jackson v. Cadwell, 1 Cow. 622; 4 Barb. 180; Pres. Chautauqua Co. Bank v. Risley, 4 Den. 480, revd., 19 N. Y. 369; 17 Abb. 137; Wood v. Morehouse, 1 Lans. 405, affd., 49 N. Y. 160; McGoon v. Scales, 9 Wall. 23.

Questions of irregularity cannot be raised by strangers. Smith v.

McGowan, 3 Barb. 404.

If a judgment, however, is entirely void, or has been satisfied before a sale on execution, it is held that even a bona fide purchaser would derive no title from the sale, whether he had notice of the payment or not. v. Colvin, 2 Hill, 566; Jackson v. Anderson, 4 Wend. 474; Swan v. Saddlemire, 8 id. 676; Stafford v. Williams, 12 Barb. 240; Neilson v. Neilson, 5 id. 565; Craft v. Merril, 14 N. Y. 456; Jackson v. Roberts, 11 Wend. 422; Stilwell v. Carpenter, 59 N. Y. 414.

So if the execution issued after the death of the judgment-debtor. Wallace v. Swinton, 64 N. Y. 188. See as to this also, Code Civ. Proc., § 1380.

Or is satisfied in effect. Terrett v. Insp. Co., 18 Hun, 6; Ten Eyck v.

Craig, 62 N. Y. 406.

A purchaser is protected, if anything is due or the execution has only been satisfied in part. Peet v. Cowenhoven, 14 Abb. 56; Peck v. Tiffany, 2 N. Y. 451.

Declarations by a sheriff, even if deceased, to prove payment, will not be

allowed. Woodgate v. Fleet, 44 N. Y. 1.

If the process is void the sale will be invalid, but not so if the process were merely erroneously issued. Jackson v. Bartlett, 8 Johns. 361; Jackson v. Delancy, 13 id. 537.

There must have been a judgment duly entered and docketed. Townshend v. Wesson, 4 Duer, 342. See in this connection Sweetland v. Buell, 164

N. Y. 541.

No formal entry or levy on the land is necessary. Wood v. Colvin, 5 Hill,

After a tender of the amount of the execution and fees, a sale to one with notice is void. Mason v. Sudam, 2 Johns, Ch. 172.

So if the sheriff had no jurisdiction or authority to sell, or there had been redemption. Harris v. Murray, 28 N. Y. 574; Stafford v. Williams, 12 Barb. 240.

Real property may be sold, though the judgment be no lien on it. Palmer

v. Clark, 4 Abb. N. C. 25, approved 47 Hun, 243.

A purchaser in good faith under a void execution who has paid the purchase money without actual knowledge of the invalidity of the process to the party who procured the sale, knowingly, may recover the money paid from such party. Schwinger v. Hickock, 53 N. Y. 280.

A return of nulla bona made by mistake may be set aside nunc pro tune

as of the date when made, thus sustaining as against other creditors a levy under the execution. Lopez v. Campbell, 163 N. Y. 340.

TITLE II. THE EXECUTION.

The statutory regulations for selling real estate under execution, and the redemption thereof, are too minute and extended to be particularly detailed here. They are contained in Chap. XIII., Tits. I and II., §§ 1362 to 1404 inclusive, and §§ 1430 to 1486 inclusive, of the Code of Civil Procedure, to which reference should be had.

Before the enactment of this Code the provisions of the Revised Statutes, as modified by the Code of Procedure, regulated these proceedings. These provisions were repealed by Chap. 417, of the Laws of 1877. But since the former provisions of law affect titles made under them, reference is made to them below. These former provisions will be found in Part III., Chap. VI., Tit. V., of the Revised Statutes; see 2 R. S. 363 et seq.

Some of the prominent features of the proceedings, as far as title to real estate is made under them, are as follows:

Execution to Issue.—By the Revised Statutes after judgment filed an execution might be issued against the goods and chattels, lands, tenements, and chattels real, of the party against whom such judgment was recovered. 2 R. S. 363, §§ 1, 2. Before an execution could be levied on real estate, the personal property was to be levied on and exhausted and the execution was to be satisfied out of the real property belonging to the debtor on the day when judgment was docketed in the county, or at any time thereafter. Code Proc., § 289.

For the corresponding provisions of the Code of Civil Procedure, see Code

Civ. Proc., §§ 1362, 1364, 1369.

On a justice's judgment entered in one county and transcript filed in another, after ten years the judge of the county where it was entered may order execution to the other county. The clerk of either may issue it. Vedder v. Lansing, 44 Hun, 590.

Execution may issue on a district court judgment, transcript of which has been filed with the county clerk though an action on the judgment is barred by limitation. Anderson v. Porter, 7 Misc. 218.

Time during which execution was stayed is not included as part of the

sixty days in which to make levy under Code Proc., § 290. Ansonia B. & C. Co. v. Conner, 103 N. Y. 502.

A neglect first to exhaust the personalty held not to avoid the sale.

Neilson v. Neilson, 5 Barb. 565.

Variance.—A slight variance between the judgment and the execution will

not vitiate. Jackson v. Walker, 4 Wend. 462.

The regularity of the execution cannot be questioned. Jackson v. Caldwell, 1 Cow. 622; Neilson v. Neilson, 5 Barb. 565; Chautauqua Co. B'k v. Risley, 4 Den. 480, revd., 19 N. Y. 369; Averill v. Wilson, 4 Barb. 180; and see supra, Tit. I.

The Revised Statutes provided that on the filing of the record and within two years thereafter execution might issue. 2 R. S. 363, § 1. The Code of Procedure provided that execution could only be issued within five years after entry of judgment, except by leave of the court. The leave was not necessary, if the execution had been returned unsatisfied within five years. Code Proc., §§ 284, 285. A similar provision is contained in Code Civ. Proc., § 1377.

Under the Code of Procedure it was held that time during which the judgment stood reversed was not to be included within the five years. Underwood v. Green, 56 N. Y. 247. So now by Code Civ. Proc., § 1382, which covers any action of the court preventing issue of execution.

Setting Aside.—The execution may be set aside where the judgment was without jurisdiction. Burch v. Burch, 116 App. Div. 865.

Wrong Name.-A judgment and execution against one by a wrong name will not authorize the sale of his property. Farnham v. Hildreth, 32 Barb. 277.

Remaining Property after Conveyance.-Where part of the judgmentdebtor's real estate has been conveyed to a bona fide purchaser, and enough remains to satisfy the execution, held the court would direct the execution to be levied on what remains. Welch v. James, 22 How. Pr. 474.

What can be Sold .- The only interest of a judgment-debtor in real estate which can be sold upon execution under Code Civ. Proc., § 1252, is his right and title at the time of recording and indexing the notice, and the execution should correctly state such interest. Garezynski v. Russell, 75 Hun, 497.

The title of an owner of land is not affected by a sale thereof on execution issued upon a void judgment, and a subsequent conveyance by him is as effectual as if the judgment had not in form been entered against him, and in such a case notice to the grantee of a claim of title made by the purchasers at such sale does not operate as an estoppel against him. McCracken v. Flanagan, 141 N. Y. 174.

Death of Plaintiff.—A revival without notice to the defendant held not to make the execution void, but voidable. Nims v. Sabine, 44 How. Pr. 252. See also Beard v. Sinnott. 38 Super. 536. Such case is now covered by Code Civ. Proc., §1376.

Decease of Defendant .- Under the Revised Statutes if a party died after pidgment and before execution, the remedy was not suspended by reason of non-age of any heir; but no execution could issue until one year after death of the party. 2 R. S. 368, § 27; repealed by L. 1877, chap. 417; Day v. Rice, 19 Wend. 644; Nichols v. Chapman, 9 id. 452; Shooke v. Phillips, 5 Cow. 440. New executions might be issued against lands, where a party died under execution against his body, but not against lands sold by him after judgment to a nurchaser in good faith, now under other independent.

to a purchaser in good faith, nor under other judgments against said party.

2 R. S. 368, §§ 28, 29, 30. The Code of Civil Procedure contains similar provisions, §§ 1493 and 1495.

By the Revised Statutes, whenever execution had not been issued within the time allowed by law, the plaintiff might have proceedings by scire facias, to cause one to be issued; also to revive a judgment for or against personal representatives, or continue a suit by the representatives of a deceased party, and for other purposes. The proceedings under the writ of scire facias are found in Art. I, Tit. II, Chap. IX, Part III, of the Revised Statutes. See 2 R. S. 576 et seq. The writ of scire facias was abolished by the Code of Procedure, and under that Code it was questioned whether proceedings against heirs and terre-tenants were not still necessary, unless the Law of 1850 integrations are to be considered as a substitute. Vide Finch w. Morrism.

1850, infra, was to be considered as a substitute. Vide Finck v. Morrison, 13 Abb. 80; Wilgus v. Bloodgood, 33 How. Pr. 289.

By Law of April 10, 1850, Chap. 295, execution might be issued on the death of a party after judgment, against his lands, etc., on which the judgment was a lien, either in law or equity; except that it could not issue within a year after his decease, nor in any case without permission of the

surrogate of the county, who had jurisdiction over the estate, and who on cause shown might make an order granting permission for the execution. The act was to apply as well to past judgments. It was repealed by Laws

of 1877, chap. 417.

The Code of Civil Procedure has fully covered all these points. of the court in which the judgment was obtained as well as of the surrogate is required. Where the lien of the judgment was created by Code Civ. Proc., § 1251, three years after letters must elapse. It must be the surrogate who granted letters. If no letters are granted for three years, leave of the court where judgment was obtained is enough. Code Civ. Proc., §§ 1379, 1380.

The limitation of three years after issuing letters, prescribed by Code Civ. Proc., § 1380, relating to applications for leave to issue execution, held to apply only to judgments originally rendered in courts of record; as to judgments of courts not of record, transcripts of which have been filed with the county clerk, the limitation of one year after the debtor's death applies.

Matter of Phelps, 6 Misc. 397.

The filing of a transcript of a justice's judgment in the county clerk's office only enlarges the field for its enforcement, and adds nothing to its longevity. It ceases to be enforcible in any way in six years after its ren-

dition.

The Code of Civil Procedure also provides that where a judgment has been made a lien for ten years, under § 1251, and the debtor dies, "such a lien existing at decedent's death continues for three years and six months thereafter, notwithstanding the previous expiration of the ten years." Code Civ. Proc., § 1380.

Held to allow the issue of execution at any time within three years and six months after the grant of administration, regardless of the ten years.

In re Gates Estate, 21 N. Y. Supp. 576, affg. 18 id. 873.

A judgment which never became a lien upon the real property of a judgment-debtor, by reason of the failure of the county clerk to properly index the same against him, does not come within the provisions of Code Civ. Proc., § 1380, allowing an execution to issue against the property of a deceased judgment-debtor, within one year after his decease, with the leave of the court.

It is a general rule, in actions brought by creditors to set aside conveyances of a judgment-debtor for fraud, that an execution must be issued and returned unsatisfied in whole or in part before the action can be maintained.

LeFevre v. Phillips, 81 Hun, 232.

Execution on a judgment obtained before defendant's death docketed as prescribed in Code Civ. Proc., § 1251, cannot, after his death, be issued until three years have elapsed from the issue of letters testamentary. Code Civ. Proc., § 1380 (amd. L. 1894, Chap. 734); Duel v. Alvord, 41 Hun, 196.

Executions issued without a scire facias, or an order of a court where required, held not void, but irregular, and cannot be questioned collaterally. Jackson v. Delancey, 13 Johns. 537; Jackson v. Robine, 16 id. 537; Finck v. Morrison, 13 Abb. 80; Alden v. Clarke, 11 How. Pr. 209; Jackson v. Bartlett, 8 Johns. 363; Bank of Genesee v. Spencer, 18 N. Y. 150; Winebrenner v. Johnson, 7 Abb. 202. The above more recent cases, however, seem to have required the notice of revival to heirs, etc., to be made in order to make the execution valid.

As to when an execution will be set aside for having been issued after the death of the judgment-debtor, contrary to the above statutes, vide Finck v. Morrison, 13 Abb. 80 and the various cases above cited. Marine Court v. Van Brunt, 49 N. Y. 160, supra; Wallace v. Swinton, 64 id. 188.

As to proceedings now to obtain leave against a decedent's property, vide

Code Civ. Proc., § 1381.

If issued a moment after judgment creditor's death it is void. Prentiss v. Bowden, 8 Misc. 420.

Heirs, Devisees, and Terre-tenants.— As to execution against them for debts of the ancestor, vide 2 R. S. 367, § 25; repealed by Laws of 1877, chap. 417; Code Proc., § 289; Code Civ. Proc., § 1371; also Wood v. Wood, 26 Barb. 356, and supra, Chap. XIV, Tit. VII.

Executors, etc.—As to form of execution against executors, etc., vide Code

Civ. Proc., § 1371.

A judgment against executors or administrators, in an action wherein they are not described in their representative capacities, cannot be enforced against decedent's real estate unless it contains a special direction to that effect. Code Civ. Proc., § 1814.

Lands of decedent cannot be sold on deficiency judgment against his execu-

tors. James v. Beesley, 4 Redf. 236.

Execution Against Stranger.—A sale of property on execution against a third party will not be enjoined on application of one in possession having the paper title, for it cannot affect him. Lehman v. Roberts, 86 N. Y. 232.

Non-residents.—A sale under execution against a non-resident served by publication upon a money judgment, where there was no attachment, is void. McKinney v. Collins, 88 N. Y. 216.

Recitals.—As to how far the execution may be proved by recitals in the deed, vide infra.

Return.- If the sale be regular, neglect of the sheriff to return the execution will not affect a purchaser's title. Phillips v. Schiffer, 7 Lans. 347.

Levy.-A levy upon real estate is good, though made more than one hundred and twenty days after issue of execution. McIntyre v. Sanford, 9 Daly, 21. See Code Civ. Proc., § 1366.

Attachment.—A general execution against attached property is void. The execution must follow the directions of Code Civ. Proc., § 1370. Place v. Riley, 32 Hun, 17, affd., 98 N. Y. 1.

An attachment vacated and afterward reinstated, held to take precedence of a levy made on an execution in the *interim*. Pach v. Gilbert, Sheriff, 124 N. Y. 612.

TITLE III. WHAT PROPERTY IS LIABLE TO SALE.

Our statutes exempt certain lands from liability to sale under execution.

As to the nature of such exemptions, see Myers v. Moran, 113 App. Div. 427.

Pension. Lands bought with pension money are exempt under Code Civ. Proc., § 1393. Yates Co. Nat. Bk. v. Carpenter, 119 N. Y. 550; Taylor v. Ballard, 31 Misc. 540. As to estoppel in such case, see McMahon v. Cook, 107 App. Div. 150.

Pews in churches are exempt. Code Civ. Proc. § 1390.

Burying Ground .- Land not over a quarter of an acre, set apart as a family or private burying ground and a portion of which has been actually used for that purpose, if it was so designated as prescribed by law, or the owner shall record a notice executed as a deed in the office of the clerk or Proc., §§ 1395, 1396. For former law see Laws of 1847, Chap. 85; repealed, Laws of 1877, Chap. 417; 3 Duer, 527; see also Laws of 1869, Chap. 708, and Laws of 1879, Chap. 310, exempting cemeteries. See also Buffalo Cem. Ass'n v. City of Buffalo, 118 N. Y. 61; and supra, Chap. XXIV, Tit. VIII.

A Reservation in a deed of oils, minerals, etc., constitutes an estate which may be sold on execution. First Nat. Bk., etc. v. Dow, 41 Hun, 138.

Homestead.— By Laws of 1850, Chap. 260, the residence occupied and owned by the debtor, being a householder and having a family, to the value of one thousand dollars, might be exempted from sale on execution as a homestead. This exemption continued until the death of the widow of the owner, and until the youngest child came of age. No release or waiver of the exemption was valid, unless subscribed and acknowledged by the householder, as are conveyances. As description of the lands was to be recorded with the county clerk in a book known as "The Homestead Exemption Book." This exemption did not run with the land on its transfer; and it might be waived; and a judgment would take precedence of a mortgage subsequently executed on the land. Smith v. Brackett, 36 Barb. 571; Robinson v. Wiley, 15 N. Y. 489; Allen v. Cook, 26 Barb. 374.

This act did not exempt from executions on judgments for torts; nor for costs therein. Lathrop v. Singer, 39 Barb. 396; Robinson v. Wiley, 15 N. Y.

489; Schouton v. Kilmer, 8 How. 527; Cook v. Newman, Id. 523.

The land was not to be exempt however, from sale for taxes and assessments, nor for a debt contracted for the purchase thereof, nor prior to the recording of the notice. L. 1850, Chap. 260, § 2; Robinson v. Wiley, 15 N. Y. 489. If the land were worth over one thousand dollars, the sheriff might sell the residue over that value; or the debtor was to pay the surplus value to the sheriff, or the land was to be sold. *Id.*, §§ 3, 4, 5. This act was repealed

by Laws of 1877, Chap. 417.

The whole subject is now elaborately regulated by Code Civ. Proc., §§ 1397 to 1404, inclusive. The chief changes from the Act of 1850 are that provision is made for a married woman's homestead (§ 1399); vacating the premises for not more than one year in consequence of destruction of or damage to the house does not affect the exemption (§ 1401); if the property be worth more than a thousand dollars it cannot be sold on execution but only by a judgment creditor's action, though the lien attaches at once to the surplus (§ 1402); releases of exemption must be acknwledged like deeds and recorded, and any other releases under former acts are declared void; provided the husband and wife may jointly convey or mortgage property so exempt (§ 1404).

The Homestead Act held not to prevent creditors from redeeming from execution sales on judgments docketed before record of exemption. Rice v. Davis,

7 Lans. 393.

A homestead exemption is good against the United States as against a

private party. Fink v. Neil, 16 Otto. 272.

Code Civ. Proc., § 1404, does not preclude renunciation in any other way.

McMahon v. Cook, 107 App. Div. 150.

Exemptions are Personal.—These exemptions are personal, and may be waived, but not transferred to another. 26 Barb. 374; Earl v. Camp., 16 Wend. 562; 22 Barb. 656.

By Code Civ. Proc., § 1400, the exemption survives, in the case of a woman, to her children and continues until the youngest surviving child attains majority. In the case of a man it continues after his death, during the life of his widow and until his youngest child attains majority. But the exemption ceases earlier by a change in the use of the property.

Land in Another State cannot be sold under a judgment in this State. Runk v. St. John, 29 Barb. 585.

Rent Charges and Rights of Entry cannot be sold on execution, Thompson v. Trustees, etc., 3 Pet. 131, 177; Jackson v. Varick, 7 Cow. 238; Payn v. Beal, 4 Den. 405; overruling People v. Haskins, 7 Wend. 463; Huntington v. Forkson, 6 Hill, 149.

Equity of Redemption.—As to the sale thereof, vide Code Civ. Proc., § 1432; also supra, Chap. XXIII, Tit. VI.

Leasehold Property is subject to the provisions relative to the sale and redemption of real property, where at the time of sale there is an unexpired term of five years. Code Civ. Proc., § 1430. Formerly contained in Laws of 1837, Chap. 462, which was repealed by Laws of 1877, Chap. 417.

This means five years from the time of sale. Ex parte Wilson, 7 Hill, 150; see also Butler v. Palmer, 1 Hill, 324; Westervelt v. The People, 20 Wend.

416.

Tenancy by the Curtesy .- Initiate may be sold on execution. Van Duzer v. Van Duzer, 6 Paige, 366; and supra, Chap. VII, Tit. V.

Contingent Remainders cannot be sold under execution. So held as to a sale in 1851. Jackson v. Middleton, 52 Barb. 9. See Sheridan v. House, 4 Keyes, 569.

Reversion. -- A reversionary interest may be sold, although contingent. Woodgate v. Fleet, 44 N. Y. 1; Burton v. Smith, 13 Pet. 464.

Married Women .- By the Code of Procedure, § 287, which was repealed by Laws of 1877, Chap. 417, an execution against a married woman had to direct the levy and collection against her from her separate property, and not otherwise. See Charles v. Lowenstein, 26 How. 29; see also Laws of 1860. Chap. 90, and 1862, Chap. 172, as fully set forth, supra, Chap. III, Tit. III, as to judgments against married women. These acts were also repealed by Laws of 1877, Chap. 417.

By Code Civ. Proc., § 450, married women, as parties to actions, stand in

the same position as other persons.

Estates at Will or Sufferance, or a mere Possession under contract of sale cannot be sold on execution, but a tenancy from year to year may be. The purchaser takes nothing, however, if the tenancy expires before he gets his deed. Bigelow v. Finch, 17 Barb. 394. See also Talbot v. Chamberlain, 3 Paige, 219; Code Civ. Proc., § 1253.

A certain possession, e. g., of five years, however, is sufficient to raise the presumption of a legal estate, upon which the judgment would attach as a lien. Dickinson v. Smith, 25 Barb. 102. And semble a possessory interest in general, other than under contract of sale, may be sold on execution. Griffin v. Spencer, 6 Hill, 525. See also as to the sale of a mere possessory

interest. Jackson v. Parker, 9 Cow. 73; 6 Barb. 116.

Trust Estates.—Vide supra, p. 319; as to liability of trust estates, also supra, and as to resulting trust, supra, p. 285. Land is not liable on a judgment against a trustee. As to how a trust estate is to be reached by a creditor. Mallory v. Clark, 20 How. 418; 9 Abb. 358; Code Civ. Proc., § 1431. Where a trust has been so far performed that the fund is payable directly

to the cestui que trust by the trustee, the fund may be reached to satisfy a judgment against the cestui que trust under Code Civ. Proc., § 2432, subd. 3, authorizing such proceedings against a person who has property in his hand belonging to the judgment-debtor. Lawrence v. Pease, 21 Supp. 223. Further as to trust interest. See Harvey v. Brisbin, 143 N. Y. 151.

See Harvey v. Brisbin, 143 N. Y. 151.

Contracts for the Sale of Land .- By the Code of Civil Procedure as by the Revised Statutes, the interest of a person holding a contract for the sale of land cannot be sold on execution, and this is so even if he has paid the full purchase-money. Code Civ. Proc., § 1253; 1 R. S. 744, § 4, supra, p. 525; Watson v. LeRow, 6 Barb. 481; Brewster v. Power, 10 Paige, 562; Griffin v. Spencer, 6 Hill, 525; Brighton v. The Bank of Orleans, 2 Barb. Ch. 458; 1d. 423; Bigelow v. Finch, 17 Barb. 394.

A sale on execution against the grantee of one holding a contract gives no title. Sage v. Cartwright, 9 N. Y. 49.

When an execution has been returned wholly or partially unsatisfied against a party holding a contract for the purchase of lands, a suit may be instituted against the defendants and the party bound to perform the contract, to prevent the transfer of the contract and to obtain satisfaction out of the interest of the defendant in the contract, which interest may be sold or transferred to the plaintiff by the court; and the court may decree a specific performance, and apply the interest of the judgment debtor to satisfy the judgment. 1 R. S. 744, \$ 4: 745, \$\$ 5, 6 (repealed by Laws of 1880, Chap. 245); Code Civ. Proc., \$\$ 1874, 1875; 2 Barb. 206; Sage v. Cartwright, 9 N. Y. 49; 12 Barb. 653; 6 Barb. 116, 127; Grosvenor v. Allen, 9 Paige, 74; Talbot v. Chamberlain, 3 Paige, 219. See also supra, pp. 523, 524.

Partnership Property.-A sale of partnership property on execution for a partnership debt is superior to a prior judgment against an individual partner for a prior debt. Martin v. Wagner, I Supm. 509.

A sale of real estate of a deceased partner under execution upon a judgment

against a surviving partner passes no title, nor will a surrogate's decree for the payment of the judgment authorize the sheriff to sell. Bennett v. Crain,

41 Hun, 183.

An apparent judgment lien on property belonging to a partnership standing in the name of one partner based on an individual debt renders the title unmarketable notwithstanding it may be shown by parol that it is the property of the partnership. Moore v. Williams, 55 Super. 116, affd., 115 N. Ŷ.

Sale of partnership property on judgment against all, though not for firm debt, is good as against firm creditors. Davis v. President, etc., D. & H. Can. Co., 109 N. Y. 47.

TITLE IV. THE SALE.

Advertisement and Notice of Sale .- Advertisement of the sale of real estate shall be made, giving time and place of sale, for forty-two days successively as follows:

1. A written or printed notice thereof must be conspicuously fastened up, at least forty-two days before the sale, in three public places, in the town or city where the sale is to take place, and also in three public places, in the town or city where the property is situated, if the sale is to take place in another town or city. 2. A copy of the notice must be published, at least once in each of the six weeks, immediately preceding the sale, in a newspaper published in the county or published in an incorporated village, a part of which is within the county; if there is a newspaper published in such county or village; or if there is none, in the newspaper printed at Albany in which legal notices are required to be published.

Code Civ. Proc., § 1434, which practically re-enacts the former law contained in 2 R. S. 368, § 34. Olcott v. Robinson, 21 N. Y. 150; Wood v. Moorehouse, 45 N. Y. 368.

Presumption is of regularity when no proof to the contrary. Wood v. Moorehouse, 45 N. Y. 368.

As to place in town clerk's office, see Town Law, L. 1890, Chap. 569, § 86. Publication of legal notices in New York city. L. 1882, Chap. 410, § 66 (amd. L. 1895, Chap. 1043); Greater New York Charter, L. 1897, Chap. 378, as amd. by L. 1901, Chap. 466, § 1526.

Affidavit by manager of newspaper is presumptively sufficient. Waters v.

Waters, 7 Misc. 519.

The language of the Code is not so imperative as to require the court, in view of the fact that a different practice has so long prevailed, to hold that seven instead of six publications are necessary to make a complete service of a summons by publication. Young v. Fowler, 73 Hun, 179.

The notice need not be published six full weeks prior to the sale, if it

is published weekly for six weeks. Olcott v. Robinson, 21 N. Y. 150, revg. 20 Barb. 140; Wood v. Moorehouse, 45 N. Y. 369, affg. 1 Lans. 405.

The execution upon which the sale is made need not be stated in the

notice or certificate of sale. Van Camp v. Searle, 79 Hun, 134.

Executions upon judgment recovered in actions in which attachments have been levied and the summons was not personally served are regulated

by Code Civ. Proc., § 1370, and an execution issued in such a case in the form prescribed by § 1369 is void. Id.

Second Sale and New Notices .- If the time for selling pursuant to notice has passed, or a new sale becomes necessary by default of purchaser, the sale must be readvertised in full, unless there be an order of the court. Bicknell v. Byrnes, 23 How. 486. So held as to mortgage sales.

How Described in the Notice.-The real property must be described in the name of township, or tract, number of lot, if any, or other appropriate description, and with common certainty. Code Civ. Proc., § 1435; 4 Barb. 159; 11 Barb. 173; Jackson v. Rosevelt, 13 Johns. 97.

Including in the notice more land than is sold will not invalidate. Code Civ. Proc., § 1435.

Time of Sale.— The sale must be at public vendue, between 9 A. M., and sunset. Code Civ. Proc., § 1384. A sale after sunset would be void (14 Barb. 9), or before sunrise. Wood v. Moorehouse, 1 Lans. 405, affd., 45 N. Y. 369. A sale on election day is not necessarily void. King v. Platt 37 N. Y. 155. See also 14 Barb. 10; 35 How. 23.

When Sale Completed .- A sale is not completed until the money is actually paid. Rowe v. Granger, 118 App. Div. 459.

Irregularities and Lots Sold Separately .- The sheriff, if required, is to

expose lots for sale separately, and no more is to be sold than sufficient to satisfy the execution. Code Civ. Proc., § 1437. So formerly, 2 R. S. 369, § 38. This is directory only, and noncompliance would render the sale voidable not void. Woods v. Monell, 1 Johns. Ch. 502; 7 Abb. 183; Jackson v. Newton, 18 Johns. 355; Cunningham v. Cassidy, 17 N. Y. 276; 17 Abb. 137.

The irregularity may be ratified or waived. 7 Abb. 183. See also 5 Barb. 568; Groff v. Jones, 6 Wend. 522; Am. Ins. Co. v. Oakley, 9 Paige, 262.

By the Code of Civil Procedure also, the omission to give the proper notice of or the taking down or defacing such notice, shall not affect the validity of any sale made to a purchaser in good faith without notice. Code Civ. Proc., § 1386. So formerly by 2 R. S. 368, § 40; vide also Moyer v. Hinman, 13 N. Y. 189; 22 Barb. 171; 3 Barb. 409; Wood v. Moorehouse, 1 Lans. 405, affd., 45 N. Y. 368.

A failure on the part of the sheriff to comply with the statutory directions as to the sale, will not invalidate it. Goff v. Jones, 6 Wend. 522; Neilson v. Neilson, 5 Barb. 565; Jackson v. Young, 5 Cow. 269; Jackson v. Hill, Id. 529; Cunningham v. Cassidy, 17 N. Y. 276.

The purchaser cannot be affected by any matter subsequent to the sale, arising between the parties to the judgment to which he is a stranger. Jackson v. Bartlett, 8 Johns. 361.

One defendant may be purchaser of the land of his codefendant. Neilson

v. Neilson, 5 Barb. 568. See also Hill & D. 265.

A sheriff is liable for loss to the judgment debtor from irregularities. Code Civ. Proc., § 1436; Frederick v. Wheelock, 3 Supm. 210.

He is bound to ascertain the situation of the property and sell accordingly. O'Donnell v. Lindsay, 39 Super. 523.

Purchase by Defendant's Grantee.—The grantee of the land from the defendant may become the purchaser at the sale, and the titles are not merged. Chautauqua Co. Bank v. Risley, 19 N. Y. 369.

Officer may not Purchase.—The officer or any deputy cannot purchase on such sale, directly or indirectly. If so, the sale is void; Code Civ. Proc., § 1387; 2 R. S. 370, § 41, unless the deputy be plaintiff. Jackson v. Collins, 3 Cow. 89.

Misnomer.— On a judgment against defendant by one name, the sale of his land under another is held void. 22 Barb. 277.

Fact of sheriff being described in some of the notices by the title of "sheriff" instead of "late sheriff," held a mere irregularity. Van Gilder v. Van Gilder, 26 Hun, 356.

As to sales in Hamilton county, vide L. 1866, Chap. 690, amd. L. 1867, Chap. 162; both repealed and superseded by L. 1870, Chap. 662.

Execution under Attachment.—Sales under execution in attachments. See Chap. XL.

Decease of Defendant after Advertisement.-A sale where the defendant died after advertisement and before sale, held valid. Wood v. Moorehouse, 1 Lans. 405, affd., 45 N. Y. 368; Holman v. Holman, 66 Barb. 215.

But his death before execution issued avoids the sale as to his successors who are not made parties to a proceeding to revive the judgment. Wallace v.

Swinton, 64 N. Y. 188; see also Code Civ. Proc., § 1381.

Lien not Necessary .- Though the lien have expired, the sale may be good. Nims v. Sabine, 44 How. Pr. 253; Beard v. Sinnott, 35 Super. 51 and 38 Super. 536 (further decision).

So, though there never were a lien. Siegel v. Anger, 13 Abb. N. C. 362.

Fraud.—A sale may be set aside for fraud though all proceedings were regular. Bruce v. Kelly, 39 Super. 27.

Sale as Evidence.—The fact that there was a sale is no evidence that there

was an execution. Goldman v. Kennedy, 49 Hun, 157.

See as to presumption thereof, now by laws of 1890, Chap. 158, when twenty years have elapsed. As to the effect of this statute, see Hume v. Fleet, 23 App. Div. 185.

Sheriff's Certificates.— On making the sale, the officer must make out, subscribe and acknowledge duplicate certificates of the sale containing,

I. The name of each purchaser and the time of sale. 2. A particular description of the property sold. 3. The price bid for each lot or parcel separately sold. 4. The whole consideration money paid.

Code Civ. Proc., § 1438.

These particulars differ from those previously required, for which vide 2 R. S. 370, § 42. These provisions requiring the giving of a certificate were first enacted by Law 1820, 167.

As to when they may be amended, vide 8 How. Pr. 8; Smith v. Hudson, 1 Cow. 430. As to assignments of the certificate, and further as to certificates, vide infra, Tits. V and VI.

Certificate as Evidence.—As to the effect of sheriff's certificate as evidence, vide Clute v. Emmerich, 21 Hun, 122. The recitals in a sheriff's certificate were made prima facie evidence in certain cases by Laws of 1884, Chap. 197, but the act was repealed at the next session by Laws of 1885, Chap. 112. See also p. 890.

Presumption of Validity .-- Recital of issue of execution was not evidence of it under 2 R. S. 370, § 44, nor is it now. Goldman v. Kennedy, 49 Hun, 157; also Dixon v. Dixon, 89 App. Div. 603. See as to presumption of execution having been issued after twenty years, Laws of 1890, Chap. 158.

Certificates to be Filed with County Clerk .- A duplicate certificate must within ten days after the sale be filed by the officer with the clerk of the county who must record and index the same; and one given to each purchaser.

Code Civ. Proc., § 1439. So formerly 2 R. S. 370, § 43; Laws of 1820,

An omission to do this will not prejudice the purchaser's title. Jackson v. Young, 5 Cow, 269.

Niagara County.-As to certificates in Niagara county, vide Laws of 1868. Chap. 586.

Record of Certificates and Index.— The clerk of any county must record the certificate and index the record in the name of the judgment debtor, in a book kept by him for that purpose.

Code Civ. Proc., § 1439, following Laws of 1857, Chap. 60, which provided also for the use of record, etc., as evidence, and was repealed by Laws of 1877, Chap. 417.

TITLE V. REDEMPTION.

Redemption by Defendant, or His Heirs, Devisees, etc.-Within one year after the sale of real property on execution it may be redeemed by paying to the purchaser, his executor, administrator or assignee, or to the sheriff to the use of the person entitled the sum of money paid upon the sale and interest at ten per cent., the redemption to be made by the judgment debtor, whose title was sold, or his heir, devisee, or grantee, who has acquired by inheritance, devise, deed, sale by virtue of a mortgage or of an execution or by any other means an absolute title to the property proposed to be redeemed, or in a case specified in Code Civ. Proc., § 1458 or 1459 to a portion of it.

Code Civ. Proc., §§ 1446, 1447, following but partly modifying, 1 R. S. 370, §§ 45, 46, which were repealed by Laws of 1877, Chap. 417.

Under a sale before the Revised Statutes the right of redemption held governed by the previous law. Hamilton v. Forkson, 6 Hill, 149, overruling 7 Wend. 463.

As to separate redemption of a distinct parcel, vide Code Civ. Proc., § 1458. If one thinking erroneously that his interest cannot be sold lets the time of redemption elapse and deed pass, he cannot be in any way relieved afterward. Weed v. Weed, 94 N. Y. 243.

The right follows the person, not the land. Livingston v. Arnoux, 56 N. Y. 507.

So the judgment debtor may redeem, though he has made a general assignment. Ellsworth v. Muldoon, 46 How. Pr. 246.

If a deputy made the sale, payment either to him or the sheriff is good. Livingston v. Arnoux, 56 N. Y. 507. See this case also as to evidence of

Leases.—The above provisions apply also to the sale and redemption of leasehold property having five years or more unexpired at the time of sale and any buildings thereon. Code Civ. Proc., § 1430, following Laws of 1837, Chap. 462, which was repealed by Laws of 1877, Chap. 417. See also Westervelt v. People, 20 Wend. 416; Huntington v. Forkson, 6 Hill, 149.

As to the redemption of demised premises for five years or over by the lessee, assignee, creditors, etc., or mortgagees or judgment creditors, when there has been dispossession, vide Code Civ. Proc., §§ 2256, 2257; L. 1842, Chap. 240.

Part Ownership.—The Revised Statutes provided that owners of portions might redeem the whole and enforce contribution, and that persons having undivided shares might redeem. This is covered now by Code Civ. Proc., §§ 1458, 1459, 1482.

Effect of Payment.—On such payment, the sale of the property redeemed and the certificates of the sale as far as they relate thereto become null and void. Code Civ. Proc., § 1448; 2 R. S. 371, § 49; Rankin v. Arndt, 44 Barb.

If a deed were thereafter executed by the sheriff, it would be void. Physe v. Riley, 15 Wend. 248.

A grantee to redeem must have the legal estate. Lathrop v. Ferguson, 22

Wend. 116.

The effect of redemption by a judgment debtor is to restore the lien of a junior judgment under which the sale was also had, but which was not reached in the application of the proceeds. Bodine v. Moore, 18 N. Y. 347.

Payment within the year by the debtor entirely extinguishes the power of the sheriff to make the sale; but the debtor may advance money to another to take the certificate. Rankin v. Arndt, 44 Barb. 251.

The purchaser and the debtor may make an agreement extending time to redeem, and it will effect other parties without their consent. Lewis, 4 N. Y. 554.

But a junior judgment creditor does not acquire any interest under the

agreement. Id.

After redemption by the debtor the property may be resold for the balance of the judgment. Titus v. Lewis, 3 Barb. 70.

Redemption by Creditors.—If not so redeemed within the year, then redemption may be made by a creditor, having in his own name, or as executor, administrator, assignee, trustee or otherwise, a judgment rendered, or a mortgage duly recorded, at any time before the expiration of fifteen months from the time of the sale, which is a lien upon the real property sold. Such a redemption may be made within three months after the year's expiration, on compliance with certain conditions and in accordance with §§ 1449 to 1470 of the Code of Civil Procedure. The details of this proceeding cannot be given here.

Similar provisions are found in 2 R. S. 371 et seq., §§ 51 to 61. Section 51 was amended by Law of 1847, Chap. 410, and the provisions as a whole were repealed by Laws of 1877, Chap. 417.

As to redemption and payment by creditors under the Code of Civil Procedure, vide Youmans v. Terry, 32 Hun, 624.

As to the affidavits under the Revised Statutes, vide Rice v. Davis, 7 Lans.

Creditors with judgments over ten years old may redeem. Ex parte Peru Iron Co., 7 Cow. 540; Tufts' Admr. v. Tufts, 18 Wend. 621.

The right of the judgment creditor to redeem cannot be prevented by the payment of his judgment by the purchaser, or by a stranger. People v. Beebe, 1 Barb. 379.

As to redemption by creditors where the land was sold under two executions, vide Buck v. Fox, 23 Barb. 259.

As to the proof of redemption by parol, and the proceedings on redemption, vide Stafford v. Williams, 12 Barb. 240.

A county clerk (not deputized) cannot act for the sheriff in the proceedings for redemption. People v. Rathbun, 15 N. Y. 528, affg. 23 Barb. 278.

The rights of parties are strictly established at the end of the fifteen months. Ex parte Raymond, 1 Den. 272.

The redemption cannot be made after the fifteen months. In the Matter of Van Rensselaer v. Sheriff of Onondaga, 1 Cow. 443; Jackson v. Budd, 7 id. 658; with the exception that twenty-four hours after the last previous redemption a creditor is allowed to redeem from a creditor who has redeemed. Code Civ. Proc., § 1454; L. 1847, Chap. 410.

They are calendar months. Snyder v. Warren, 2 Cow. 518; vide Statutory Construction Law, L. 1892, Chap. 677, § 26.

The plaintiff in execution, however, shall not be entitled to acquire title of the original purchaser, or of any creditor, unless under another judgment or decree. 2 R. S. 373, § 58; Code Civ. Proc., § 1457.

An assignee of a judgment is a creditor, and may redeem. In the Matter

of Van Rensselaer v. Sheriff of Onondaga, 1 Cow. 443.

The three months begun to run on the day succeeding the expiration of the year, and that day is counted inclusively. People v. Sheriff of Broome, 19 Wend, 87.

It may be made before midnight on the last day. Ex parte Bank of Monroe, 7 Hill, 177.

If last day is Sunday, it has been held redemption must be made the day before. People v. Luther, 1 Wend. 42. Cf., however, Statutory Construction Law. L. 1892. Chap. 677, § 27, excluding from a number of days specified Sunday or public holiday, other than half-holiday, if the last day of a period. The redemption by senior judgment creditor pays his judgment, if the land is worth enough. Benton v. Hatch, 43 Hun, 142, affd., 122 N. Y. 322.

When the last day to redeem was Saturday and a creditor redeemed on the the last day to redeem was Saturday and a creditor redeemed on the table set the set that the last day to redeem was Saturday and a creditor redeemed on the table set the set that the set that the last day to redeem was Saturday and a creditor redeemed on the set that the set th

that day, redemption by another on Monday was held valid. Porter v. Pierce, 43 Hun, 11, affd., 120 N. Y. 217. See Code Civ. Proc., § 1454. As to successive redemptions by creditors, vide infra.

As to redemption of property of which a receiver has been appointed, Moore v. Duffy, 74 Hun, 78.

By Mortgagees.—A mortgagee or his assignee or representative may redeem, if the mortgage is a lien and recorded within fifteen months from the sale. Section 51, Laws of 1836, Chap. 525; Laws of 1847, Chap. 410, repealed by Laws of 1877, Chap. 417. This matter is now regulated by Code Civ. Proc., § 1450.

Under the Act of 1820, a mortgagee could not redeem; nor under the Act of 1836, unless the mortgage was executed by judgment debtor. Hodger v.

Gallup, 3 Den. 527,

The provisions of the Revised Statutes were to apply to liens by mortgage in the same manner as to the liens by judgment or decree. Laws 1847, Chap. 410, repealed as to this by Laws of 1877, Chap. 417. See now Code Civ. Proc., § 1450.

As to proceedings by the mortgagee to redeem, vide Law of 1836, Chap. 525; and Laws of 1847, Chap. 410. Both repealed as above. For proceedings

now, vide Code Civ. Proc., §§ 1449-1463, 1465-1470.

A mortgage on a portion of the lands will entitle a mortgagee to redeem. Neilson v. Neilson, 5 Barb, 565. To the contrary was People v. Beebe, 1 id. 379.

By Superintendents of the Poor .- As to their right to redeem on sheriffs' sales, vide the Poor Law, G. L., Chap. XXVII; L. 1896, Chap. 225, § 131; L. 1862, Chap. 473.

Statement of Redemption.—The law formerly in force required the officer to file an elaborate statement. Laws of 1847, Chap. 410, § 3. This was repealed by Laws of 1877, Chap. 417. See now as to procedure, Code Civ. Proc., §§ 1455, 1468-1470.

Since the Act of 1847, a redemption by the creditor on or after the last day of redeeming must be made at the sheriff's office. Code Civ. Proc., § 1455; Laws of 1847, Chap. 410; Gilchrist v. Comfort, 34 N. Y. 235; Morss v. Purvis,

68 id. 225.

A deed shall be executed immediately after the lapse of fifteen months from the time of sale, except when there was redemption on the last day; in that case twenty-four hours after the last redemption. Code Civ. Proc., § 1471 (amd. L. 1866, Chap. 637); 2 R. S. 373, § 62 (amd. to accord with L. 1847, Chap. 410, § 4).

L. 1847, Chap. 410, § 4).

By its terms the provisions of the Law of 1847 were not to apply to previous sales. See L. 1847, Chap. 410.

Any creditor may redeem within twenty-four hours of a preceding redemption, even after the expiration of the fifteen months. Law of 1847, Chap. 410 (repealed Laws of 1877, Chap. 417); Code Civ. Proc., § 1454.

If full payment be not made on the redemption (unless by mistake of the sheriff), the redemption is void, and the purchaser is entitled to the deed. Hall v. Fisher, 1 Barb. Ch. 53, 56; Dickinson v. Gilliand, 1 Cow. 481; Ex parte Peru Co., 7 id. 540; People v. Rathbun, 1 Smith, 528.

The law requires certain evidences of the right to redeem to be exhibited

The law requires certain evidences of the right to redeem to be exhibited to the sheriff duly verified. If erroneous, the right to redeem is lost. See Code Civ. Proc., §§ 1464, 1465, 1466.

For the former law see the above sections of the Revised Statutes, 2 R. S. 373, § 60; also, Laws of 1847, Chap. 410; and Smith v. Miller, 25 N. Y. 619; People v. Becker, 20 *id.* 354; Hall v. Thomas, 27 Barb. 55; Griffin v. Chase, 23 *id.* 278, affd., 15 N. Y. 278; Rice v. Davis, 7 Lans. 393; Ellsworth v. Muldoon, 46 How. Pr. 246.

As to papers to be presented to sheriff by a creditor under Code Civ. Proc.,

vide Nehrbass v. Bliss, 88 N. Y. 600.

Certificate of Redemption, its Record and Effect.—A certificate is to be executed by the officer, to the party redeeming, which may be acknowledged or proved and certified in like manner as a deed to be recorded in the county where the property is situated. The recording thereof, in the office of the clerk or register of that county, in the book for recording deeds "has the same effect as against subsequent purchasers and incumbrancers, as the recording of a conveyance."

Code Civ. Proc., §§ 1469, 1470. Formerly Law of 1847, Chap. 410 (now repealed). The certificate or the record thereof, or a duly authenticated copy of such record, was prima facie evidence of the facts therein. See said L. 1847, Chap. 410.

On redemption the original certificate of sale becomes void, and any deed under it would be inoperative. Physe v. Riley, 15 Wend. 248.

Before the Law of 1847, there was no provision for the filing of the certificate of redemption as notice. It has been questioned whether, if no such certificate were filed, a bona fide assignee of the original certificate of sale would not be now protected against any redemption, even if fairly made. The law does not so state, but the general impression is that he would be so protected, if the filing of the evidence of redemption is omitted.

But in Livingston v. Arnoux, 56 N. Y. 507, it is held that failure to record will not affect the right of the party redeeming or his grantee in passession.

See also infra.

TITLE VI. THE DEED.

Title not Divested before Deed .- The title of the judgment debtor, or of a person holding under him, or deriving title through him is not divested by the sale until the expiration of the period of redemption, and the execution of the deed. But if the property is not redeemed, and a deed is executed in pursuance of the sale, the

grantee is deemed vested with the legal estate, from the time of the sale.

Code Civ. Proc., § 1440 (amd. by L. 1881, Chap. 681); also infra.

This section as amended further provides that where, in an action, the grantee's title is found invalid, the judgment debtor must pay him what he paid the sheriff with interest, and the costs of the action. Upon his so doing the title of the grantee is divested. But if he fail to do so within twenty days after judgment, the grantee's title becomes valid against him; provision is also made in case of appeal. See also Tit. VII.

This section does not cover invalidity arising from grantee's fraud. McIntyre V. Sandford 88 N. V. 734

v. Sandford, 88 N. Y. 734.

For the former law, vide 2 R. S. 373, § 61.

The deed must now be executed immediately after the expiration of the fifteen months from the time of sale. Code Civ. Proc., § 1471. Formerly, however, it seems it might be executed at any time after the fifteen months, no matter how remote. Reynolds v. Darling, 42 Barb. 418.

But purchasers without knowledge of the sale after more than ten years after the judgment would be protected, even if they knew of the judgment. Id.

Completion of the Sale after Fifteen Months.— Immediately after the expiration of fifteen months from the time of sale; except where a redemption has been made on the last day of the fifteen months, and in that case immediately after the expiration of twentyfour hours from the last redemption; the sheriff, who made the sale, must execute the proper deed or deeds, in order to convey to the person or persons entitled thereto, the part or parts of the property sold, which have not been redeemed by the judgment debtor, his heir, devisee, or assignee. The deed conveys to the grantee therein the right, title, and interest, which were sold by the sheriff. After the same shall have been recorded for twenty years in the county where the real estate is situated, it shall be presumptive evidence of the facts therein stated.

Code Civ. Proc., § 1471 (as amd. L. 1886, Chap. 637).

For former law see 2 R. S. 373, § 62 (amd. to accord with L. 1847, Chap. 410, § 4).

The deed cannot be subsequently altered or amended by the sheriff. Clarke v. Miller, 18 Barb. 269.

A deed may be given to a third party by the creditor's direction. Merrit v. Jackson, 1 Wend. 46.

As to laches, see People v. Grant, 61 App. Div. 238.

Deeds, to Whom Executed.—If any part of the property remains unredeemed by the creditor, the sheriff must convey it to the purchaser at the sale, or, in case of assignment, to the last assignee. Parts redeemed by a creditor must be conveyed to him or, if he have assigned, to his last assignee.

If a person entitled to a deed die before delivery, the deed must be to his executor or administrator in trust for his heirs or devisees, subject to dower of his widow, if there is one; but, it may be sold in a proper case for the payment of his debts, in the same manner as land, whereof he died seized.

Code Civ. Proc., §§ 1472, 1473. See also infra. The former law is found in Laws of 1835, Chap. 189, as amended by Laws of 1867, Chap. 116, and 2 R. S. 374, §§ 63, 64, which were repealed by Laws of 1877, Chap. 417. Their provisions are practically the same as those of the

By Law of 1867, Chap. 116, the deed was to be given to any person or persons to whom such certificate had been duly issued or had been duly assigned, or to any person who had duly redeemed the said real estate, other than the execution debtor or his heirs or assigns, the executors or administrators of any deceased assignee, or of the person who had so redeemed the

The method of transferring exists solely by statute, which must be strictly followed, and a deed to an heir, instead of to the executor or administrator, is improper. Dixon v. Dixon, 89 App. Div. 603.

Assignments to be Recorded.—An assignment of the certificate must be acknowledged or proved and certified in like manner as a deed to be recorded in the county where the property is situated and filed in the office of the clerk of that county, before the assignee or his representatives, are entitled to a deed. Code Civ. Proc., \$ 1474; formerly so by Laws of 1835, Chap. 189, which was repealed by Laws of 1877, Chap. 417.

An omission to record the assignment will not vitiate the title of the purchaser from a redeeming creditor. Chautauqua County Bank v. Risley, 4 Den. 480, revd. on another point, 19 N. Y. 369; Bank of Vergennes v. Storrs, 7 Hill, 91; see People v. Muzzy, 1 Den. 239. As to assignment by a bank,

vide same case.

A sheriff may waive the recording of an assignment of certificate of sale, and give a deed without it. Phillips v. Schiffer, 7 Lans. 347; Wood v. Moorehouse, 45 N. Y. 369, affg. 1 Lans. 405. See this case also as to a junior judgment creditor redeeming from the assignee of the certificate.

As to form of acknowledgment of the assignment, vide Ex parte Newell, 4 Hill, 608; also People v. Newell, 1 Den. 239, as to rights, in redeeming, of

a judgment creditor, who is also assignee of the certificate of sale.

The sheriff cannot be compelled to give the deed, until the assignment has been filed. People v. Ransom, 4 Den. 145, affd., 2 N. Y. 490.

Assignments of sheriff's certificates made prior to the Law of 1835, Chap. 189, held not invalidated by that act, although they were not acknowledged, proved or filed. Phillips v. Schiffer, 64 Barb. 548.

Authority of the Sheriff.-There must be an existing power in the sheriff at the time of the execution of a conveyance by him, or he can confer no title. Therefore, if redemption be made, a deed to the purchaser would be void, and it might be shown by parol. Stafford v. Williams, 12 Barb. 240; Livingston v. Arnoux, 56 N. Y. 507, distinguished in People v. Lynch, 68 id. 473.

Execution of Deed .- If the sheriff dies, is removed or becomes otherwise disqualified to act, at any time after making sale, the undersheriff may conduct the proceedings and execute the deed; if the undersheriff dies, or is removed or becomes otherwise disqualified, the sheriff's successor must act. And they have the same powers, and are subject to all the liabilities and duties of the sheriff who made the sale. This section applies to sales made before or after the Code of Civil Procedure.

Code Civ. Proc., § 1475; substituted for 2 R. S. 374, §§ 65, 66, 67, and L. 1867, Chap. 116, § 1; see also L. 1835, Chap. 189; 1837, Chap. 462; 1836, Chap. 525, infra, repealed by L. 1877, Chap. 417; Gorham v. Gale, 7 Cow. 739; Jackson v. Tuttle, 9 id. 233; Sickles v. Hogeboom, 10 Wend, 562. By Revised Laws of April 13, 1813, where the sheriff died before signing

the deed, his executors or administrators might sign it. 1 R. L. 506.

A deed from the sheriff is necessary to pass the title under the statute of frauds. Catlin v. Jackson, 8 Johns. 520.

Without a substantial compliance with the statute provisions, the redeeming creditor acquires no right by the sheriff's deed. People v. Covell, 18 Wend. 598; People v. Sheriff of Broome, 19 id. 87; Waller v. Harris, 20 id.

Recitals in the deed of various assignments of the certificates held not conclusive, but otherwise as to the executions or reservations at the sale. Stafford v. Williams, 12 Barb. 240; Jackson v. Roberts, 11 Wend. 422; Griffin v. Chase, 23 Barb. 278, affd., 15 N. Y. 528.

If recitals are omitted or are erroneous, the deed is not vitiated. Jackson v. Streeter, 5 Cow. 529; Jackson v. Jones, 9 id. 182; Jackson v. Pratt, 10 Johns. 381; also 4 Barb. 180; Spraker v. Cook, 16 N. Y. 567; Jackson v. Paige, 4 Wend. 585. And the recitals under certain circumstances will be presumed correct in default of other proof. Phillips v. Schiffer, 64 Barb. 548.

Erroneous recital of day of sale where the certificate is correct is harmless.

Holman v. Holman, 66 Barb. 215.

Recitals of the deed are not evidence as to the issue of execution. Goldman v. Kennedy, 49 Hun, 157; nor of an order mentioned. Dixon v. Dixon,

89 App. Div. 603.

After deed has been recorded twenty years in the county where the real estate is situated, it is presumptive evidence of the facts therein stated. Code Civ. Proc., § 1471; see Dixon v. Dixon, 89 App. Div. 603.

Description .- If the land is not definitely described, no title passes. Jackson v. De Lancey, 13 Johns. 537, affg. 11 id. 365; Peck v. Mallams, 10 N. Y. 509, 533; Jackson v. Roosevelt, 13 Johns. 97.

A purchaser under misrepresentation may be relieved. 15 Abb. 259.

Obtaining Possession .- On obtaining the deed the purchaser has no right to enter on the premises, unless they are vacant. He is left to his ejectment suit, or to proceed under the Code of Civil Procedure to obtain possession of real property by summary proceedings. Code Civ. Proc., § 2232 (allowing summary proceedings) following 2 R. S. 511, § 28, which was repealed by Laws of 1880, Chap. 245; Evertson v. Sawyer, 2 Wend. 507; People v. Nelson, 13 Johns. 340.

To recover in ejectment, held the plaintiff must show the judgment defendant in possession at the time of the recovery of the judgment against him, and a continued possession from that time to the time of the commencement of the action, and that the plaintiff acquired the title under the sheriff's sale by a conveyance. 6 Barb. 116; 25 id. 102; 17 id. 157.

He must prove the judgment. 11 Barb. 498; Wright v. Douglass, 2 N. Y.

He must prove the judgment by the production of the judgment-roll, duly filed, and must show that it was docketed. Townshend v. Wesson, 4 Duer, 342. The plaintiff also might proceed under the Revised Statutes to get posses-

sion or recover rent. Spraker v. Cook, 16 N. Y. 257.

A purchaser at a judicial sale is not required to accept a deed and then struggle for possession; he is entitled to be put into possession when he

accepts the conveyance and pays the purchase price.

A tender of a deed and possession to a purchaser at a judicial sale is too late when it was made nearly two months after the date fixed in the contract for the completion of the purchase, and more than one month after the purchaser, who had failed to secure even a promise of possession with the deed, had declared the contract at an end, and demanded the repayment of the money paid by him. Remsen v. Reese, 72 Hun, 370.

Effect of the Deed .- The deed relates back to the time of the sale, although executed afterward. But the title of the judgment debtor is not gone until Laws of 1881, Chap. 681) following generally 2 R. S. 373, § 61, which was repealed by Laws of 1677, Chap. 417; Jackson v. Dickinson, 15 Johns. 309; Jackson v. Ramsay, 3 Cow. 75; Wright v. Douglass, 2 N. Y. 373, revg. 3 Barb. 554; Rich v. Baker, 3 Den. 79; Boyd v. Hoyt, 5 Paige, 65; Talbot v. Chamberlain, 3 id. 219; Farmers' Bank v. Merchant, 13 How. Pr. 10; Vaughn v. Ely, 4 Barb. 159; Smith v. Colvin, 17 id. 157; Jackson v. Winslow, 9 Cow. 13; McLaren v. Hartford Fire Ins. Co., 5 N. Y. 151; Wright v. Douglass, 7 id. 564, revg. 10 Barb. 97; Holman v. Holman, 66 Barb. 215; Dixon v. Dixon, 38 Misc. 652.

The purchaser's title before the deed, however, is but a lien or conditional right, the naked title being in the debtor, who has the enjoyment of the

property until the expiration of a year. Evertson v. Sawyer, 2 Wend. 507. The retroactive effect is only as to recoveries for injury to the property

under the sale. Schermerhorn v. Merrill, 1 Barb. 511.

The deed extinguishes all junior liens. Ex parte Stevens, 4 Cow. 133. Until the expiration of a year the judgment debtor is entitled to possession, rents and profits. Evertsen v. Sawyer, supra; Marsh v. White, 3 Barb. 518; Schermerhorn v. Merrill, 1 id. 511.

A lease given after the sale by the debtor would be extinguished by the

deed. 5 Barb. 619.

By a sale of land under a judgment the lien of the judgment and the right to redeem under it are extinguished. 4 Barb. 125; 17 Abb. 137; Wood v.

Colvin, 5 Hill, 228.

The purchaser, or one redeeming, takes all the title of the judgment debtor, the benefit of all estoppels and covenants running with the land; Sweet v. Green, 1 Paige, 473; Kellogg v. Wood, 4 id. 578, and subject to all prior incumbrances or liens; also junior liens, to the extent of any surplus. Bartlett v. Gale, 4 Paige, 503.

The title of an owner of land is not affected by a sale thereof on execution issued upon a void judgment, and a subsequent conveyance by him is as effectual as if the judgment had not in form been entered against him. McCracken v. Flanagan, 141 N. Y. 174.

Extrinsic evidence cannot be given to explain the sheriff's deed as to his intent, but it may as to location of land, etc., or as to parcels. Mason v. White, 11 Barb. 173; vide Bartlett v. Judd, 21 N. Y. 200, however, doubting

this case.

Though under Revised Laws of 1813, the docketing of a judgment was not essential, held the sheriff's deed was not effectual as against a bona fide purchaser for value from the judgment debtor. Sweetland v. Buell, 164

The Deed as Evidence.-A sheriff's deed is evidence of his authority and of the regularity of the proceedings, at any rate after the lapse of forty years. Dunham v. Townshend, 43 Hun, 580, affd., 118 N. Y. 281; Goldman v. Bantee, 12 N. Y. Supp. 346. Compare Hasbrouck v. Berhans, 42 Hun, 376.

Recitals in deed or certificate of an execution are prima facie evidence of

the existence of such execution. L. 1890, Chap. 158.

After record for twenty years in county where real estate is situated, deed is presumptive evidence of facts stated therein. Code Civ. Proc., § 1471: vide also supra.

Code Civ. Proc., § 1471, and amendments of 1886, Chap. 637, held to apply

only to future cases. Goldman v. Kennedy, 49 Hun, 157.

Record.—The recording of a sheriff's deed has been held not notice to a party who contracted with the judgment debtor to purchase the land, and entered into possession before judgment. Moyer v. Hinman, 13 N. Y. 180, 182; Smith v. Gage, 41 Barb. 60, overruling 17 id. 139.

Held that one who purchases land without notice of a prior sale under execu tion is protected, if he records his deed prior to the sheriff's deed.

v. Darling, 42 Barb. 418. And see supra, Chap. XXVI, Tit. III.

Registration is no notice, except in cases where registry is made necessary

by statute. James v. Morey, 2 Cow. 246.

But if a deed from a sheriff is recorded prior to a deed from a debtor before judgment, it will prevail. Jackson v. Post, 15 Wend. 588. See also Cook v. Travis, 22 Barb. 338, affd., 20 N. Y. 400.

A purchaser without notice at sheriff's sale will hold the same, although the defendant had previous to the judgment conveyed the lands, provided the sheriff's deed is first recorded. Jackson v. Chamberlain, 8 Wend. 620; Hetzel v. Barber, 69 N. Y. 1.

Auction to Reform Deed may be had in equity — necessary parties. Butler v. Clark, 21 N. Y. Supp. 415; s. c., 66 Hun, 444, affd., 142 N. Y. 636.

U. S. Marshal's Sales.—As to sales under process out of the Federal courts, vide Law of March 3, 1797, I U. S. St. at L. 515; Law of May 7, 1800, 3 U. S. St. at L. 61; Law of May 20, 1826, 4 U. S. St. at L. 184; Law of May 19, 1828, 4 U. S. St. at L. 281; Law of August 1, 1842; R. S. U. S., §§ 916, 985 to 989, and 994. Also the rules of U. S. courts of the Circuit and District. Vide Rule 21, of Admiralty rules, amended I Black. 1862. Also Beers v. Haughton, 9 Pet. 329 at 361. See as to whom the sale affects. U. S. Tel. Co. v. Boston, etc., Co., 147 U. S. 431.

TITLE VII. REMEDIES FOR FAILURE OF TITLE TO REAL ESTATE SOLD BY EXECUTION AND TO ENFORCE CONTRIBUTION.

Purchaser may Recover Purchase Money.— The purchaser of real property, sold by virtue of an execution, his heir, devisee, grantee, or assignee, who is evicted from the possession thereof, or against whom judgment is rendered, in an action to recover the same, may recover the purchase money, with interest, from the person for whose benefit the property was sold, where the judgment was rendered, or the eviction occurred, in consequence either:

1. Of any irregularity in the proceedings concerning the sale; or
2. Of the judgment upon which the execution was issued, being vacated, or reversed, or set aside for irregularity, or error in fact.

Code Civ. Proc., § 1489; 2 R. S. 375, § 68.

Remedy of Judgment Creditor.— In that event the judgment by virtue of which the sale was made remains valid and effectual, and there may be a further execution on that judgment, but the execution does not affect a purchaser in good faith, or an incumbrancer by mortgage, judgment or otherwise, whose title or whose incumbrance accrued, before the actual levy thereof.

Code Civ. Proc., § 1480; 2 R. S. 375, § 69.

Contribution is also provided for, when the real property liable and levied on is owned by several persons, and the order in which lands are to contribute; and it is also provided that the original

judgment may be used to enforce contribution, and shall continue a lien as other judgments by sections 1251 and 1255 on the lands from the time of docketing. Code Civ. Proc., §§ 1481–1484; 2 R. S. 375, §§ 70–72, as amd.

The lien of the original judgment may be preserved by filing in the clerk's office of the county where the real property is situated, within twenty days after the payment, for which contribution is claimed, an affidavit in behalf of the person aggrieved, stating the sum paid, and his claim to use the judgment for the reimbursement thereof, with a notice requiring the clerk to make the entries specified in section 1486. *Bona fide* holders for value without notice, who took before the entries were made are not affected. Code Civ. Proc., § 1485; 2 R. S. 375, § 73, as am'd.

On filing the affidavit and notice the clerk must make upon the docket of the judgment an entry, stating the sum paid, and that the judgment is claimed to be a lien to that amount. Similar filing and entry may be made in each county where there is real estate. Code Civ. Proc., § 1486.

See the provisions on which the above sections of the Code of Civil Procedure are founded. Article 3, Tit. V, Chap. VI, Part III, of the Revised Statutes, which was repealed by Laws of 1877, Chap. 417. See as to these provisions, Wood v. Genet, 8 Paige, 137; Lansing v. Quackenbush, 5 Cow. 38; James v. Hubbard, 1 Paige, 228; Clowes v. Dickenson, 5 Johns. Ch. 235.

CHAPTER XXXIX.

RECEIVERS UNDER PROCEEDINGS SUPPLEMENTARY TO EXECUTION.

The subject of proceedings supplementary to execution is now regulated by Chap. XVII, Tit. XII, Arts. 1, 2 of the Code of Civil Procedure, to which reference should be had.

The restriction against such proceedings in the case of certain corporations

was abolished in 1908. L. 1908, Chap. 278; see also in this connection, Keystone Pub. Co. v. Hill Dryer Co., 55 Misc. 625.

Even formerly a foreign corporation not doing business in the State, nor having any business or fiscal agency, or for the transfer of stock here, was not within the prohibition. *Id.*; see also Logan v. McCall Pub. Co., 140 N. Y. 447.

Order for Receiver.—After execution unsatisfied, or in a proper case before execution is returned, under supplementary proceedings against the judgment debtor, or a third person holding property of the judgment debtor, a judge of the court may by order forbid a transfer or other disposition of the property of the judgment debtor, may appoint a receiver of his property, or may order any "property" not exempt, to be applied on the judgment.

Code Civ. Proc., §§ 2446-2451, 2464-2471. These provisions are based on Code Proc., §§ 297, 298, which contain the former law.

Where, however, a receiver of the property of the same person has already been appointed, the judge must make an order extending his receivership to the proceedings before him. This has the same effect as if he were originally appointed in that proceeding. There can be but one receiver.

Code Civ. Proc., § 2466.

A receiver may be appointed though the property be worth nothing. Baker v. Herkimer, 43 Hun, 36.

As to the right of a junior creditor to vacate order, see Lisner v. Toplitz,

177 N. Y. 559.

The appointment rests largely in the discretion of the judge to whom application is made. Matter of Stafford, 105 App. Div. 46.

Order to be Filed and Recorded.— An order appointing a receiver or extending a receivership must be filed in the office of the clerk of the county wherein the judgment-roll is filed; or if the special proceeding is founded upon an execution issued out of a court other than that in which the judgment was rendered, in the office of the clerk of the county wherein the transcript of the judgment is filed. The clerk is to record the same in a special book, and note the time of filing.

Code Civ. Proc., §§ 2467, 2470. For the former law, vide Code Proc., § 298. The above provisions for the recording and filing of said order were first passed by amendment to the Code of Procedure of April 23, 1862. By amendment of May 4, 1863, a provision similar to the following was added to the section.

When Real Property to Vest .- Real property is vested in the receiver from the time when the order or a certified copy thereof, as the case may be, is filed with the clerk of the county where it is situated.

Code Civ. Proc., § 2468, subd. 1. See Kimball v. Burrell, 14 N. Y. St. Rep. 536.

A substantially similar provision was contained in Code Proc., § 298 (though that section required recording as well as filing) under which the

following decisions were made.

Ordinarily the mere appointment of a receiver does not vest in him the real estate of the debtor. The court can compel a conveyance thereof to pass the title. Chautauqua Co. Bk. v. Risley, 19 N. Y. 370, overruling 9 id. 142; Wilson v. Wilson, 1 Barb. Ch. 592; Moak v. Coats, 33 Barb. 498; People v. Hurlburt, 5 How. 446. See also infra.

After the amendments of 1862-1863, it was supposed that under these proceedings no conveyance was necessary to the receiver. The following cases had theretofore held that no conveyance was necessary. Porter v. Williams,

9 N. Y. 142; Beamish v. Hoyt, 2 Rob. 307. In 1877 it was held, in Scott v. Elmore, 10 Hun, 68 (disapproved 5 N. Y. St. Rep. 818), criticising Porter v. Williams, supra, that a conveyance was necessary, but this case was itself disapproved in Wing v. Disse, 15 Hun, 190 (decided in 1878) which held a conveyance not necessary. In Manning v. Evans, 19 Hun, 500 (decided in 1880), it was held that an order that the judgment debtor assign his real estate was unnecessary, as the interest vested in the receiver without assignment. So also First Nat. Bk. of Canandaigua v. Martin, 49 Hun, 571.

Appointment.—The receiver's appointment is not complete until his bond

is filed. Johnson v. Martin, 1 Supm. 504; Conger v. Sands, 19 How. Pr. 8.

The regularity of the appointment of the receiver cannot be questioned collaterally. 12 Abb. 465; Wright v. Nostrand, 94 N. Y. 31.

His Title.— The title of the receiver held to relate back to, and to take effect only from the date of the order appointing him. Becker v. Torrance, 31 N. Y. 631 (1864); DuBois v. Cassidy, 75 N. Y. 298; see also Metcalfe v. Del Valle, 64 Hun, 245.

He was held to be vested from the time of filing and recording the order. Bostwick v. Menck, 40 N. Y. 383, reversing 10 Abb. 197; Rogers v. Corning,

44 Barb. 229; Wing v. Disse, 15 Hun, 190.

Where the debtor resides in the county in which the land is, filing once in that county is enough. Fredericks v. Niver, 28 Hun, 417.

The lien held not to date back to the time of commencing supplementary proceedings. Becker v. Torrance, 31 N. Y. 631; Voorhees v. Seymour, 26 Barb. 569; Conger v. Sands, 19 How. Pr. 8.

The lien as against assigned property held to begin only from the time of commencement of action by the receiver. Field v. Sands, 8 Bosw. 685; Conger v. Sands, 19 How. 8; Bostwick v. Menck, supra; see Watson v. N. Y. C. R. R., 6 Abb. N. S. 91.

He takes no after acquired property. Thorn v. Fellows, 5 Wkly. Dig. 473; DuBois v. Cassidy, 75 N. Y. 298; Metcalf v. Del Valle, 64 Hun, 245.

His title to real property is only a qualified one, subject to which the debtor may deal with the property as formerly. Moore v. Duffy, 74 Hun, 78. See also supra.

It is only the right to take possession of the judgment debtor's real property for the purpose of satisfying the judgment, and is subject to be terminated by sale in execution and otherwise. Hall v. Senior, 54 Misc. 463.

His Authority.—The receiver represents only those who procured or are represented by his appointment. Bostwick v. Menck, 40 N. Y. 383, revg. 10 Abb. 197. The above and various cases also show that the receiver may bring an action to set aside all fraudulent transfers theretofore made as against, and to the extent only of the interests represented by him. See, however, Gilroy v. Everson-Hickok Co., 118 App. Div. 733.

As to the rights of judgment creditors who are not parties to the proceedings, vide Chautauqua Bk. v. Risley, 19 N. Y. 370.

An assignee, receiver, etc., has a right to disaffirm, treat as void, etc., any action in fraud of rights of creditors and others interested in the estate. Real Property Law, L. 1896, Chap. 547, § 232; L. 1894, Chap. 740; see however, Gilroy v. Everson-Hickok Co., 118 App. Div. 733; also Wright v. Nostrand, 94 N. Y. 31.

As to actions by the receiver see a full discussion of the subject in Wright v. Nostrand, 94 N. Y. 31.

What Property Passes.— See Code Civ. Proc., § 2463.

A widow's right of dower it is held may be reached under these proceedings and a conveyance compelled. Moak v. Coats, 33 Barb. 498; Stewart v. McMartin, 5 id. 438; Payne v. Becker, 87 N. Y. 153.

An estate by the curtesy also held to pass under these proceedings. Beamish

v. Hoyt, 2 Rob. 307.

A sale cannot be made freeing the land from dower; but must be subject thereto. Lowry v. Smith, 9 Hun, 514.

Nor a trust interest created by or proceeding from a person other than the judgment debtor. Code Civ. Proc., §§ 1879, 2463. Also infra. Nor property held by defendant in a representative capacity, as executor, trustee, receiver, or assignee, although the judgment was obtained against the defendant in his representative capacity. Jones v. Arkenburgh, 112 App. Div. 483.

An award in condemnation proceedings held to pass. Van Loan v. City of

New York, 105 App. Div. 572.

Property out of the State.—Such property it seems might have been reached, when the Code of Procedure was in force, under these proceedings by compelling a conveyance to a receiver. Fenner v. Sanborn, 37 Barb. 610; Bailey v. Ryder, 10 N. Y. 363; Bunn v. Forda, 2 Code Rep. 70.

But cannot be under the Code of Civil Procedure. Smith v. Tozer, 42

Hun. 22.

The property vested in the receiver is only such as the debtor owned at the time of granting the order for examination. That subsequently acquired does not pass. Bostwick v. Menck, 40 N. Y. 383, revg. 10 Abb. 197; Campbell v. Genet, 2 Hilt. 290; Sands v. Roberts, 8 Abb. 343; Potter v. Low, 16 How. 549; Graff v. Bennett, 25 id. 470, affd., 31 N. Y. 9; DuBois v. Cassidy, 75 N. Y. 298; Gilroy v. Everson-Hickok Co., 118 App. Div. 733.

The receiver would not take an interest in a trust estate that was inalienable by the mere force of his appointment. Genet v. Foster, 18 How. 50; Campbell v. Forster, 35 N. Y. 361; Locke v. Mabbett, 2 Keyes, 457; Graff v. Bennett, 31 N. Y. 9, affg. 2 Rob. 54; 25 How. 470; see Code Civ.

Proc., § 2463.

Such an interest can be reached only through the agency of a court of equity, vide supra, p. 289, and Stewart v. Foster, 1 Hilt, 505; Genet v. Foster, 18 How. 50; Williams v. Thorn, 70 N. Y. 270; also Metcalf v. Del Valle, 64 Hun, 245.

Action of the Receiver .- Sales are made by the receiver, by order, on application to the court. Code Civ. Proc., § 2471. Also if there are adverse interests or claims, the court may forbid transfer by others until the interest is determined, in an action to be brought by the receiver. Code Civ. Proc., § 2451; Code Proc., § 299; Scott v. Nevins, 6 Duer, 672; Dickerson v. Van Tyne, 1 Sandf. 724; Wardell v. Leavenworth, 3 Edw. Ch. 244.

A delay in taking possession,—e. g., of ten months—would not postpone the lien of the receiver. Fessenden v. Woods, 3 Bosw. 550.

As to the form and manner of the action to be brought by the receiver to set aside other transfers, vide Coope v. Bowles, 42 Barb. 88; Livingston v. Staessel, 3 Bosw. 19.

Where the receiver's title is vested, it cannot be disturbed by any order in proceedings to which he was not a party. Rogers v. Corning, 44 Barb. 229.

Held the receiver cannot recover surplus of trust, nor enforce an implied or resulting trust. Only the creditor can do so. Ward v. Petrie, 157 N. Y. 301; Levey v. Bull, 47 Hun, 350; Underwood v. Sutcliffe, 77 N. Y. 58. Cf. Metcalf v. Del Valle, 64 Hun, 245.

Receiver held not authorized to bring partition. Payne v. Becker, 87

N. Y. 154. See also Chap. XXX.

Concurrent Remedies.—The remedies by a receiver and by execution may be pursued concurrently. Smith v. Davis, 63 Hun, 100; see, however, Matter of Damers v. Sternberger, 52 Misc. 532.

CHAPTER XL.

TITLE UNDER ATTACHMENT PROCEEDINGS.

In actions to recover a sum of money only as damages for certain causes specified property of foreign corporations, of nonresidents, of absconding and concealed residents, or of persons or domestic corporations having removed, or assigned, or being about to remove or assign property, or persons making fraudulent statements in writing, or being absent without designation of agent, etc., for more than six months; and of public officers for peculation, may be attached and sold as will be seen more particularly by reference to the provisions of the Code of Civil Procedure regulating attachments. The details of these provisions cannot be given here.

Code Civ. Proc., §§ 635-712.

The sheriff is to levy upon enough personal and real property of the defendant to satisfy the plaintiff's demand, with costs and expenses. He may levy from time to time, and as often as is necessary, until he has covered property enough. He is to take into his possession all evidences of title to land, and personal property capable of manual delivery. Id. The levy may be set aside and the attachment as a writ stand. Bridges v. Wade, 110 App. Div. 106.

The attachment may be discharged on defendant's giving a bond. See Code

Civ. Proc., §§ 687, 696.

In case of two or more warrants against the same person the rules of preference are the same as in case of execution. Code Civ. Proc., § 697. Execution on the judgment must issue to the sheriff who attached even though his term of office have expired, unless some other person be designated by law to complete his unfinished business, and in case of a nonresident or a foreign corporation served without the State or by publication, levy can be made only upon property under attachment at the time of the judgment. Code Civ. Proc., §§ 706, 707. The order in which sale is to be made is provided for by Code Civ. Proc., §§ 1370, and the proceedings to satisfy the judgment are fully regulated by Code Civ. Proc., § 708.

Attachment of Real Estate.— Any interest in real property, either vested or not vested, which the defendant could alien is capable of attachment. Code Civ. Proc., § 645. Real estate is attached by filing with the clerk of the county where it is situated, a notice of the attachment, stating the names of the parties to the action, the amount of the plaintiff's claim, as stated in the warrant, and a description of the particular property levied upon. The notice must be subscribed by the plaintiff's attorney, adding his office address; and must be recorded and indexed by the clerk, in the same book, in like manner, and with like effect, as a notice of the pendency of an action. Code Civ. Proc., § 649, subd. I.

See also this section, subd. 4, as to property discovered in any action brought under Code Civ. Proc., § 655, subd. 2.

Attachment of Real Estate before the Code of Civil Procedure.—Real estate might be attached without the officer going on the property, or having it in view, or leaving a copy of the warrant. He need only have done some act, by way of memorandum or entry, with intent to make the property liable to the process. This constituted a seizure and created a lien against the debtor, and all claiming under him by subsequent title, except bona fide purchasers and incumbrancers. Rodgers v. Bonner, 55 Barb. 9, affd., 45 N. Y. 379; Burkhardt v. McClellan, 15 Abb. 243.

The sheriff may attach any property the defendant may have fraudulently disposed of. Rinchey v. Stryker, 31 N. Y. 140; Gage v. Dauchy, 34 N. Y. 293.

The possessory right of a mortgagor may be attached. Hall v. Sampson, 23

How. 84; Fairbanks v. Bloomfield, 5 Duer, 434.

Sale under the attachment confers no greater title than the debtor had when judgment was docketed. Lamont v. Cheshire, 6 Lans. 234, affd., 65 N. Y. 30.

The attachment lien was not lost by the decease of the defendant before

judgment. Thacher v. Bancroft, 15 Abb. 243.

Real estate of a nonresident situated out of the State, could not be sold

under an attachment here. Runk v. St. John, 29 Barb. 585.
Failure to serve summons personally, or begin publication within thirty days from attachment, is a fatal defect, and is not cured by a subsequent appearance. Cossit v. Winchell, 39 Hun, 439. See as to appearance pending publication. Fuller v. Beck, 46 Hun, 519, affd., 108 N. Y. 355.

Under the Code of Civil Procedure.—Where the person designated by a foreign corporation to receive service for it cannot be found within the State, held a delivery of the summons and complaint to the custodian of property attached and a delivery thereof by the latter to the managing agent of the corporation, who calls the attention of the board of directors of the corporation thereto, is a sufficient service to support the attachment, although the papers were not delivered to such agent with intent to effect a service, and were subsequently returned to said custodian. Kieley v. Central, etc., Co., 13 Misc. 85.

If defendant appears pending publication, it need not be completed. Fuller v. Beck, 46 Hun, 519, affd., 108 N. Y. 355.

Failure to serve or publish summons within statutory time avoids the attachment. Ruser v. Union Dis. Co., 7 Misc. 396.

An attachment not signed by plaintiff's attorney as required by Code Civ. Proc., § 641, is irregular and void. Lassen v. Burt, 46 Misc. 582.

Lis Pendens.— The clause of Code of Procedure, § 132, by which subsequent purchasers and incumbrancers were bound by all proceedings in the action taken after filing of the lis pendens, to the same extent as if they were parties to the action, was held not applicable to attachment cases. mont v. Cheshire, 6 Lans. 235, affd., 65 N. Y. 30. This is now regulated by Code Civ. Proc., § 1670 et seq; vide "Lis pendens," Chap. XLV.

Affidavits, etc., for Attachments.—The moving papers should be sufficient to call for exercise of court's discretion. Waterbury v. Waterbury, 76 Hun, 51, affd., 60 St. Rep. 876; also as to sufficiency, see Selser v. Potter, 77 Hun, 313; Murphy v. Jack, 142 N. Y. 215; Edick v. Green, 38 Hun, 202; James v. Richardson, 39 id. 399; Nat. Park Bk. v. Whitmore, 40 id. 499; 104 N. Y. 297; Gumbes v. Hicks, 116 App. Div. 120; Hersereau v. L. K. Hirsch Co., 103 N. Y. Supp. 577; Dudley v. Armenia Ins. Co., 115 App. Div. 380; Wholesale Grocery Co. v. Meeker, 54 Misc. 55; Philip Becker & Co. v. Bevins, 102 N. Y. Supp. 144; Jones v. Hygienic Soap Granulator Co., 110 App. Div. 331; Am. T. Co. v. Bedowin S. Nav. Co., 48 Misc. 624.

An attachment attacked collaterally will be upheld unless absolutely void for jurisdictional defects. Denman v. McGuire, 101 N. Y. 161.

Held, the papers upon which an attachment is granted are defective, if they

fail to show an assignment, disposal or secretion of the property by the defendant with the intent to defraud creditors, as required by Code Civ. Proc., § 636, and if every allegation contained therein relating to the alleged assignment, disposal or secretion of his property by the defendant with the intent to defraud his creditors is made upon information and belief and the grounds of such information and belief are withheld.

Held also, in order to meet the requirements of Code Civ. Proc., § 636, it is not sufficient to show that the defendant has assigned, disposed of or secreted the plaintiff's property; the demands of the statute can only be met by showing that the defendant has made such disposition of his own property with the intent to defraud his creditors. Empire Warehouse Co. v. Mallett. 84 Hun. 561.

Execution and Sale.—Code Civ. Proc., § 1370, regulates, where a warrant of attachment has been levied. A special form of execution should be issued. *Id.*. Lamont v. Cheshire, 6 Lans. 235 affd., 65 N. Y. 30.

Under Code Civ. Proc., § 1370, a sale under a general execution in case of attachment passes no title. Place v. Riley, 98 N. Y. 1. Compare Thomas v.

Bogart, 33 Hun, 11.

Nor does a sale of lands not attached under execution against a non-resident served by publication, who did not appear. McKinney v. Collins, 88 N. Y. 216.

See above, Code Civ. Proc., § 1370, as to the requisites of an execution and

as to order of selling realty.

The execution supersedes the attachment. Barton v. Palmer Co., 87 App. Div. 35.

After Judgment.—The power to levy under an attachment ceases with judgment. Lynch v. Crary, 52 N. Y. 181. So also, Code Civ. Proc., § 644.

Code of Remedial Justice.—During the twenty-two days that this Code was in force, held that proceedings were valid if according either to that Code or to the Code of Procedure. Denman v. McGuire, 101 N. Y. 161.

CHAPTER XLL

EJECTMENT AND OTHER PROCEEDINGS TO RECOVER POSSESSION OF LAND.

TITLE I.— THE ACTION OF EJECTMENT. II. SUMMARY PROCEEDINGS. III.— MISCELLANEOUS.

TITLE I. THE ACTION OF EJECTMENT.

This action lies to recover the possession of land wherever a right of entry in præsenti exists, and the interest is of such a character that possession of the land can be delivered in execution of a judgment for its recovery.1

Code Civ. Proc., § 1496-1531.

It is defined for the purposes of the Code of Civil Procedure as being "an action to recover the immediate possession of real property." Code Civ. Proc., § 3343, subd. 20. Rowan v. Kelsey, 18 Barb. 484; Bryant v. Butts, 27 id. 503, affd., 28 How. 582; Child v. Chappel, 9 N. Y. 243; Trull v. Granger, 8 id. 115; Hunter v. Trustees, 6 Hill, 411; McLean v. McDonald, 2 Barb. 534; 5 Duer. 130; Thompson v. Burhans, 81 N. Y. 51; Carleton v. Darcy, 90 id. 566.

The plaintiff must show seizin in himself or some grantor anterior to de-

fendant's possession. Roberts v. Baumgarten, 51 Super. 482, affd., 110 N. Y. 380. An equitable title is not enough. Bennett v. Gray, 92 Hun, 86.

¹Mr. Fowler's Note on "Ejectment and other Actions to Try Title to Real Property in New York."—The rise and development of ejectment from the remedy accorded at common law to an injured tenant into the one great action to try titles and to recover the possession of real property is very familiar to lawyers and need not be repeated. 3 Bla. Com. Chap. XI; Digby, Hist. Real Prop., Chap. III, \$17; Chap. V, \$ 1; Tyler Ejectment, Chap. I; Sedgwick & Waits, Hist. Trial of Title to Land, Chap. I. Step by step the writs of "ejectione hymae" and "quare ejectiinfra terminum" were so molded by means of a fictitious demise, entry and ouster, as to supplant all the other and more intricate real property remedies, furnished by the common law. Prior to the Revised Statutes, the old fashioned real actions were occasionally resorted to in New York as more appropriate than the action of ejectment. That intricate treatise, "Booth on Real Actions" was actually reprinted in New York early in the nineteenth century. But here, as everywhere, where the common method of trying titles to lands. Since the express abolition of writs of right, entry and assize and all real actions known to the common law (2 R. S. 343), the substituted action of ejectment, devoid of all fictions and as reformed by the Revised Statutes, has been made the form of action in this State not only to recover possession, but to try title to real property. 2 R. S. 303, 312; Bradt v. Church, 110 N. Y. 537, 542; Leprell v. Kleinschmidt, 112 id. 364; Cagger v. Lansing, 64 id. 417. The Code of Civil Procedure has now substituted its own provisions for those of the Revised Statutes (Code Civ. Proc., Chap. XIV, Tit. I, Art. I; L. 1880, Chap. 245, repealing Chap. V. Part III, R. S.), and at this day furnishes the sole criteria of the reformed action of ejectment; although the action of ejectment is not eo nomine identified with the article of that code, entitled "action to recover real property" (Cf. Code Civ. Proc., § 1680, 3343, subd. 20), notwithstanding that the latest

Limitation.—As to limitation of time to bring action for real property. vide supra, Chap. XXXIV.

Ejectment is brought to establish through a judicial determination the title of land, and to remove therefrom those wrongfully in possession or whose title has been determined by limitation, forfeiture, or otherwise.

It is regulated by Code Civ. Proc., Chap. XIV, Tit. I, Art. 1, §§ 1496 to 1531

These provisions supersede those of the Revised Statutes, which were con-

tinued in force by the Code of Procedure.

Real actions were to be tried in the county where the subject of the action or some part of it was situated, subject to the power of the court to change the place of trial in the cases provided. So now by Code Civ. Proc.,

By the Revised Statutes the action of ejectment was retained, and might be brought as theretofore, subject to changes by the statutes. It might be brought in the cases where a writ of right might be; and by any person claiming an estate in lands, tenements or hereditaments, as heir, devisee or purchaser, or by a widow for dower, after six months from the time her right accrued. 2 R. S. 303, §§ 1, 2.

The Revised Statutes also abolished all writs of right, writs of dower, writs of entry, and writs of assize, all fines and common recoveries, and all other real actions known to the common law, except as enumerated in the chapter; and all process except as retained therein. R. S., Part III, Chap. V,

Tit. VII (2 R. S. 343, § 24).

The question as to what parties may or should be made plaintiffs or defendants is one of practice and does not properly come within the purview of this treatise. It is regulated by Code Civ. Proc., Chap. XIV, Tit. I, Art. I, in most particulars. The question of parties, however, is closely connected with the question as to when the action lies, and a brief reference may be made to some important classes of both parties, on both points.

When Ejectment may be Brought.— Ejectment is the remedy to redress an ouster or disseisin, where plaintiff has an immediate right of entry. Leprell v. Kleinschmidt, 112 N. Y. 364. See on this subject generally, Fiero, Special Actions, Vol. I, Chap. I; Sedgwick & Wait, Trial Titles to Land, Chap. III; Tyler Ejectment, Chap. II. The action is not, even under our liberal system of pleadings, to be confused with an action for trespass, Leprell v. Kleinschmidt, 112 N. Y. 364; Budd v. Birgham, 18 Barb. 494, or forcible entry

the two actions is quite different and certainly not concurrent, if rightly viewed: the two actions is quite different and certainly not concurrent, it rightly relevent; the one is primarily possessory and brought by a person out of possession (Bradt v. Church, 110 N. Y. 537, 542; Pease v. Moore, 114 id. 256, 259), the other is strictly a trial of title or right and brought by a person in possession. Ford v. Belmont, 69 N. Y. 567; Merritt v. Smith, 27 Misc. 366, 368. Vide, infra, under Code Civ. Proc., §§ 1638–1650.

Equity.—Recently a very anomalous proceeding in equity seems to have been invented to try a right of possession. But there seems to be little authority for such a proceeding by one out of possession. H. Koehler & Co. v. Brady, 22 App. Div. 264; affd. 163 N. Y. 565; and again 82 App. Div. 270, 281.

Another mode of trying title to land but of more limited application, is the action of trespass quare clausum fregit, although originally as the issue in this action was simply "guilty" or "not guilty," it was not classed as a real action. Vide, Code of Civ. Proc., Chap. XIV., Art. 8. But as the issue sometimes involves the ownership of the "close" and the judgment now may be an adjudication on this point and consequently an estoppel we find this form of action sometimes classed as "trespass to try title." Alt v. Gray, 55 App. Div. 565; et vide Weiant v. The Rockland Lake Trap Co., 61 id. 383. But as stated, the reformed action of ejectment is become the greater and more comprehensive lode of trying title to land, especially where the relatifit is out of possession. Alt v. Gray, 55 App. Div. 563; Hahl v. Sugo, 169 N. Y. 109.

and detainer. Code Civ. Proc., §§ 2233, 2245; People ex rel. v. Van Nostrand, 9 Wend. 50; cf. Compton v. The Chelsea, 139 N. Y. 538.

This action is maintainable only for corporeal hereditaments which are tangible, Child v. Chappell, 9 N. Y. 246; Moodhull v. Rosenthal, 61 id. 382; not for easements, Brondage v. Warner, 2 Hill, 145; Rogers v. Sinsheimer, 50 N. Y. 646; Leprell v. Kleinschmidt, 112 id. 364, 369; Crocket v. Manhattan Life Ins. Co., 61 App. Div. 226, 229; unless such as are appurtenant to the locus in quo. Sedgwick & Wait, Trial Titles to Land, § 102; Remson v. Hyams, 36 Misc. 345. So although, there may be seisin and estates in a rent, such as a "fee farm," there can be no disseisin of it, and ejectment is not the proper remedy to lay title to it as it is an incorporeal hereditament.

Who May Bring the Action.

Married Women, by the Code of Civil Procedure, stand in the same position as other parties to actions. Code Civ. Proc., § 450. Even before this Code they might bring ejectment alone for their separate estates. 14 How. 456; 5 Duer, 130; Darby v. Callaghan, 16 N. Y. 71.

But it was held that a married woman separated from her husband could

not bring ejectment against him. Gould v. Gould, 29 How. 441.

Ejectment cannot be maintained by wife having inchoate right of dower, not cut off by foreclosure. Campbell v. Ellwanger, 81 Hun, 259. See Code Civ. Proc., § 1499; also, as to dower, infra, p. 911.

Infants.—An infant, while such, may bring ejectment, or be made a defendant therein, in his own name. Code Civ. Proc., § 1686.

Guardians ad litem may be appointed for infant plaintiffs or defendants.

Code Civ. Proc., §§ 469, 472.

Formerly an infant could not bring the action, but his guardian might. Seaten v. Davis, 1 Supm. 91.

The Revised Statutes provided for the appointment of a guardian ad litem

for an infant defendant. 2 R. S. 341, § 12. The widowed mother of an infant may bring ejectment as guardian in socage.

Matter of Hines, 105 N. Y. 560.

And formerly the surrogate might appoint a guardian for a nonresident infant to bring the action. Andrews v. Townshend, 53 Super. 522.

An infant after arriving at majority cannot bring ejectment for lands sold

without some prior act of disaffirmance. 24 Barb. 150.

Tenants in Common.— One or more joint tenant or tenants in common may bring ejectment for the others. Code Civ. Proc., § 1500; 6 Barb. 117; but cannot bring it against the others without showing ouster or some other act amounting to a total denial of right. Code Civ. Proc., § 1515; 2 R. S. 306. § 27; Edwards v. Bishop, 4 N. Y. 61.

If he show ouster the action will lie. Trustees, etc. v. Johnson, 66 Barb.

Formerly it was held that all the tenants in common must be plaintiffs or, if any refuse to join, they must be made defendants. Bunce, 62 N. Y. 475, but now each may sue for himself or for all. Code Civ. Proc., § 1500; C. C. Land Ass'n v. Lolebauer, 187 N. Y. 106; Deering v. Riley, 167 id. 184; cf. Zapp v. Miller, 109 id. 51.

As to Necessity of Possession.—Where the conveyance is void because the grantor was out of possession, the grantee or his devisee or heirs may bring the action in the name of the grantor or his heir. Code Civ. Proc., § 1501. This was so formerly under Code Proc., § 111.

The grantee cannot bring the action in his own name. 17 Abb. 452;

9 Bos. 494.

That the plaintiff has conveyed while out of possession is no defense to Chamberlain v. Taylor, 92 N. Y. 348.

Presumption of possession of intermediaries in the chain of title. Arents v. L. I. R. R., 89 Hun, 126.

As to effect of partition deed, claims of title, etc., making possession against parties not of the action. Geenleaf v. Brooklyn, etc., R. Co., 14 N. Y. 395.

Remedy of vendee to get possession. Preston v. Hawley, 139 N. Y. 296.

Mortgagee as Plaintiff.—A mortgagee cannot bring the action. Code Civ. Proc., § 1498; 2 R. S. 312, § 57. See also supra, p. 620; 9 Barb. 284; Jackson v. Myers, 11 Wend. 533; Stewart v. Hutchins, 13 id. 485; Sahler v. Singer, 37 Barb. 329; 27 id. 54.

This held to apply to a grantee by a deed intended as a mortgage. Murray

v. Walker, 31 N. Y. 399.

Such a grantee cannot maintain the action against anybody. Shattuck v. Bascom, 105 N. Y. 39.

Lessee as Plaintiff.—A lessee may maintain the action before entry against a stranger. Trull v. Granger, 8 N. Y. 115; Spencer v. Tobey, 22 Barb. 260. A lessee may maintain the action against his lessor. Trull v. Granger,

8 N. Y. 115; Olendorf v. Cook, 1 Lans. 371.

Ejectment by the People.—Ejectment will not lie by the People unless they have an interest in the subject-matter. People v. Booth, 32 N. Y. 397.

As to ejectment under the former law in the name of the People for the benefit of an individual, vide 1 R. S. 180, 181. These provisions were

repealed by Laws of 1880, Chap. 245.

As to ejectment by the People in cases of escheat, etc., vide Code Civ. Proc., §§ 1977 to 1982, inclusive. The former Law (1 R. S. 282) was repealed by the Act of 1880, Chap. 245.

Title in Plaintiff.—The plaintiff must have the legal title. Wright v. Douglass, 3 Barb. 566; 7 N. Y. 564; and must prove title in himself. Goodhart v. Street, 12 Misc. 360; Country Club Land Assn. v. Lohbauer, 110 App. Div. 875.

An action to recover the possession of real estate may be maintained by one who has only an equitable title, where all the parties connected with the transaction are brought before the court. Boyd v. Boyd, 12 Misc. 119.

He must show title at the time of beginning of the action. Layman v.

Whiting, 20 Barb. 559.

But he must allege and prove that he has not possession. Taylor v. Crane,

15 How. 358.

The executors of one who has granted land in fee cannot bring ejectment; otherwise of one who has leased for years. Van Rensselaer v. Hayes, 5 Den.

There cannot be several plaintiffs having distinct titles. People v. Mayor,

It is enough if the plaintiff show title in himself by a deed good on its He need not explain nor account for it. Rockwell v. Brown, 54 N. Y.

In an action of ejectment brought by grantee under Code Civ. Proc., § 1501, all of the grantors in the void deed must be joined as plaintiffs. Crowley v. Murphy, 11 Misc. 579.

The answer in ejectment need not set up specifically facts which merely

refute the claim of a right of entry. Id.

Ejectment lies by owner of land against telephone company maintaining a wire unlawfully strung across plaintiff's premises, though no part of soil is touched by wire or its appurtenances. Butler v. Frontier Tel. Co. 186 N. Y. 486.

Plaintiff may prove that deed from his ancestor to defendant and set up by latter was obtained by undue influence and fraud and that grantor was non compos mentis at time of execution. Babcock v. Clark, 93. App. Div. 119; see also Smith v. Ryan, 191 N. Y. 452.

Plaintiff recovers in the strength of his own title, not in the weakness

of that of his adversary alone. White v. Hill, 100 App. Div. 207. See also Fagan v. McDaniel, No. 1, 115 App. Div. 39; Lunny v. McClellan, 116 App. Div. 473; Flagler v. Devlin, 109 id. 904.

THE DEFENDANTS AND DEFENSES.

Occupants as Defendants.—The action must be brought against all the actual occupants by their real names without the old fictions. Pearce v. Ferris' Exrs., 10 N. Y. 280; Ellicott v. Mosier, 7 N. Y. 201; 8 Barb. 244; 13 id. 526; 25 id. 54; 37 id. 350. Danihee v. Hyatt, 81 Hun, 238; s. c., 68 id. 255; Danihee v. Hyatt, 151 N. Y. 493.

Mortgagee as Defendant.—The action will not lie against a mortgagee who has obtained possession in any lawful way. Bolton v. Brewster, 32 Barb. 389; Porter v. McGrath, 41 Super. 84; Madison Ave., etc., Church v. Bap. Church, etc., 73 N. Y. 82.

The same rule applies to a grantee by a deed on its face absolute, but really intended as a mortgage. Berdell v. Berdell, 33 Hun, 535.

And to a purchaser at a sale under a defective foreclosure before redemp-

tion or tender. Lockwood v. McBride, 53 Super. 268.

But if possession be unlawfully obtained the equitable rights of the mortgagee will not be a defense to the action. Howell v. Leavitt, 95 N. Y. 617.

Husband and Wife.-Where husband and wife live together on premises conveyed to and which were paid for by the wife, she is the occupant and the proper party to an action of ejectment, and such action cannot be maintained against the husband. Danihee v. Hyatt, 81 Hun, 238; and see also s. c., 68 Hun, 255.

Parties .- None but the occupants are necessary parties. Bradt v. Church, 110 N. Y. 537.

The defendant must be alleged in the complaint to be in actual possession or the complaint will fail, under Code Civ. Proc., § 1502. Sanders v. Parshall, 67 Hun, 195, affd., 142 N. Y. 679.

Remaindermen. When tenant for life is in possession, remaindermen must be made parties. Sand v. Church, 152 N. Y. 174.

Vendee in Possession.— Ejectment lies against a vendee in possession after default, without demand or notice. Powers v. Ingraham, 3 Barb. 576; Hotailing v. Hotailing, 47 id. 163; Pratt v. Peckham, 44 Hun, 247, affd., 122 N. Y. 669.

A vendee in possession under an executory contract of sale can defend only by pleading his equitable rights and tendering performance. Risley v. Rice, 40 Hun, 585.

Other Defendants.—It will not lie against the mere servant of the owner. It must be a tenant. Seaver v. McGraw, 12 Wend. 558.

As to those not jointly possessed joined as defendants. Dillaye v. Wilson, 43 Barb. 261. A division of the action may be directed into as many actions as are necessary. Code Civ. Proc., § 1516.

It will not lie against one who occupies by license and permission. Corkill

v. Landers, 44 Barb. 218.

Or as husband of the occupant. Huber v. Blitzer, 19 N. Y. Supp. 506.

If there are no occupants it must be brought against some one exercising acts of ownership or claiming title or interest at the time of the commencement of the action. Code Civ. Proc., § 1502, following 2 R. S. 304, § 4. As to the claim, which must be a distinct and serious claim of title, vide Lucas v. Johnson, 8 Barb. 244; Banyer v. Empie, 5 Hill, 50; Edwards v. Farmers' Co., 21 Wend. 467.

The action will not lie against one not in possession—formerly not even if he had leased to one who is. It must be against one in possession exercising ownership or claiming title. Champlain, etc. R. R. Co. v. Valentine

rising ownership or claiming title. Champlain, etc., R. R. Co. v. Valentine, 19 Barb. 484; Van Buren v. Cockburn, 14 id. 118; Redfield v. Utica R. R. Co., 28 id. 54; Allen v. Dunlap, 42 id. 585.

By Code Civ. Proc., § 1503 (following generally Code Proc., § 118) a landlord, remainderman, reversioner or person claiming title to or the right

to the possession of the property adversely to the plaintiff may be made a

But it has been held that this does not entitle a mortgagee to defend.

Robert v. Ismay, 51 Super. 531.

Before the Code of Civil Procedure it was held that the action would not lie against a remainderman during the continuance of the particular estate. Seaver v. McGraw, 12 Wend. 558.

Possession under tax lease, when not a defense. Wing v. De La Rionda,

125 N. Y. 678.

Death of Parties.—See Code Civ. Proc., §§ 1521-1523, and Chap. VIII, Tit. IV.

Detenses and Answers.— The answer in ejectment actions is governed by the general rule stated in the Code and must consist of (1) general or specific denial; (2) statement of new matter constituting a defense or counterclaim, Code Civ. Proc., § 500. Some defenses, however, must be taken by demurrer or they may be deemed waived. Code Civ. Proc., §§ 488, 499. Such as mis-joinder of defendants, plaintiff's want of capacity to suc. Seaton v. Davis, 1 Supm. 91; Bartholomew v. Lyon, 67 Barb. 86; Fosgate v. The Herkimer Co., 12 N. Y. 580. Equitable defenses may be now pleaded in action of ejectment. Murray v. Walker, 31 N. Y. 399.

Outstanding Title.—While an outstanding title is a defense (Bloom v. Burdick, 1 Hill, 130; Jackson v. Harrington, 9 Cow. 86) it is not always such unless defendant claims under it. Wing v. De La Rionda, 131 N. Y. 422, 429. A tenant cannot acquire an outstanding title for the purpose of deposing his landlord's title. Willis v. McKennon, 37 Misc. 386, 388.

General Issue.—Under the general issue defendant may prove plaintiff's want of title (Benton v. Hatch, 43 Hun, 142, affd., 122 N. Y. 322; Raynor v. Timerson, 46 Barb. 518), possession or seisin, and that the defendant has not ousted plaintiff or withheld possession. Gilman v. Gilman, 111 N. Y. 265, 270.

Adverse Possession .- While there is some doubt as to the necessity of pleading this defense in all cases specially, it is certainly safer than to trust to the ability to show it under the general issue. Hansee v. Mead, 27 Hun, 162; 2 C. P. R. 175; Armstrong v. Dubois, 90 N. Y. 95, 99; Church v. Hempsted, 27 App. Div. 412, 417.

Equitable Defenses or Counterclaims .- While an equitable defense or counterclaim by and in favor of defendants may now be alleged as a defense in ejectment, in any case which would formerly have given defendants relief in equity (Murray v. Walker, 31 N. Y. 399; Wing v. De La Rionda, 131 id. 422, 429; Dyke v. Spargur, 143 id. 651; Claffin v. Gantz, 17 App. Div. 425), such defense must be pleaded. Crary v. Goodman, 12 N. Y. 266; Blair v. Caxton, 18 id. 529; Cavalli v. Allen, 57 id. 508; Hoppough v. Strubble, 60 id. 430, 434. And if affirmative relief is sought as a counterclaim and not simply as a defense.

Defense of Escheat.—A defendant in an action of jectment, where plaintiff shows a title good as against all the world except the possible right of the State to enforce an escheat, will not be permitted to establish the escheat for the purpose of defeating plaintiff's title. Croner v. Cowdrey, 139 N. Y. 471.

Defense of Payment.-Vide Riddell v. Cornell, 69 Hun, 605, as to possession under a parol contract for the sale of land, and payment, as a defense in ejectment - evidence as to the agreed purchase price.

Defense of Mistake. May be a good defense without reformation of deed. Mutual Trust Co. v. Polymero, 54 Misc. 379.

FOR WHAT ACTION MAY BE BROUGHT.

Easements and Encroachments .- Ejectment will not lie for an easement. Child v. Chappel, 9 N. Y. 246; Withlow v. Lane, 27 Barb. 244.

Nor for land covered by part of an adjoining house which was erected by a common owner of both lots. Rogers v. Sinsheimer, 50 N. Y. 646.

Nor for a mere projection, e. g., a gutter. Aiken v. Benedict, 39 Barb. 400, criticising Sherry v. Frecking, 4 Duer, 452, which held that it lay for an overhanging wall.

Nor for a projecting cornice. Vrooman v. Jackson, 6 Hun, 326. Compare, however, Leprell v. Kleinschmidt, 112 N. Y. 364, limiting the general application of the last above cases.

The remedy for land taken by a railroad company without compensation is ejectment. Thomas v. Grand View Beach R. R. Co., 76 Hun, 601.

Same in case of telegraph poles. Eels v. American Telephone & Tel. Co., 143 N. Y. 133; Butler v. Telephone Co., 186 id. 486.

Right of owner of ground against builder thereon. Smith v. Revels,

79 Hun. 213.

When the action does not apply to mining rights. Moore v. Brown, 139 N. Y. 127.

Streets.— It does not lie against a municipal corporation for the public use

of a street. Cowenhoven v. Brooklyn, 38 Barb. 9.

It was held not to lie against a railroad company for using an easement over streets in Redfield v. Utica R. R. Co., 28 Barb. 54, but this case was overruled on this point with Adams v. Saratoga & Wash. R. R. Co., 11 id. 414, 454, and 10 N. Y. 228, by Carpenter v. Oswego, etc., R. R. Co., 24 id. 655; Wager v. Troy Union R. R. Co., 25 id. 526, and Lozier v. N. Y. C. R. R. Co., 42 Barb. 468.

As to land in closed streets, Holloway v. Southmayd, 139 N. Y. 390.

Reversioners. - By the Code of Civil Procedure landlords, reversioners, remaindermen, etc., may be defendants, when those having life interests are sued. Code Civ. Proc., § 1503. Formerly so by 2 R. S. 339, § 1, which was repealed by Laws of 1880, Chap. 245.

But infant heirs who disclaim cannot under this provision be made defendants with a tenant by the curtesy who holds wrongfully. Sisson v.

Cummings, 19 Abb. N. C. 182.

Highways.— We have seen supra, p. 839, what are the rights of owners of the bed of highways, as against trespassers and others. They may maintain ejectment for encroachments. Etz v. Daily, 20 Barb. 32. As for setting up telephone poles in highway without authority, see Myers v. Bell Tel. Co., 83 App. Div. 623. See also Westlake v. Koch, 134 N. Y. 58; Carpenter v. Oswego, etc., R. R. Co., 24 id. 655.

Land under Water.— Ejectment will lie for land under water granted by the commissioners of the land office, for erecting docks, etc., The Champlain, etc., R. R. v. Valentine, 19 Barb. 484; and see infra, Chap. XLIII.

Ejectment for Forfeiture.— Ejectment may also be brought by a grantor or his heirs against parties in possession under a lease or conditional fee, to recover possession for forfeiture, or nonperformance of a covenant or condition; and this may be done without any clause in the deed providing for re-entry.

4 Kent. 123; and see supra, Chaps. V and VIII. As to ejectment for forfeiture of conditions in a lease, vide supra, Chap. V, Tit. IV, end.

Where there is a clause of re-entry on forfeiture, no actual entry is necessary before suit. Lawrence v. Williams, 1 Duer, 585, said to be reversed on other grounds; see Wall v. Buffalo Water Works Co., 18 N. Y. 119, 122.

Ejectment by Landlord.—It has been seen also, supra, Chap. V, that a landlord may have ejectment to remove his tenant if the latter hold over after the expiration of his term, although the simpler remedy by summary proceedings is generally adopted. Independent of any provision of statute, however, the landlord may re-enter upon the tenant holding over, and remove him and his goods, if no force is necessary for the purpose; and the tenant would not be entitled to resist or sue him therefor. Formerly the decisions allowed a gentle force for that purpose. Our statutes have made provision against a forcible entry by a landlord; as seen infra, Tit. II.

By the Code of Civil Procedure, also, the landlord may have ejectment for the nonpayment of rent under certain circumstances. As to re-entry and ejectment for nonpayment of rent, see supra, pp. 146, 199. A demand for rent need not be first shown; although, as has been seen, under the common law, a demand had to be first made under circumstances of great particularity and even under the Revised Statutes the action could not be brought, if there was sufficient property liable to distress. An act passed, however, in 1846 abolishing distress for rent. L. 1846, Chap. 274.

Vide fully as to this, supra, p. 144 and Fowler Real Prop. (2d ed.), 150 seq. See the cases reviewed as to necessity of a demand to authorize a re-entry and forfeiture of lease. N. Y. Acad. of Music v. Hackett, 2 Hilt. 217.

It was held in a case in the Superior Court that a mere assignee of the lease and rent cannot bring ejectment of take proceedings to recover possession. His only remedy is on the personal covenants. Huerstel v. Lorillard, 6 Rob. 260. But see fully as to the rights of heirs and assignees of lessors and lessees, supra, Chap. V, Tit. IV.

By the Revised Statutes provision was made for recovery of land by ejectment against a tenant when a half-year's rent or more was due. 2 R. S. 505,

§ 30 et seq.

The provisions of the Revised Statutes were repealed by Laws of 1880, Chap. 245, but were substantially re-enacted in Code Civ. Proc., §§ 1504-1510, which regulate these proceedings.

Re-entry on Notice .-- Where the right of re-entry is reserved in default of sufficient distress, re-entry may be made after any default in payment of rent, on fifteen days' written notice, whether there is sufficient distress or not. Code Civ. Proc., § 1505. Formerly Laws of 1846, Chap. 274, which was repealed by Laws of 1880, Chap. 245. This act abolished distress for rents.

This held to apply only to re-entry for nonpayment of rent. 6 Duer, 262. The above provision extends also where the right of re-entry was given before the Act of May 13, 1846. Williams v. Potter, 2 Barb. 316; Van Rensselaer v. Snyder, 9 id. 302, affd., 13 N. Y. 299.

As to the notice and proof thereof. Martin v. Rector, 43 Hun, 371, revd., 118 N. Y. 476.

It may be waived. Williams v. Potter, 2 Barb. 316, supra.

Tenants.— Tenants served with process were required by the Revised Statutes to give notice to the landlord under penalty of the value of three years' rent. 1 R. S. 748. § 27; now Real Property Law, § 195; but the landlord should also be joined. Fosgate v. The Herkimer Mfg. Co., 12 N. Y. 580, 583.

Lis Pendens.— A notice of lis pendens was held unnecessary before the Code of Civil Procedure in an action to recover possession of real property, even as against a purchaser pendente lite; and no notice was necessary to make the judgment effectual as against parties claiming under a party by transfer subsequent to the judgment. The judgment was held full notice. Sheridan v. Andrews, 49 N. Y. 478, revg. 3 Lans. 129.

Under the Code of Civil Procedure a notice of *lis pendens* is necessary.

Code Civ. Proc., § 1670.

Ejectment against Defendant by Purchaser on Sale under Execution.—Possession of defendant at time of recovery of judgment continued to the time of the ejectment suit must be shown, and the judgment and filing must be proved, and that the plaintiff acquired the title of defendant under the sale. See *supra*. p. 890; Kellogg v. Kellogg, 6 Barb. 126; 25 *id*. 102; 11 *id*. 498; 17 id. 157; 4 Duer, 342.

Lands Yielded by Default by Tenant for Life or Years.—If α tenant for life or years make default or give up lands demanded, so that judgment is obtained against him, the heir, reversioner, or remainderman may, after the decease of such tenant, have ejectment to recover the lands. Code Civ. Proc., § 1680. Formerly so by 2 R. S. 339, § 2, amd.

Remedy of Wife on Default of Husband, and Rights of Remaindermen, Reversioners, Lessees, etc. - Provision was also made by the Revised Statutes allowing a wife to recover after a default or neglect of her right suffered by her husband, and also rendering void all recoveries by fraud or collusion as against reversioners or remaindermen, or their heirs or judgment debtors; and providing against "feigned recoveries." 2 R. S. 340, §§ 4-8. It is proper, therefore, in taking title under ejectment, to see that the reversion or remainder was represented in the action. Similar provisions were also made in favor of lessees for years who might falsify fraudulent recoveries for their term. 2 R. S. 340, § 9. These provisions were repeated by Laws of 1880, Chap. 245.

Landlords to be Parties .- Where ejectment is brought against a tenant, the landlord and every person having privity of estate with them may be made defendants. Code Civ. Proc., § 1503; formerly 2 R. S. 341, § 17; Code Proc., § 118. Where parties recover they have the same rights for rents, etc., as lessors had. 2 R. S. 340, § 10. Repealed by Laws of 1880, Chap. 245. See as to tenant's duty to give landlord notice of such action, Real Property Law, § 195.

Alienation of Interest .-- By the Revised Statutes the action was not to be barred or delayed by any alienation of his interest by a party in possession, either before or after suit, and the alienee was liable for mesne profits. 2 R. S. 342, §§ 18, 19; repealed by Laws of 1880, Chap. 245; but the liability of the purchaser for the time of his tenancy if the defendant cannot pay, is retained. Code Civ. Proc., § 1685.

lf one of two plaintiffs die after judgment, held execution might issue in

the name of both. Harell v. Eldridge, 21 Wend. 678.

If during the action all the right of defendant is determined or transferred to another, the latter cannot be substituted. Moseley v. Albanv N. R. R., 14 How. 71; Putnam v. Van Buren, 7 id. 31.

Expiration of Plaintiff's Title Before Trial .- if right of plaintiff expires after suit brought but before trial, damages only are recovered. Code Civ. Proc., § 1520; following 2 R. S. 308, § 31. Vide 2 Barb. 162; 2 Duer, 171; Van Rensselaer v. Owen, 48 Barb. 61.

The Verdict .- The Code of Civil Procedure contains special provisions as to what verdict shall be given. Code Civ. Proc., § 1519. So did the Revised Statutes. 2 R. S. 307.

The verdict is to specify the estate which shall have been established on the trial. See also Code Proc., § 261; repealed Laws 1880, Chap. 245.

When defendants are in possession of separate rooms in a house, vide Fosgate v. The Herkimer, etc., Co., 9 Barb. 287; 12 N. Y. 880.

The Judgment.— The Revised Statutes provided that judgment (if plaintiff recovered) should be that the plaintiff recover possession of the premises according to the verdict; or if by default, according to the description in the declaration. Repealed, Laws 1880, Chap. 245.

The plaintiff recovering judgment is entitled to an order that the sheriff put him in possession, if the judgment award possession to him. Code Civ.

Proc., § 1675.

Effect of Judgment .- Final judgment rendered upon the trial of an issue of fact (except where otherwise expressly provided in the Code) is conclusive as to the title established in the action, upon each party against whom it is rendered, and every person claiming from, through or under him, by title accruing, either after filing the judgment-roll or after lis pendens is filed in the proper county clerk's office. A judgment rendered otherwise than upon such trial is binding in like manner after three years. Code Civ. Proc., §§ 1524, 1526. See 2 R. S. 309, §§ 36, 38.

Judgment in ejectment for a stranger against a tenant does not bind

the landlord if not a party. Masten v. Olcott, 101 N. Y. 152.

A judgment to recover possession of land held to take all structures wrongfully erected upon it. DeLancey v. Piepgras, 73 Hūn, 607, affd., 141

New Trials.— The court, however, on the application of the party defeated, his heir, devisee or assignee, and upon payment of all costs and damages, other than for rents and profits or for use and occupation awarded against him within three years after such judgment is rendered and the judgment-roll filed, must vacate the judgment and grant a new trial. Within two years after the second judgment, it may vacate it, and grant another new trial. Code Civ. Proc., § 1525; formerly regulated by 2 R. S. 309, § 37; amd. by Laws of 1878, Chap. 292. It will be seen, therefore, that a party is not safe in taking title through an ejectment suit until the expiration of at least three years from the first judgment and two years from a second judgment. if rendered.

These provisions of the Revised Statutes remained in force under the

Code of Procedure. 5 How. Pr. 50; 4 id. 360; 1 Duer, 701.

The statute applies only where there has been a trial by jury and a verdict. The three years are to be computed from the first judgment in the action, Chautauqua Co. Bank v. White, 23 N. W. 349, and not within three years after its affirmance in an appellate court.

The statute applies only where there has been a verdict. Chautauqua. Co. Bank v. White, 23 N. Y. 349.

These new trials, however, apply strictly to possessory actions of ejectment and not to ejectment for rent. Code Civ. Proc., § 1528; Shumway v. Shumway, 1 Lans. 474, affd., 42 N. Y. 143; Christie v. Bloomingdale, 18 How. Pr. 12.

Vide, Purdy v. Bennett, 68 Hun, 227, as to vacating a judgment in ejectment on the application of the "assigns" of the defendant; DeLancey v. Piepgras, 73 Hun, 607, affd., 141 N. Y. 88, as to judgment amended nunc pro tunc. Townshend v. Keenan, 117 App. Div. 484, as to payment of costs.

The orders granting them held not appealable to the Court of Appeals. Evans v. Millard, 16 N. Y. 619. See, when they will be refused, Wright v. Milbank, 9 Bosw. 672. When granted (second new trial) Barson v. Mulligan, 40 Misc. 470.

See also as to the effect of the judgment against parties and their privies. Ainslie v. Mayor, 1 Barb. 169; Beebe v. Elliot, 4 id. 457; Briggs v. Wells, 12 id. 567; Dunckle v. Wiles, 6 id. 515; Wilson v. Davol, 5 Bosw. 619.

As to the effect of a recovery before the Revised Statutes barring a present

action, vide Bates v. Stearns, 23 Wend. 482.

Where the title is not in issue under notice to the landlord, or he is not a party, a judgment against a tenant held not conclusive against the landlord's title. Ryerss v. Rippey, 25 Wend. 432; Ryerss v. Wheeler, Id. 437.

Each party cannot have two new trials. Bellinger v. Martindale, 8 How.

Pr. 113.

As to stay of proceedings by bills of exceptions formerly, vide Law of 1846, Chap. 159, repealed by Laws of 1880, Chap. 245.

As to who is an assignee under the Code of Civil Procedure, vide Howell v. Leavitt, 90 N. Y. 238.

Possession by Force.—How restored. De Lancey v. Piepgras, 73 Hun, 608, affd., 141 N. Y. 88.

When Judgment by Default.— A final judgment for the plaintiff rendered otherwise than upon the trial of an issue of fact, is, after three years from the filing of the judgment-roll, conclusive upon the defendant, and every person claiming from, through or under him, by title accruing after the filing of the judgment-roll or his pendens in the proper county clerk's office. But within five years after the judgment-roll is filed on the application of the defendant, his heir, devisee or assignee, and on terms, etc., the court must vacate such judgment and grant a new trial, if satisfied justice will be thereby promoted. If, however, at the time of filing the judgment-roll the defendant be either, 1. Within the age of twenty-one years; 2. Insane; or, 3. Imprisoned on any criminal charge, or in execution upon conviction of a criminal offense for a term less than for life; any such person may bring an action for the recovery of such premises within three years after such disability shall be removed. Code Civ. Proc., §§ 1526, 1527. Formerly covered by 2 R. S. 309, §§ 38, 39.

The plaintiff's possession is not to be disturbed by vacating the judgment, and if the defendant recover, he may have execution for the possession. Code Civ. Proc., § 1529, formerly 2 R. S. 310, § 41, amd. See Hunt-

ington v. Forkson, 7 Hill, 195.

Restitution.— See Barson v. Mulligan, 94 N. Y. Supp. 690.

Ejectment for Dower.—Ejectment for dower is now abolished. Code Civ.

Proc., § 1499.

It was allowed by the Revised Statutes under which the following provisions were in force: If the recovery was for dower the court was to appoint commissioners to admeasure the dower out of the land in suit; and on the confirmation of their report, a writ of possession put the dowress into possession. 2 R. S. 311, § 55.

As to inchoate dower, supra, p. 903.

Ejectment by mortgagee .- No action now lies in favor of mortgagee to recover possession of mortgaged premises. Code Civ. Proc., § 1498; Barson v. Mulligan, 191 N. Y. 306, revg. 120 App. Div. 879.

Mesne Profits.-- Provisions were also found in the Revised Statutes as to the recovery of mesne profits, 2 R. S. 310; and also by Law of April 10, 1865, Chap. 357 (repealed by Laws of 1880, Chap. 245), as to such profits against The Code of Civil Procedure provides for such a substituted defendant. recovery in §§ 1496, 1497.

Mesne profits can only be had from the accruing of plaintiff's title.

ziger v. Boyd, 54 Super. 365.

They are not limited to six years absolutely. Willis v. McKinnon, 178 N. Y. 451. See as to earlier rule, Larned v. Hudson, 57 id. 151.

Essentials of Action of Ejectment .- The plaintiff must recover on the strength of his own title and not on the weakness of the defendant's title. McRoberts v. Bergman, 132 N. Y. 73; Wallace v. Swinton, 64 id. 188, and see 1 Fiero Special Actions, 22, and cases there cited; and for general principle, City of Cleveland v. Bigelow, 98 Fed. Rep. 242; Baird v. Campbell. 67 App. Div. 104, 107.

TITLE II. SUMMARY PROCEEDINGS TO RECOVER POSSESSION OF LAND.

The following are the leading features of these proceedings as to the recovery of the possession of land. They are based upon the provisions of Chap. XVII, Tit. II (§§ 2231 to 2265) of the Code of Civil Procedure.

The law formerly in force was contained in Part III, Chap. VIII, Tit. X. Art. 2, of the Revised Statutes, which provisions were repealed by Laws of 1880, Chap. 245. This repeal carried with it all the amendatory acts. As title is not made under these proceedings a particular statement of the

repealed law is not given.

The Supreme Court has no jurisdiction of summary proceedings to dispossess tenants. Jones v. Reilly, 68 App. Div. 116. As the proceedings are statutory, they must be strictly pursued, and consequently "dispossess" is not the remedy where there is a breach of a condition subsequent in the lease, but the landlord must bring ejectment. The difference between a limitation which puts an end ipso facto to the term itself and a condition subsequent is often close. Low v. Thompson, 109 N. Y. Supp. 750; Penoyer v. Brown, 13 Abb. N. C. 82; Low v. Thompson, 58 Misc. 541. Cf. Matter of Schoelkopf, 54 id. 31.

Summary Proceedings, Deserted Premises.—Under the Revised Statutes landlords might resume the possession of deserted premises when rent was not paid and no goods subject to distress were left thereon, by certain proceedings before a justice of the peace, and not more than twenty nor less than five days' notice, to be affixed to the premises. 2 R. S. 512, § 24. *Vide* Stratton v. Lord, 22 Wend. 611; 16 How. Pr. 450; 2 Hilt. 520; 2 Abb. 123; 15 id. 434.

The general grounds of jurisdiction in summary proceedings is nonpayment of rent or a holding over on the part of tenants without consent of the landlord. Code Civ. Proc., § 2231.

Removal of Tenants Holding Over, etc .- Tenants or lessees at will or at sufferance, or for part of a year, or for one or more years, of real property, including a specific or undivided portion of a house, or other dwelling, their assigns, under-tenants, or legal representatives, may be removed by statutory proceedings before certain courts and officers. 1. Where they hold over and continue in possession after the expiration of the term, without permission of the landlord, including (except in New York and Brooklyn) servants and employees. 2. Where they hold over without permission after default in payment of rent, and a demand of the rent has been made, or three days' notice given requiring payment or possession of the premises.

3. Where in any city the tenant holds over after sixty days default in paying taxes or assessments which he has agreed to pay and a demand or three days' notice has been served. 4. Where the tenant, being in possession under lease for three years or less, has been adjudged a bankrupt under the United States law, or has taken advantage of an insolvent act. 5. Where any part of the premises are used as a bawdy-house or for

any illegal business. Code Civ. Proc., § 2231.

These provisions follow, with slight alterations, those formerly in force by the Revised Statutes Subdivision 5 is taken from Laws of 1868, Chap. 764, and Laws of 1873, Chap. 583, which were repealed by Laws of 1880,

Chap. 245.

By Laws of 1882, Chap. 303, tenants from month to month in New York must have five days' notice. Amd. L. 1889, Chap. 357, so as to include

Failure to pay rent of a furnished house will sustain these proceedings. The rent issues from the land alone. Armstrong v. Cummings, 58 How. Pr. 331, and less fully, 20 Hun, 313.

Before the Code nonpayment of taxes under a covenant to do so was

not cause for proceedings. Wilson v. Swayne, 15 Abb. 432.

Illegal use, though discontinued, may be basis of proceedings. Conforti v. Romano, 50 Misc. 148.

Right to maintain summary proceedings for nonpayment of rent is not defeated by the fact that the lease provided for re-entry. Fleishauer v. Bell, 44 Misc. 240; Crosley v. Jarvis, 46 id. 436.

Nonpayment of a sum to be paid on a default of performance of agreement to make alterations not a basis of summary proceedings. Sipp v. Reich, 88 N. Y. Supp. 960.

As to a void lease and necessity of notice, see Gossett v. Fox, 90 N. Y.

Supp. 477.

Removal of Other Persons .- After a notice served upon the person concerned or affixed conspicuously upon the property at least ten days before the application, a person who holds over and his assigns, tenants or legal representatives may be removed: 1. Where the property has been sold under execution against him or a person under whom he claims and a title under the sale has been perfected. 2. Where the property has been duly sold on foreclosure of a mortgage executed by him or a person under whom he claims and the title has been perfected. 3. Where he cultivates the property on shares and the term has expired. 4. Where he is a squatter without permission, or where a permission given has been revoked and he has had notice of the revocation. Code Civ. Proc., § 2232. (Subd. 4, amd. L. 1894, Chap. 232, extending it to "any real property.")

One who has entered by collusion with the tenant may be ejected as a squatter under this section. O'Donnell v. McIntyre, 41 Hun, 100, revg. 16 Abb. N. C. 84.

Jurisdiction.— As to United States property, see Lotterle v. Murphy, 67

Hun, 76.

When question of title is raised the New York Municipal Court has no jurisdiction. Bowen v. Ludvik, 119 App. Div. 11. See also Hollister v. Wohlfield, 115 App. Div. 400.

Rights of a Mortgagee in Possession .- Constant v. Barrett, 13 Misc. 249. Vide People v. Jeroloman, 69 Hun, 301, affd., 139 N. Y. 14. Purchaser on foreclosure sale. Bonacker v. Weyrick, 48 Misc. 189.

A perfected appeal from a judgment for rent as being a stay upon preexisting summary proceedings. Code Civ. Proc., § 1310.

Who May Bring Petition and When.— See generally Code Civ. Proc., § 2235.

Joint Tenants, etc .- Where property is held by husband and wife by joint conveyance, husband may institute summary proceedings against tenant. Peer v. O'Leary, 8 Misc. 350.

Landlord and Tenant.- Where a lease is terminated by reason of a conditional limitation therein, summary proceedings on the ground of nonpayment of rent will not lie, but the remedy is by a proceeding against the tenant as a holdover. Estelle v. Dinsbeer, 9 Misc. 487.

Where it is provided that on breach of a covenant and notice to tenant, the term shall cease, summary proceedings lie. Matter of Schoelkopf, 54 Misc. 31; Miller v. Levi, 44 N. Y. 489; Cottle v. Sullivan, 8 Misc. 184. Cf. Penoyer v. Brown, 13 Abb. N. C. 82; Low v. Thompson, 58 Misc. 541.

Contract on Shares .-- Agreement by a quarry-worker to pay the landowner a specified part of the proceeds of the stone produced - summary proceedings for dispossession - thirty days' notice. Barry v. Smith, 69 Hun, 88.

Partners.— Bailey v. Crowell, 13 Misc. 63.

Neighbor .- In case of real property used or occupied as a bawdy-house. Code Civ. Proc., § 2237.

Demand.—See Iroquois Realty Co. v. Iroquois Hotel, etc., Co., 104 N. Y. Supp. 748; Glauz v. Schaefer, 102 N. Y. Supp. 518.

Practise, Defenses, etc.- After commencement of proceedings, a plea of tender is not permissible. Stover v. Chasse, 9 Misc. 45.

Claims against landlord for violations of the lease on his part, no defense

in summary proceedings. Pearson v. Germond, 83 Hun, 88.

In summary proceedings to recover possession of real property, the only questions that can be raised by the answer are those which are directly put

in issue by a denial of the allegations of the petition; no other issue can be tried by the judge or justice. Bloom v. Huyck, 71 Hun, 252.

During the pendency of an action by a tenant to annul his lease, the land-lord may be enjoined from prosecuting summary proceedings. Rodgers v.

Earle, 5 Misc. 164.

On the termination of the proceedings favorably to the applicant, a warrant is issued by the officer directing the removal of all persons on the premises, and the putting of the applicant in possession thereof. Code Civ. Proc., §§ 2251, 2249.

The proceedings must be very strictly carried out. Luhrs v. Comm'rs, 30

Hun, 168.

A judgment and stay on appeal does not bar the remedy. Durant Land,

etc., Co. v. Thomson-Houston, etc., Co., 2 Misc. 182.

See Frank v. Miller, 116 App. Div. 855. An equitable defense in the New York Municipal Court allowable. Schlaich v. Blum, 42 Misc. 225. Assignment of judgment prior to execution may be shown as a defense. Mawson v. Wermuth, 182 N. Y. 234.

Warrant; When and How Stayed .- See Code Civ. Proc., § 2254. See also Peabody v. Long Acre Sq. Bldg. Co., 188 N. Y. 103.

Redemption.—Where the proceeding was founded on an allegation of holding over after default in payment of rent and there is an unexpired term of five years at the time when the warrant issued, the lessee or his executor, administrator or assignee may redeem within a year by paying rent, expenses, ctc. Code Civ. Proc., § 2256. A judgment creditor has the same privilege. Code Civ. Proc., § 2257. These sections followed, L. 1842, Chap. 240, repealing Law of April 25, 1840, itself repealed by L. 1880, Chap. 245.

But the right does not exist where dispossessal is for nonpayment of taxes. Witty v. Acton, 12 N. Y. Supp. 757; s. c., 58 Hun, 552. Peabody v. Long Acre Sq. Bldg. Co., 188 N. Y. 103.

Under the Act of 1842, payment or tender within a year of all arrears and costs and charges held a condition precedent to restoration. Pursell v. N. Y., etc., Co., 42 Super. 383.

Setting Aside Verdict .- New trial must be granted, not judgment for other party. Kiernan v. Cashin, 92 N. Y. Supp. 255.

Rent Accrued.— Eviction for nonpayment of rent by summary proceedings does not discharge the tenant from liability for rent or other obligations already accrued, but only for the future. An action for past breaches of covenant is still maintainable. See Code Civ. Proc., § 2253. See cases reviewed in Johnson v. Oppenheimer, 55 N. Y. 280.

An eviction during the month does not prevent recovery of the rent for

that month, due before the eviction. Johnson v. Barg, 8 Misc. 307.

TITLE III. MISCELLANEOUS.

Squatters.—By Laws of 1857, Chap. 396, squatters upon land in a city or village without authority might be compelled to quit on ten days' notice, and they and their structures removed. This act was repealed by Laws of 1880, Chap. 245, and 1886, Chap. 593. See Code Civ. Proc., § 2232, supra, as amended L. 1894, Chap. 232, which covers this and other cases.

See Manterstock v. Williams, 42 Misc. 402; Bowen v. Ludvik, 119 App.

Div. 11.

Bawdy-Houses.— See Code Civ. Proc., § 2237.

Forcible Entry and Detainer.—By the Code of Civil Procedure, § 2233, following the Revised Statutes, Part III, Chap. VIII, Tit. X, Art. 1 (2 R. S. 507, § 1), no entry shall be made into real property, but in a case where entry is given by law, and, in such case, only in a peaceable manner, nor with strong hand, nor with multitude of people, and persons who enter or retain possession unlawfully may be removed. The Revised Statutes directed the restoration of the person evicted to possession; which is not so now. Id.

He may also have an action and recover treble damages. Code Civ. Proc., § 1669, following 2 R. S. 338, § 4. The Code of Procedure, § 471, continued the provisions of the Revised Statutes.

The title could not be tried in these proceedings. Clason v. Shotwell, 12 Johns. 31; People v. Rickert, 8 Cow. 226; 7 How. Pr. 166; id. 441.

Though the defendant might impeach plaintiff's title. People v. Brincker-

hoof, 13 Johns. 340.

The petition in proceedings for forcible entry may be made by a custodian of the premises, who was appointed as such by the person in possession. Central Park Baptist Ch. v. Patterson, 9 Misc. 452. See Code Civ. Proc., § 2235.

Possession is enough for the complaint. People v. Reed, 11 Wend. 157;

People v. Nostrand, 9 id. 50; People v. Field, 52 Barb. 198.

And possession of a house is possession of the land. Id. And see Crane v. Van Derveer, 45 App. Div. 139; Ross v. N. Y. City Baptist M. Society, 23 Misc. 683; Potter v. N. Y. Baptist Mission Society, Id. 671.

The object of summary proceedings for forcible entry and detainer is to preserve the peace and to prevent the use of force. Town of Oyster Bay v. Jacob, 109 App. Div. 613; Becker v. City of New York, 102 App. Div. 269.

The Code of Procedure also made provision for these proceedings.

Proc., § 471.

The above cases also show that actual occupancy at the time of the entry is not necessary, and the entry ought to be accompanied by some circumstances of actual violence or terror. Entry into an enclosure containing two parcels with intent to enter upon both is entry upon both, though only one was actually entered. Pharis v. Gere, 110 N. Y. 336.

An entry made by a party entitled to possession is not unlawful, although made against the will of the party in possession. Such person may enter peaceably. People v. Fields, 1 Lans. 223. See the above case as to proceedings

on a trial for forcible entry and detainer, and what must be shown.

In ejectment a party who has entered forcibly is not debarred from showing

title in himself. Jackson v. Farmer, 9 Wend. 201.

A mere trespasser cannot have forcible entry and detainer by those in

possession enjoined. Littlejohn v. Attrill, 94 N. Y. 619.

Where plaintiffs were occupying as servants of defendants by their permission, nonsuit was properly ordered. Napier v. Spielmann, 127 App. Div. 711, July, 1908.

The statute of forcible entry is in derogation of common law and must be

strictly construed. Fuchs v. Cohen, 29 Abb. N. C. 156.

After the wife's death the husband may have summary proceedings as tenant

by the curtesy. Mack v. Roach, 13 Daly, 103.

Vide as to summary proceeding for forcible detainer of land — constructive possession — peaceable entry — claim of title — Code of Civ. Proc., § 2245;

Lowman v. Sprague, 73 Hun, 408.

Ejectment will lie at the suit of the owner of real estate for a forcible entry and detainer, and in such an action treble damages may be demanded and recovered if plaintiff establishes that the dissesin was actually affected ri et armis. The owner is not confined to the summary remedy given by the Code Civ. Proc., § 2233, nor to a separate action for the recovery of the treble damages, as authorized by said Code, § 1669. Compton v. The Chelsea, 139 N. Y. 538; Schrier v. Shaffer, 123 App. Div. 543; Salmon v. Blasier Manufacturing Co., 53 Misc. 36; Hong Sing v. Wolf Fein, 33 id. 608; Waterbury v. Deckelmann, 50 App. Div. 434; Bach v. New, 23 id. 548. as to appeal from proceedings under the statute, Norton v. Avernam Company, 14 App. Div. 581.

CHAPTER XLII.

ACTION TO COMPEL THE DETERMINATION OF CLAIMS TO REAL PROPERTY.

Where a person has been, or he and those whose estate he has, have been for one year in the possession of real property, or any undivided interest therein, claiming it in fee, or for life, or for a term of years not less than ten, he may maintain an action against any other person to compel the determination of any claim adverse to that of the plaintiff which the defendant makes, or which it appears from the public records the defendant might make to any estate in that property in fee or for life, or for a term of years not less than ten, in possession, reversion, or remainder or to any interest in that property, including any claim in the nature of an easement therein, whether appurtenant to any other estate or lands or not, and also including any lien or incumbrance upon said property, of the amount of value of not less than two hundred and fifty dollars. But this section does not apply to a claim for dower.

Code Civ. Proc., § 1638. See 2 R. S. 312, § 1, as amd. by Code Proc., § 449; L. 1848, Chap. 50; L. 1864, Chap. 116; L. 1855, Chap. 511; L. 1860, Chap. 173; L. 1864, Chap. 219; L. 1891, Chap. 210; L. 1904, Chap. 526.

The Act of 1891 changed the former period of possession of three years to one year; and introduced the provision as to easements. L. 1891, Chap. 210.

The whole procedure is regulated by §§ 1638 to 1650 of the Code of Civil Procedure. It is now by action governed by the rules covering other actions, except as provided otherwise, and assimilated in many respects to ejectment (§§ 1642 and 1646). The defendant may deny possession, in which case, if he succeed, he gets judgments with costs (§ 1640); or he may allege title and demand any appropriate relief (§ 1641). If a reversioner be plaintiff he need not show a right to immediate possession, but the verdict, report or decision must specify the time when or contingency in which he will be entitled to possession. Then, upon special application showing that the time has come, he may afterward have execution for possession (§ 1643).¹

^{&#}x27;Mr. Rowler's Note on "Actions to Compel the Determination of a Claim to Real Property."— The reforms in actions relating to real property are primarily due to the Revised Statutes. In the chapter on actions relating to real property the authors of the Revised Statutes expended much labor, going far in their reform [916]

Former Laws, etc., and Changes by the Codes.—The proceedings in force before the Codes were regulated by the Revised Statutes, Part III, Chap. V,

of the ancient real actions. Yet the Legislature went still farther (Cf. Hahl v. Sugo, 169 N. Y. 109, 113) and compelled the revisers to remodel their drafts of the chapter. Prior to this epoch contentions over legal titles to real property were redressed either by the ancient "real actions" or else by the more frequent and omnivorous action of ejectment. In some cases recourse to real actions was essential. These actions were either possessory, by writs of entry or assize, or droitural, by writs of right. They were proverbial for tardiness, intricacy and expense, as the revisers said. Revisers' notes to R. S. The procedure in the old common law real actions was no doubt very technical, but the issues in them were common law real actions was no doubt very technical, but the issues in them were very well defined and certain; indeed, perhaps more certain than at present, when equitable defenses are allowed to confuse the plain common law issue. For example, the only issue allowed on a writ of right was "which of the parties had the better right." Nase v. Peck, 3 Johns. Cas. 128, and see the Record of Final Judgment, 3 Chitty on Pleading, 1385 et seq. Real actions of the common law required great technical skill, and in New York only the leaders of the bar were usually engaged in them. In 1908 John Anthon, Esq., brought out an edition of the English treatise, "Booth on Real Actions," an authority in New York until the Revised Statutes superseded real actions. Indeed only in 1786 had trials upon writ of right by battle, or the grand assize, been expressly abolished and trial by a virtual jury substituted. 1 J. & V. 239; 1 K. & R. 43; 1 R. L. 50. In real actions no damages were recoverable, unless some statute authorized it. I Roscoe, Real Actions, 307.

The authors of the Revised Statutes had proposed to reform and enlarge the

Roscoe, Real Actions, 307.

The authors of the Revised Statutes had proposed to reform and enlarge the old scope and practice of writs of right, and, as so reformed, to retain them as well as the very efficacious assurance by fines, which then barred certain claims to property. But the Legislature directed the revisers to enlarge the scope of the newer action of ejectment. Consequently instead of the proposed titles on "Fines" and "Writs of Right" which they abolished, the revisers substituted the Title of the Revised Statutes, as passed, "Proceedings to Compel the Determination of Claims to Real Property." 2 R. S. 312, Tit. II, Chap. V, Part III.

When the Code was adopted it was provided that the relief afforded in the special proceeding contemplated by the Revised Statutes might be granted (Laws of 1855. Chap. 511) in an action. Code Proc., § 449. Next the scope of the action and proceeding was enlarged. Thus there were two remedies co-existing. Burnham v. Onderdonk, 41 N. Y. 425; Fisher v. Hepburn, 48 id. 41. On the adoption of the Code of Civil Procedure the special proceeding of the Revised Statutes was abolished, and the action alone survived. Code Civ. Proc. §§ 1638-1650, as am'd; See L. 1891, Chap. 210. Thus this action now stands for the old writ of right. of right.

am'd; See L. 1891, Chap. 210. Thus this action now stands for the old writ of right.

When Action lies Under This Article.— Jurisdiction of an action to have a recorded instrument, not required by law to be recorded, removed from the record, does not fall under this article (Code Civ. Proc., Chap. XIV, Tit. I, Art. 5), but under a special act. Laws of 1880, Chap. 530. Nor is an action to establish a lost deed and compet the execution of another deed referable to this article, but to the general equity jurisdiction of the Supreme Court. Kent v. Church of St. Michael, 136 N. Y. 10; Lewis v. Howe, 64 App. Div. 44; Letson v. Letson, 81 App. Div. 556. The action lies by one in possession to test the validity of plaintiff's deed, where the heirs at law of grantor claim such deed is void (Diefendorf v. Diefendorf, 132 N. Y. 100); to test the validity of an alleged alien's claim to be an heir at law (Stamm v. Bostwick, 122 N. Y. 48); to try the better right to the estate or some interest therein. (Ford v. Belmont, 69 N. Y. 567; but not to establish an easement and thus deduce a title in fee therefrom. Consolidated Ice Co. v. Mayor, 166 N. Y. 92.

The action of ejectment is still a possessory action primarily (see note on "Ejectment," supra, p. 901; Bradt v. Church, 110 N. Y. 537, 542; Pearce v. Moore, 114 id. 256, 259; Hahl v. Sugo, 169 N. Y. 109) although so extended as to try title. Cagger v. Lansing, 64 N. Y. 417, 428; Chamberlain v. Taylor, 92 id. 348; Leprell v. Klemschmidt, 112 id. 364. But this action is in the main one primarily to try right or title. Code Civ. Proc., § 1645; Ford v. Belmont, 69 N. Y. 567; Pearce v. Moore, 144 id. 256, 259. It was the revisers' and codifiers' substitute for the old writ of right. But if the defendant affirmatively sets up title in himself, he becomes the actor and the action then becomes one of ejectment (Code Civ. Proc., § 1642; King v. Ross, 28 App. Div. 371, 373), and the judgment may award him possession. Code Civ. Proc., § 1644. Before the Code. indeed. the resondent setti

setting up title in himself was put to his action of ejectment. 2 R. S. 314, § 9. Nature of the Action.—The action to compel a determination of a claim is said to be neither at law nor in equity; it is a fusion of both (Cuthbert v. Chauvet, 20 C. P. R. 391, 393), and an injunction may issue in it to restrain defendants from proceeding with numerous ejectment actions to try the same title or claim. Stamm v. Bostwick, 65 How. Pr. 358; 30 Hun, 70; Cuthbert v. Chauvet, 20 C. P. R. 391. It is now sometimes called an action to quiet title. King v. Ross, 28 App. Div. 371; Clason v. Stewart. 23 Misc. 177. But it certainly is not a bill quia timet. Mulry v. Norton, 100 N. Y. 424, 438; Hinckel v. Stevens, 17 App. Div. 279.
Without regard to these authorities, it is not difficult to affirm that this action was originally intended in the main to be a short statutory substitute for the old real action, instituted by writ of right; and consequently, trial by a jury was

Tit. II, as amended. Vide L. 1848, Chap. 50; L. 1855, Chap. 511, as to the details of the proceedings; all repealed by Laws of 1880, Chap. 245.

These proceedings were regulated in detail in the Revised Statutes, 2 R. S. 312-315. See also Laws of 1860, Chap. 173 (repealed by Laws of 1880, Chap. 245), applying these proceedings to estates for ten years. Laws of 1864, Chap. 219 (repealed by Laws of 1880, Chap. 245), making them applicable to married women.

always provided for the issues of fact, in the statute. 2 R. S. 314, §§ 9-14; Code Civ. Proc., § 1642. The question at issue is still, which party has the better right or title. Vide supra, p. 917; Ford v. Belmont, 69 N. Y. 567. The effect of the legislative amendment of 1891 is to broaden the class of claims triable in this action (Laws of 1891, Chap. 210; Livingston v. Moore, 15 App. Div. 15, 25) and in so far to vary the nature of the issues. King v. Ross, 28 App. Div. 371.

In this action the successful plaintiff is now entitled to an extra allowance Code Civ. Proc., § 3252; 8 C. P. R. 216, n.

The section of the Revised Statutes from which § 1668 of the Code Civ. Proc. 95, 3252; 8 C. P. R. 216, n.

The section of the Revised Statutes from which § 1668 of the Code Civ. Procedure was transcribed contemplated only a special proceeding (2 R. S. 312, § 1), which, however, the Code of Civil Procedure finally converted into an action. Supra. The jurisdiction of the present action is not, however, governed by the principles relative to the former writs of right or fines, but is wholly statutory and, consequently, the statute must be strictly pursued by a plaintiff acting on it. Austin v. Goodrich, 49 N. Y. 266; Churchill v. Onderdonk, 50 id. 134; Bailey v. Briggs, 56 id. 407. The plaintiff's estate must be a fee or a life estate or for a term of years not less than ten (Barnard v. Simms, 42 Barb. 304), and plaintiff or his grantor must have been in possession for at least one year. Lewis v. Howe, 174 N. Y. 340; Letson v. Letson, 81 App. Div. 556.

Formerly actual possession (pedis possessio) of plaintiff was essential to the maintenance of the action (Churchill v. Onderdonk, 59 N. Y. 134; Boylston v. Wheeler, 61 id. 521), but now constructive possession suffices. Laws of 1891, Chap. 210, amending Code Civ. Proc., § 1638; Kings v. Townshend. Rs Hun, 380; 23 C. P. R. 326; Clason v. Stewart, 23 Misc. 177; Whitman v. City of New York, 85 App. Div. 68; cf. Merritt v. Smith, 50 id. 349; Lewis v. Howe, 174 N. Y. 340; Mit

defendant's claim is for a lien or incumbrance. Otherwise not. Loomis v. Semper, 38 Misc. 567.

Where defendant pleads title, Code Civ. Proc., \$ 1641 enlarged the scope of the original proceeding as instituted by the Revised Statutes. Supra, 917; Throop's Note to Code Civ. Proc., \$ 1641; Livingston v. Moore, 15 App. Div. 15, 25. The defendant must prove his title, as he is now the actor. Benson v. Townsend, 7 N. Y. Supp. 162; Barnard v. Simms, 42 Barb. 304; Merritt v. Smith, 27 Misc. 366, 368; Code Civ. Proc., \$ 1642. But in order to do this the defendant must plead title in bimself. Kings v. Townshend, 78 Hun, 380; 29 Supp. 181. The same defense may be set up as in other actions. Hammond v. Tillotson, 18 Barb. 332; Peck v. Brown, 26 How. Pr. 350; Ford v. Belmont, 35 Super. 135; 69 N. Y. 567; Fisher v Hepburn, 48 id. 41, 54; Brown v. Leigh, 49 id. 78.

The Code of Civil Procedure (\$ 1642) provides that, unless defendant merely demands that the complaint be dismissed, the proceedings after issue shall be the same as in ejectment actions. This section relates to two subjects, viz: title and interests.

If the defendant takes issue simply on plaintiff's allegation of possession (supra. If the defendant takes issue simply on plaintiff's allegation of possession (supra. If the defendant takes issue simply on plaintiff's allegation of possession (supra. If the defendant takes issue simply on plaintiff's allegation of possession (supra. If the defendant takes issue simply on plaintiff's allegation of possession (supra. If the defendant takes issue simply on plaintiff's allegation of possession (supra. If the defendant takes issue simply on plaintiff's allegation of possession (supra. If the defendant takes issue simply on plaintiff's allegation of possession (supra. If the defendant takes issue simply on plaintiff's allegation of possession (supra. If the defendant takes issue simply on plaintiff's allegation of possession (supra. If the defendant takes issue simply on plaintiff's allegation of possession takes issue

same as in ejectment actions. This section relates to two subjects, viz. the and interests.

If the defendant takes issue simply on plaintiff's allegation of possession (supra, Code Civ. Proc., § 1640) he demands only that the complaint be dismissed. But if he alleges title in himself then the subsequent proceedings are as in an action of ejectment, and the judgment may now award him possession. Code Civ. Proc., § 1644: King v. Ross, 28 App. Div. 371, 373. The defendant 'thus becomes a virtual plaintiff in ejectment. Barnard v. Simms, 42 Barb. 304. If the defendant does not assert title to the entire estate, but simply an interest, easement or lien therein, the action may lose its resemblance to ejectment, as ejectment never lies affirmatively for the possession of the interest. Thus a foreclosure of a mechanic lien is an action in equity and neither party has a right to trial by jury. Kenney v. Apgar, 93 N. Y. 539. Yet the validity of a mechanic's lien may be tested by this action at the instance of the owner of the estate, as well as in an action to foreclose the lien brought by the lienor. § 3399 Code Civ. Proc.

Although the Code of Civil Procedure forbids any special proceeding to recover real property (Code Civ. Proc., § 1688) the statute allows a special proceeding to establish a title under a lost decree when thirty years' possession has elapsed (Laws of 1890, Chap. 503.)

By the Code of Procedure, § 449, these proceedings might be prosecuted by action under that Code without regard to the forms of the proceedings as prescribed by the Revised Statutes, and it was questionable whether the proceedings under the statute were not repealed, but they were held not so repealed in 42 Barb. 304, and Haynes v. Onderdonk, 5 Supm. 176.

By Laws of 1854, Chap. 116 (repealed by Laws of 1880, Chap. 245, having been superseded by Code Civ. Proc., § 1650), these provisions were extended to

corporations.

These proceedings by notice were not abrogated by the Code of Procedure but were superseded by the Code of Civil Procedure. Burnham v. Onderdonk, 41 N. Y. 425; Barnard v. Simms, 42 Barb. 304. In the case of Hammond v. Tillotson, 18 Barb. 332, the mode of proceeding under the Code of Procedure is given. The proceedings were subject to the same rules as other actions. Id., overruling Crane v. Sawyer, 5 How. Pr. 372. As to the pleadings, proof and judgment in such proceedings, vide Hager v. Hager, 38 Barb. 92; Tanner v. Tibbits, 18 Wend. 546; Boylston v. Wheeler, 5 N. Y. S. C. 179.

A party could, before the Code of Civil Procedure, proceed either by notice under the statutes, or by action under the Code of Procedure. Fisher v. Hep-

burn, 48 N. Y. 41.

The procedure is now by action. Code Civ. Proc., § 1638; assimilated to the action of ejectment. Code Civ. Proc., § 1642.

When Action Lies .- Plaintiff must be in actual or constructive possession of the property. Hoyt v. Forrest, 56 Misc. 147; see Merritt v. Smith, 50 App. Div. 349; Whitman v. City of New York, 85 App. Div. 468; Lese v. Metzinger, 54 Misc. 151; Mitchell v. Einstein, 42 Misc. 358; Lewis v. Howe,

Proof, however, that plaintiff has legal title enables him to maintain action as to unoccupied property without regard to actual possession. Whitman v.

City of New York, 85 App. Div. 468.

It cannot be maintained against an assignee of a tenant where the remainder of latter's term is less than ten years. Hollister v. Wohlfeil, 115 App. Div.

A purchaser in possession under a deed executed by one of two trustees under will pursuant to sale under authority of both, the other trustee having since died, may maintain action against heirs to confirm title. Brown v. Doherty, 185 N. Y. 383.

An owner of land sold for city taxes of thirty-five dollars, claimed to be illegally assessed, may maintain action against purchaser who will acquire absolute title in two years unless land is redeemed. Loomis v. Semper, 38

It is not maintainable merely to establish that plaintiff has easements or rights of any character in lands of another. Consolidated Ice Co. v. Mayor. etc., of New York, 166 N. Y. 92.

Judgments.— A judgment obtained by either party in an action to compel the determination of a claim to real property shall be conclusive against the other party "as to the title established in the action; and also against every other person claiming from, through or under that party, by title accruing after the filing of the judgment-roll, or of the notice of the pendency of the action."

Code Civ. Proc., § 1646.

All persons claiming may be joined as defendants. Fisher v. Hepburn, 48 N. Y. 41.

As to unauthorized record of deed. Trustees, etc., of Town of East Hampton v. Bowman, 136 N. Y. 521.

Lost Judicial Decrees .- As to those lost or destroyed, how supplied. Laws of 1890, Chap. 503.

As to Claimed Invalid Record.—Real Property Law, Laws 1896, Chap. 547, § 276; L. 1880, Chap. 530. This applies to recorded instruments in writing relating to real property not required to be recorded, and their cancellation of record.

Certificates under Assessment Sales.—It is held that these proceedings may be instituted to determine the validity of certificates held under assessment sales. Burnham v. Onderdonk, 41 N. Y. 425.

An action to set aside, as a cloud on title, a deed of the county treasurer of Suffolk county given on a tax sale, may be maintained where the prior proceedings are in fact void, as the statute makes such deed presumptive evidence of the regularity of such proceedings. Sanders v. Downs, 141 N. Y. 422. See also Loomis v. Semper, 38 Misc. 567.

Membership Assessment.—When not removable. Whiteside v. Noyac Cottage Ass'n, 142 N. Y. 585.

Cloud Upon a Title — Essentials of the Action.— An action to remove a cloud upon the title to land can be maintained only in a case where the pretended title is valid upon its face, and where the party in possession will be compelled to resort to extrinsic evidence to show the invalidity of such

pretended title and to defend his own.

Where a judgment, at the time of its recovery, appears to have been a lien upon certain land, and the judgment creditor subsequently sells the land upon execution and receives a sheriff's certificate of sale, but the owner of the fee of the land claims that at the time of the recovery of the judgment the title was not in the judgment debtor of record, but was in another person, by virtue of a deed, unrecorded and lost, the pretended title by the sale on execution is so far regular upon its face as to justify the interference of a court of equity. Travis v. Phelps, 86 Hun, 593.

Infant Defendants.— Action under the Revised Statutes would not lie against infants. Bailey v. Briggs, 56 N. Y. 407. Such action may now, however, be maintained by or against an infant in his own name, a guardian ad litem being appointed. Code Civ. Proc., § 1686.

Dower.—As to this action against one claiming dower, vide Code Civ. Proc., §§ 1647 (amended 1891, Chap. 210), 1648, 1649.

Adverse Possession.—The grantee of one out of possession cannot sue. His grantor must do so in ejectment. Pearce v. Moore, 114 N. Y. 256. Compare Sanders v. Parshall, 67 Hun, 105, affd., 142 N. Y. 679.

A person in possession of land by his tenant may maintain an action to

A person in possession of land by his tenant may maintain an action to compel the determination of an adverse claim to it. Kings v. Townshend, 78 Hun, 380.

Mortgages.— Mortgage on which nothing has been advanced may be removed. Rapps v. Gottlieb, 142 N. Y. 164.

An action may be maintained to remove a mortgage by a life tenant to whom full power was given by the will to use so much of the corpus of the estate as was neessary for her comfort and support. Swarthout v. Ranier, 143 N. Y. 499.

Death of Party.—The action may be continued, in case of the death of a sole plaintiff or sole defendant by his representative or successor in interest. Code Civ. Proc., § 757.

In an action to determine the title to land, if plaintiff dies while the action is pending, his devisee can be compelled to proceed with the action in his place, under Code Civ. Proc., § 757, which provides that in case of the death of a sole plaintiff or defendant, if the cause of action survives, the court must, on motion, allow or compel the action to be continued by his successor in interest. Higgins v. Mayor, etc., of New York, 136 N. Y. 214.

in interest. Higgins v. Mayor, etc., of New York, 136 N. Y. 214.

In case of death of one of two or more plaintiffs, or one of two or more defendants, the action may proceed in favor of or against the survivors.

Code Civ. Proc., § 758. See also § 759.

What the Judgment Affects.—As to how the judgment affects all parties and privies, see Code Civ. Proc., § 1646 (amd. L. 1891, Chap. 210).

Appeals.—In an action to remove a cloud on a title, defendant cannot object for the first time on appeal, that the complaint was insufficient, or that the facts proved by plaintiff did not justify equitable relief.

that the facts proved by plaintiff did not justify equitable relief.

In an action to cancel a void deed as constituting a cloud on plaintiff's title, though the findings are insufficient to uphold a judgment for plaintiff, such judgment will not be reversed, if evidence can be found which would justify the other findings necessary to uphold it. Trustees, etc., East Hampton v. Bowman, 136 N. Y. 521.

New Trials.— New trial may be granted on application made by any party within one year after final judgment, in the court's discretion in the interests of justice, provision being made in case of disability. Code Civ. Proc., § 1646 (as amended Laws of 1891, Chap. 210).

CHAPTER XLIII.

TITLE TO LAND UNDER WATER AND WATER RIGHTS.

TITLE I .- STREAMS ABOVE TIDE-WATER.

II .- WATER-COURSES.

III.— TIDE-WATER AND ARMS OF THE SEA.

IV.— FISHERIES.

V.— FERRIES.

The subjects of the title to land under water, and to rights in water, are of great interest and importance, as part of the law of They abound in curious learning and nice distinctions, and have been the topics of investigation in many special treatises. It is not pretended in a volume of this general character, to give more than a summary of the various general legal principles relating to those subjects, and the most important modifications or applications of them, as embodied in the reports of the tribunals of this State. and of the United States.

TITLE I. STREAMS ABOVE TIDE-WATER.

It has been before observed (p. 114), that a grant of water does not pass the soil beneath, but a mere right of piscary or user, and that a grant to carry the water must convey the land under it. has been also observed (Chap. XX), that grants of land, bounded on rivers, or by rivers, or along or up to rivers or streams above tide-water, even if to a certain extent navigable, carry the right and title of the grantee to the center of the stream, unless the terms of the grant clearly denote the intention to stop at the edge or margin of the river, or some local custom may override the general principle. The proprietors of the adjoining banks are presumptively owners to the center of the stream, and have a right to use the land under it, and the water of the river in its flow, in any way not inconsistent with the rights of others, or with the jus publicum or common-law right of the public to use the stream as a highway or easement. easement may exist not only for purposes of navigation, where the stream is sufficient for the purpose, but for any general use, such as floating logs, rafts, etc., to which the stream may be adapted. public right to use navigable streams as highways is paramount to that of the riparian proprietor; and the owner of the bed of streams of that character has no right, as such, in the waters thereof, which

can authorize him to impede or obstruct navigation upon them, nor can he so use the stream as indirectly (e. g., by depositing refuse or other matter in it) to cause subsequent impediment or obstruction to the use of other confluent water.

In the statutes of this State will be observed various acts declaring, from time to time, certain inland streams to be highways, and imposing penalties for their obstruction by dams, booms or otherwise. It is considered, however, that rivers of sufficient capacity to float products to a market are subject to the general right of passage independent of legislation. As to the power of the United States and State governments to regulate streams and waters for the purposes of commerce, vide supra Chap. II, Tit. III.

For a verification of the above general principles, see the cases cited, supra, p. 545; and also Canal Commissioners v. People, 5 Wend. 423; 17 supra, p. 545; and also Canal Commissioners v. People, 5 Wend. 423; 17 id. 571; Brown v. Chadbourne, 31 Maine, 9; Moore v. Sanbourne, 2 Gibbs (Mich.), 519; Morgan v. King, 18 Barb. 277; further decision in 30 id. 9, which was reversed in 35 N. Y. 454; Loman v. Benson, 8 Mich. 18; Barclay R. R. v. Benson, 36 Pa. St. 194; Munson v. Hungerford, 6 id. 265; Commissioners, etc. v. Kemshall, 26 Wend. 404; Child v. Starr, 4 Hill, 369; Walton v. Tefft, 4 Barb. 216; Avery v. Fox, 1 Abb. (U. S.) 246; Brown v. Schofield, 8 Barb. 239; Buffalo, etc., Co. v. N. Y., etc., Co., 10 Abb. N. C. 107; Smith v. Bortlet 180 N. V. 2360. Smith v. Bartlett, 180 N. Y. 360.

As to a public easement in a private stream, vide Meyer v. Phillips, 97

N. Y. 485.

The State may Authorize a Dam on a Navigable Stream .- Demott v. The State, 99 N. Y. 101. See in this connection, People v. Page, 39 App. Div. 110. See also as to the rights of a riparian owner on the outlet of Skaneateles lake. City of Syracuse v. Stacy, 169 N. Y. 231; Lakeside Paper Co. v. State of New York, 15 App. Div. 169.

Right of riparian owner to build dock in Lake Champlain. People v.

People's Coal Co., 32 Misc. 478.

License to build a pier held assignable except as against the State. Ziegele v. R. & O. Nav. Co., 3 App. Div. 77.

Moose River.— Moose river declared a public highway: Laws 1851, Chap. 207, amd., L. 1894, Chap. 712. Matter of Thomson, 86 Hun, 405, as to floating logs thereon. These acts declared unconstitutional, as making no provision for compensation to riparian owners, a stream not being a public highway. De Camp v. Dix, 159 N. Y. 436.

The following cases show exceptions to or modifications of the above general principles:

The bed of a private river cannot pass as incident or appurtenant to a grant. Child v. Starr, 4 Hill, 369.

An owner on a stream, although not owning the bed, may construct necessary wharves and landings. Railroad Co. v. Shurmeir, 7 Wall. 272.

The Large Lakes and Rivers as Boundaries .- The right of possession and ownership in riparian proprietors to streams above tide-water does not apply to the large navigable lakes of this country, nor to rivers constituting national boundaries. Smith v. Rochester, 92 N. Y. 463, limited, 57 Hun, 480; People v. Jones, 112 N. Y. 597; Illinois Cent. R. R. Co. v. Illinois, 146 U. S. 387.

Great Inland Rivers .- By decisions in this State the great navigable fresh water rivers of this State are held not subject to the principle of individual appropriation allowed by the common law. See *supra*, p. 923, and Morgan v. King, 30 Barb. 9, revd. on the facts, 35 N. Y. 454. The same principle is held in Pennslyvania, and riparian proprietorship does not give to the middle of the stream on the great inland rivers of that State. 2 Binn. 475; 14 Serg. & Rawle, 71; 1 Watts & Serg. 351.

So also the rule has been laid down by the Supreme Court of the United States, and the ebb and flow of the tide is considered as no test of the

navigability of rivers in a legal sense. In re Ball, 10 Wall. 557.

Nor will local obstructions to navigation affect the legal character of the

stream. Matter of State Reservation, 37 Hun, 537.

See as to a river bounding the State, Kingman v. Sparrow, 12 Barb, 201. On inland navigable waters the riparian owners may possess land between high and low water mark subject to public easements for navigation. Sisson v. Cummings, 35 Hun, 21, revd., 106 N. Y. 56, on other grounds.

New York City — Title to Lands Under Water.— The title of the city of New York in the tideway and submerged lands of the Hudson river under the Dongan and Montgomerie charters and acts of the Legislature (L. 1807, Chap. 115; L. 1826, Chap. 58; L. 1837, Chap. 182) was not absolute and unqualified but is held subject to the right of the public to the use of the river as a water highway. Knickerbocker Ice Co. v. 42d St. R. R. Co., 176 N. Y. 408.

The title to lands under water, with the appurtenant rights of wharfage and cranage, held, might be acquired as against the city of New York by adverse possession and prescription. Timpson v. Mayor, 5 App. Div. 424.

Islands belong to the person on whose side of the dividing line they are situated or formed by accretion. If on the dividing line, they belong to each owner proportionately to their position on either side of it. See more fully supra, p. 547, as to islands, and also infra.

If the stream is divided by an island, the riparian owner is entitled to the water flowing on his side. Crooker v. Bragg, 10 Wend. 260.

Jurisdiction in this State Over a River Boundary, etc .-- By the Revised Statues, it is declared that whenever two counties are separated from each other by a river or creek, the middle of the channel is the division line, and if the boundary line crosses an island, the whole of the island is deemed to be within the county within which the greater part of it lies, (3 R. S. .18, § 6) and the officers of the counties bordering on Seneca lake, and the counties of Kings, Richmond and New York, on the waters in the counties of Kings and Richmond, south of the county of New York, have concurrent civil and criminal jurisdiction for the purpose of serving process. 3 R. S. 19, § 8; 18, § 7.

See also the State Law, G. L., Chap. II, Laws of 1892, Chap. 678, giving full details of boundaries of the State, waterways, cessions to the United

States and other matters pertaining to the State ownership.

Accretion.—The general doctrine as to alluvion on waters is as follows: If a river running between the lands of separate owners, insensibly or by imperceptible degrees, gains on one side or the other, the title to such continues to go ad filum medium aqua; but if the alteration be sensibly and suddenly made, or by artificial means, the ownership remains according to the former bounds. the river should establish its channel in the lands of the owner on one side, he would own the whole river, so far as it is inclosed by his land.

Where water is diverted by artificial means from the land of a proprietor bounded by low water, he acquires no title to the derelict bed of the stream unless perhaps the diversion were a wrongful act. Halsey v. McCormick, 18 N. Y. 147; see also as to the general principle. Chapman v. Haskins, 2 Md. Ch. 485; Municipality v. New Orleans Cotton Press, 18 La. 122; Child v. Starr, 4 Hill, 369; and the cases quoted, supra, p. 546.

Imperceptible or slow accretions of islands or land on navigable tidewater rivers would belong to the sovereign. Otherwise such islands belong to the adjacent owners, according to their position on the dividing line. Deerfield v. Arms, 17 Pick. 41; The King v. Yarborough, 3 Barn. & Cress. 91; New Orleans v. United States, 10 Pet. 662; Atty.-Gen. v. Chambers, 4 De Gex & J. 55; People v. Lambier, 5 Den. 9.

Alluvial accretion discussed. See Jefferis v. East Omaha Land Co., 134

Accretion must be by imperceptible degrees. Saunders v. N. Y. C. & H. R. Co., 144 N. Y. 75.

The right to accretion may be reserved. People v. Jones, 112 N. Y. 597.

The owner of upland along the navigable waters of the Hudson river has such a title to accretions to his land, in the sense of having the right to unobstructed access to the shore, as entitles him to restrain the occupation unobstructed access to the shore, as entitles him to restrain the occupation of such accretions by a railroad company which has acquired no title thereto nor made compensation therefor to the owner, and to compel the removal of its tracks therefrom. Sanders v. N. Y. C. & H. R. R. Co., 71 Hun, 153, affd., 144 N. Y. 75.

As to soil formed by natural accretion on the shore of a natural pond, Cook v. McClure, 58 N. Y. 437. The law of accretion does not apply to the case of islands formed separately and united by sudden filling of the channels between. Mulry v. Norton, 29 Hun, 660, affd., 100 N. Y. 424.

Where land belongs to a party and is bounded by a creek "subject to the wear" thereof. a violent diversion of the stream does not change the "filum"

wear" thereof, a violent diversion of the stream does not change the "filum aquae." Henning v. Bennett, 63 Hun, 592.

Rights of riparian owners as to trespassers. Nolan v. Rockaway Park

Imp't Co., 76 Hun, 458.

The rules applicable to the acquisitions by riparian owners of land formed by alluvion stated. People v. Woodruff, 30 App. Div. 43.

And see St. Louis v. Rutz, 138 U. S. 226; Widdicombe v. Rosemiller, 118 Fed. Rep. 295; Missouri v. Nebraska, 196 U. S. 23.

The Right of Eminent Domain as applied to Inland Waters.—

It has been seen above (Chap. II), that where lands are appropriated or used for the public advantage by the State, under the exercise of the right of eminent domain, compensation has to be made to the owners of the lands taken or the damage caused. So also is it determined, that neither the State, nor any individual has the right so to use an inland stream, as to render it less useful to the owners of the soil. The riparian owners are entitled to the usufruct of the waters flowing in the river-bed, as appurtenant to the fee of the adjoining banks; and for an interruption in the enjoyment of the owners' privileges, in that respect, in consequence of improvements made by the State, for a public purpose, they are entitled to compensation for damages sustained.

Canal Appraisers v. People, 5 Wend. 423, 432, revd., 13 id. 355; same case, 17 id. 571 (vide infra); Walton v. Tefft, Id. 316; The Commissioners, etc. v. Kempshall, 26 id. 404, approved, Child v. Starr, 4 Hill, 369; Matter of Thomson, 86 Hun, 415.

In the above case of Canal Appraisers v. People all rivers in fact navigable were deemed public rivers, and subservient to public uses, and the State had, it was held, a right to erect dams for the public benefit, even if it impaired individual rights. The doctrine in this case, however, and in that of others holding to the same general effect, seems overruled in the case of the Commissioners of the Canal Fund v. Kempshall, 26 Wend. 404, which holds that although the public may have the public right of navigation in fresh water rivers, any interruption of riparian owners in their enjoyment of the flow of the water, in consequence of public improvements, must be compensated in damages. See also Ex parts Jennings, 6 Cow. 518; Arnold v. Hudson R. R. R. Co., 55 N. Y. 661. See also Waterford El. L., H. & P. Co. v. Reed, 47 Misc. 406.

The Mohawk and Hudson rivers held not within the general rule, being governed by the civil law. Smith v. Rochester, 92 N. Y. 463, limited, 57 Hun,

480; as to the Moose river, see Matter of Thomson, 86 id. 415.

See fully as to the taking or interruption of such waters for a public purpose, The Watershed Act, Laws of 1893, Chap. 189; held constitutional. Kelley v. Mayor, 6 Misc. 516. Supra, p. 46.

If a stream is diverted by a railroad company, it is bound to restore and preserve it in its former usefulness. Cott v. Lewiston R. R., 36 N. Y. 214.

As to action against the State for damages caused through abandonment of a canal and diversion of water thereby. Stone v. State, 138 N. Y. 124.

See also on the question of compensation, Slingerland v. International Contracting Co., 169 N. Y. 60; Pine v. Mayor, etc., of City of New York, 112 Fed. Rep. 98.

Adverse Possession, etc.—As to an adverse possession of water lots, vide supra, p. 817. As to a prescriptive right therein, vide supra, Chap. XXXIV, Tit. II, also supra, Chap. XXXVI. As to adverse possession vide also 45 How. Pr. 357.

TITLE II. WATER-COURSES.

The general principles regulating the use of flowing waters running naturally, as between proprietors through or over whose lands they run, are as follows: Such a proprietor has ownership of but an equal right to the use of such waters, in a reasonable manner, and without alteration or diminution or offensive contamination; and no one proprietor can so use the water as to injure, prejudice or annoy others whether above or below him, or impair their rights in the enjoyment of the water, unless he have some special right to divert it, or to enjoy it exclusively. Each opposite owner is entitled to use a moiety of the adjacent stream for power, unless there exist a prescriptive or other legal right to the contrary. The water must be returned to its natural channel, if temporarily detained or diverted (which may be done for a reasonable time), and it must be returned without being polluted or poisoned by admixture of unwholesome substance, to the injury of the owner below. The use or quantity of water used may be varied as occasion may require.

The above principles have been held not to apply to mere drainage water, nor to a water-course created by an owner of the land for a special purpose; but they would apply where there is an habitual accumulation of water, from natural causes, confined in a well-defined channel. Jeffers v. Jeffers 107 N. Y. 650. See as to the above principles, Arkwright v. Gell, Exch. E. 7, 1839; Rawstron v. Taylor, 33 Eng. L. & Eq. 428; Broadbent v. Ramsbotham, 34 id. 533; Ashley v. Wolcott, 11 Cush. 192; Luther v. Winisimnick Co., 9 id. 171; Earl v. DeHart, 1 Beasley, 280; Van Bergen v. Van Bergen, 3 Johns. Ch. 282; Brown v. Bowen, 30 N. Y. 519; Sackrider v. Bears, 10 Johns. 241; Housee v. Hammond, 39 Barb. 89; Merritt v. Brinckerhoff, 17 Johns. 306; Marshall v. Peters, 12 How. Pr. 222; Thomas v. Brackney, 17 Barb. 654; Pollett v. Long, 56 N. Y. 200; Arthur v. Case, 1 Paige, 447, affd., 3 Wend. 632; Carhart v. The Auburn Gas Co., 22 Barb. 297; O'Reilly v. McChesney, 49 N. Y. 672; Clinton v. Myers, 46 id. 511; Crooker v. Bragg, 10 Wend. 260; Wagner v. L. I. R. R. Co., 5 Supm. 163; 70 N. Y. 614; Seaman v. Lee, 10 Hun, 607; Sumner v. City of Gloversville, 35 Misc. 523; Strobel v. Kerr Salt Co., 164 N. Y. 303.

Natural water-course defined. Mann v. Retsof Mining Co., 49 App. Div. 454. A water company must compensate riparian owners for water taken by 1839; Rawstron v. Taylor, 33 Eng. L. & Eq. 428; Broadbent v. Ramsbotham,

A water company must compensate riparian owners for water taken by it; it can take no more than other owners, without just compensation. Standen v. New Rochelle Water Co., 91 Hun, 272. In Hooker v. Rochester, 37 Hun, 181, it was held that a city cannot pollute

a private stream by discharging sewage into it. The court, however, expressly

reserved the case of a public stream.

So also Chapman v. Rochester, 110 N. Y. 273, as to pollution of private pond by municipalities. See Schriver v. Johnstown, 71 Hun, 232; same as to diversion of stream. Covert v. Valentine, 21 N. Y. Supp. 219, revd. on other grounds, 57 St. Rep. 720.

Where the water is used for milling purposes, if diverted so as to injure others, damages will be awarded; so also if unreasonably detained, and injunctions will be granted in proper cases. Corning v. Burden, 6 How. Pr. 89; People v. The Canal Appraisers, 17 Wend. 571, revg., 13 id. 355; Walton v. Tefft, 4 Barb. 216; Van Hoesen v. Coventry, 10 id. 518; Brown v. Bowen, 30 N. Y. 519; Hoyt v. Cline, 133 id. 686. See also Village of Keeseville v. Keeseville El. Co., 59 App. Div. 381; Neal v. City of Rochester, 156 N. Y. 213; Amsterdam Knitting Co. v. Dean, 13 App. Div. 42.

Water rights pass by a conveyance of the adjacent and subjacent soil, as a necessary and inseparable incident of ownership, unless there be a legal adverse enjoyment. Corning v. Troy, etc., Fac., 39 Barb. 311, affd., 40 N. Y. 191; Hall v. Sterling Iron & R. Co., 148 id. 432.

Where the right of using or drawing off water from a pond is granted (for the purpose of carrying on certain works of the grantee) in such quantity as would be sufficient to carry on such works and no further or greater quantity, held the works of the grantee are intended as the measure of quantity, and not to limit the purpose to which the use of the water can be applied; when however, the intention of the parties to restrict the use is evident from the instrument or from the surrounding facts and circumstances, such intention must prevail. Hall v. Sterling, etc., Co., 74 Hun, 10. See also Palmer v. Angel, 69 id. 471, as to measure of quantity of water intended or necessary. Also infra.

A party owing lands on a stream, where there is an island, has a right to all the water flowing on his side of the island, though it be twice as much as that on the side of the other owner. Crooker v. Bragg, 10

Wend. 260.

The grant of a mill carries with it the use of the head water necessary to its enjoyment with all incidents and appurtenances and all rights of overflow, as far as the right to convey to this extent existed in the grantor. Voorhees v. Burchard, 6 Lans. 176, affd., 55 N. Y. 98; McTavish v. Carroll. 7 Md. 752; LeRoy v. Platt, 4 Paige, 78; vide Russell v. Stout, 9 Cow. 279; see also Preble v. Reed, 17 Maine, 169; Woodworth v. Genesee Paper Co., 18 App. Div. 510.

As to rights of parties in a mill stream and dam, and obligations to repair under a special agreement, vide Jones v. Turner, 46 Barb. 527; Dean v. Benn, 69 Hun, 519, affd., 142 N. Y. 684.

The owner of a mill, etc., may change or improve the race-way, in which he has an easement by deposit of earth on the servient estate; and the right

Kingman v. Sparrow,

to use a mill-race includes the right to float logs thereon. Beals v. Stewart, 6 Lans. 408.

Strictly speaking, a natural stream is not an easement, but an incident

of the property over which it flows. Archer v. Archer, 84 Hun, 297.

A person is entitled to the natural flow of the water in a stream upon his land, and if another first diverts the water from such stream and then permits it, in a dirty and polluted condition, to find its way back into the stream upon such land, the owner is entitled to recover the amount of the loss which he has sustained thereby. Smith v. Cranford, 84 Hun, 318. See also Gilzinger v. Saugerties Water Co., 21 N. Y. Supp. 121, affd., 142 N. Y. 633.

As to unexpected damages caused by a permitted or lawful act. Covert v.

Cranford, 141 N. Y. 521. Reichert v. Backenstross, 71 Hun, 516.

A dam may be maintained where the flow of water is not injured. Chace

v. Kerr Salt Co., 77 Hun, 71.

Not, however, where the use of the water is merely for ornamental purposes, where it appears in times of drought to result in loss of water. Pierson v. Speyer, 82 App. Div. 556.

As to the right to use the waters of a pond to flood a cranberry bog,

Robinson v. Davis, 47 App. Div. 405.

A party may have a prescriptive right to use flush-boards on a dam. Hall v. Augsbury, 46 N. Y. 622.

A dam may be repaired, even if the water is retained more constantly at an upper level. Hynds v. Shultz, 39 Barb. 600; to the contrary, Stiles v. Hooker, 7 Cow. 266.

Property in a stream of water is indivisible. Vandenburgh v. Van Bergen,

13 Johns. 212.

Easement of piping from a spring construed. Furner v. Seabury, 135 N. Y. 50.

A reservation in a grant of so much water as is necessary for a certain purpose held not to restrict its use to that purpose, but only the quantity. Olmsted v. Loomis, 9 N. Y. 423; Griswold v. Hodgman, 4 Supm. 325; Merrill v. Calkins, 74 N. Y. 1; Groat v. Moak, 94 id. 115; Canal Co. v. Hill, 15 Wall. 94; Ferry v. Smith; 47 Hun, 333; Mudge v. Salisbury, 110 N. Y. 413. See also Swan v. Goff, 39 App. Div. 95. Also supra.

The extent of a privilege secured by a conveyance is to be measured and circumscribed by the terms of the instrument construed in the light of the legal principles applicable thereto, and the facts surrounding the parties

at the time of the grant. Hall v. Sterling, etc., Co., 74 Hun, 10.

There can be no dower in an hydraulic right. 12 Barb. 201.

Diversion of stream may be enjoined notwithstanding award of nominal

damages. Amsterdam Knitting Co. v. Dean, 162 N. Y. 278.
"Reasonable use" is a question of fact for the jury. Pollett v. Long, 3 Supm. 232; 56 N. Y. 200. As to an unreasonable use by discharge of coloring matter into stream, see Townsend v. Bell, 42 App. Div. 409.

Water may be detained by a dam to get ice as well as for milling.

DeBaun v. Bean, 29 Hun, 236.

The owner of land under water with a covenant giving a right to maintain the pond is not estopped to bring an action to abate it when it has become so foul, etc., as to be a nuisance. 108 N. Y. 338. Leonard v. Spencer, 34 Hun, 341, affd.,

Acquiescence by a riparian owner in the building of a dam below him -equitable estoppel by silence and acquiescence and settlement of boundary line. Dean v. Benn, 69 Hun, 519, affd., 142 N. Y. 684. Vide New York Rubber Company v. Rothery, 69 Hun, 59, affd., 141 N. Y. 573, as to diversion of the waters of a natural stream.

As to duty of railroad company, as to culverts, etc., see Drake v. N. Y. L. & W. R. R. Co., 75 Hun, 422; Mundy v. N. Y. L. E. & W. R. R. Co., id. 479;

Branson v. N. Y. C & H. R. R. R. Co., 111 App. Div. 737.

Measure of Damages for Diversion .- Cooper v. N. Y., L. & W. R. Co., 122 App. Div. 128.

For taking 3 dam Hall v. State c? New York, 72 App. Div. 360. See also Brewster v. Rogers Co., '69 N. Y. 73; Sumner v. City of Gloversville, 35 Misc. 523; Reissert v. Cry of New York, Id. 413; Weeks v. State of New York, 48 App. Div. 357; akeside Paper Co. v. State of New York, 45 id. 112.

Drainage of Agricultural Lan's. - See Revised Statutes, Part III, Chap. VIII, Tit. XVI, as amd. by Lars of 1869, Chap. 888; see also 1886, Chap. 636; 1858, Chaps. 259, 527 and 636; 1890, Chaps. 557, 888; 1891, Chap. 310; 1892, Chap. 321; 1895, Chap. 384; 1896, Chap. 819; 1897, Chap. 168; 1901, Chap. 523. See Matter of Tutthill, 163 N. Y. 133, holding the Act of 1895, Chap. 384, unconstitutional.

Artificial Channels .- In the absence of agreement, adjoining owners to artificial channels of streams have the same rights to the use of the water, as if the artificial were the natural channel of the stream. Townsend v. McDonald, 12 N. Y. 381, revg. 14 Barb. 460.

Water flow of spring on to farm sold by owner of both farms cannot be stopped—it is covered by the word "appurtenances" in the deed. Paine v.

Chandler, 134 N. Y. 385.

If a stream is diverted by the owner of land who afterward divides and sells, the channel cannot be changed back to the natural one on the portion Lampman v. Milks, 21 N. Y. 505; Roberts v. Roberts, 55 id. 275.

And if the banks of the artificial channel become broken the owner of the other lot may enter and restore them. Roberts v. Roberts, 55 N. Y. 275.

No one can acquire an easement by adverse possession of a ditch across another's land, through which he drains by the other's permission. v. Sheldon, 35 Hun, 193.

Ponds.—Riparian owners presumably own to the center. Deuterman v. Gainsborg, 9 App. Div. 151.

Adverse Possession .- Water-courses may be the subject of adverse possession. Vide supra, p. 814, and Coleman v. State, 134 N. Y. 564; White v. Sheldon, 35 Hun, 193.

Ice.—As to an action brought for interfering with a grant to cut ice from a mill pond, vide Marshall v. Peters, 12 How. Pr. 218; Myer v. Whitaker, 5 Abb. N. C. 173; Am. Ice Co. v. Catskill Cement Co., 99 App. Div. 31.

As to damages recoverable by the owner of land under water for cutting ice, vide Van Rensselaer v. Mould, 48 Hun, 396; see in this connection also, Hazleton v. Webster, 20 App. Div. 177. See also p. 940.

Obstructions, Barriers, etc .- One who without legislative authority or right obstructs a running stream is responsible for all damages resulting. If he have such authority, he is only responsible for damages resulting from want of skill or care. Bellinger v. N. Y. C. R. R., 23 N. Y. 42; Waggoner v. Jermaine, 7 Hill, 357; 3 Den. 306; compare McKee v. Delaware & H. Canal Co., 125 N. Y. 353.

A party cannot impede the usual flow by erecting machinery or dams for water greater than the stream in its ordinary course would flow, nor can he hold the water in reservoirs. Clinton v. Meyers, 46 N. Y. 511; Roberts v. Roberts, 55 id. 275; Parry v. Citizens' Water Works Co., 13 N. Y. Supp. 471; s. c., 59 Hun, 196.

Nor make deposits which may obstruct public channels or harbors. Ogdens-

burgh v. Lovejoy, 2 Supm. 83.

No prescription can legalize an obstruction in a navigable stream. Crill v. City of Rome, 47 How. Pr. 398; Ogdensburgh v. Lovejoy, 2 Supm. 83. See also Kellogg v. Thompson, 66 N. Y. 88.

A diversion will be restrained at the suit of a mill-owner below, independent of actual damage. Smith v. Rochester, 38 Hun, 612, affd., 104 N. Y. 674; Hoyt v. Cline, 133 id. 686; see also Rider v. City of Amsterdam, 31 Misc. 375.

The fact that the mill is not very valuable is no ground for denying injunctive relief against a diversion of the waters of the stream, if otherwise entitled thereto. Chace v. Warsaw Water Works Company, 79 Hun, 151.

The use by a riparian owner, as one of the inhabitants of a village, of

water diverted from the stream and supplied to the village by the defendant is not such a participation in the diversion as to estop him from maintaining an action to enjoin it, where the water was supplied from other sources at the time he commenced using it. Id.

Depositing rubbish in a stream so that it lodges on the land of one below is Winchester v. Osborne, 61 N. Y. 555. See Spink v. Corning, 61 unlawful.

App. Div. 84.

But those owning the stream-bed have a right to build dams and make a necessary detention, if the flow is resumed, as of the natural course injury result from an overflow or percolation, liability arises only if the damage is caused by improper interference or want of care and skill. Pilev v. Clark, 32 Barb. 268, revd. on the facts, which were held to show improper interference, 35 N. Y. 520, and that decision explained in Losee v. Buchanan, 5t vd. 476; Livingston v. Adams, 8 Cow. 175; Roberts v. Roberts, 55 N. Y. 275; Reed v. State, 108 vd. 407.

A barrier or embankment may be erected to confine the waters into an original channel, after its diversion by a flood, but a party is not under

obligation to erect or maintain it. Pierce v. Kinney, 59 Barb. 56.

But any barrier must be so placed as not to injure a neighbor by flood ing his land. Hartshorn v. Chaddock, 135 N. Y. 116. This, however, could not apply to extraordinary floods. Wallace v. Drew, 59 Barb. 413; vide Bailev The Mayor, 2 Den. 433.

He may restore a bank even if the effect be to injure another.

Fox, 5 Hun, 544.

Actions for obstructions to a river, if navigable, are to be brought by the People. People v. Gutchess, 48 Barb, 656.

As to municipalities being hable, see Ordway v. Village, etc., 21 N. Y. Supp. 835; s. c., 66 Hun, 569. See Rider v. City of Amsterdam, 31 Misc. 375.

The general rule will not be relaxed in favor of great industries. Strobel v.

Kerr Salt Co., 164 N. Y. 303.

As to actions against the city of New York, for injuries caused by the Croton Aqueduct, vide Bailey v. The Mayor, 3 Hill, 531, affd., 2 Den. 433; see also Blake v. Ferris, 5 N. Y. 48; Floyd v. N. Y., etc., Id. 369; see also Kelly v. The Mayor, 6 Misc. 516.

No one can divert a stream from his own land to the damage of another, or of the public. Kellogg v. Thompson, 66 N. Y. 88, disapproved, 73 Hun, 236;

Vernum v. Wheeler, 35 id. 53.

The right to have a stream run through one's land is a corporeal not an incorporeat right, and if the land be flooded by a dam erected by an owner below under paramount right, this is a breach of the covenant for quite enyment. Schriver v. Smith, 100 N. Y. 471. As to liability of railroad for obstructing artificial ditch under embank-

Branson v. N. Y. C. & H. R. R. R. Co., 111 App. Div. 737.

Contribution for Repairs.— Loomis v. Loewenheim, 121 App. Div. 88.

Drainage, etc.— Overseers of highways or the authorities of cities have no right, in making repairs, to change a natural water-course or the natural course of surface water drainage, or to increase the same on another abutting owner. Moran v. McClearns, 63 Barb. 185; Clark v. Rochester, 43 Hun, 271.

Unless it merely results from proper grading of a street. Watson v. Kingston, 43 Hun, 367; Rutherford v. Holley, 105 N. Y. 632, distinguishing Noonan v. Albany, 79 N. Y. 470.

It they do the owner may abate the sluiceway as a nuisance. Thompson v.

Allen, 7 Lans. 459.

And he may recover damages for any injury resulting therefrom. Noonan v. Albany, 79 N. Y. 470; Acker v. Newcastle, 48 Hun, 312.

So where the cause was the building of too small a sewer. Seifert v. Brooklyn, 15 Abb. N. C. 97.

So of the discharge of sewage; Van Rensselaer v. Albany, 15 Abb. N. C. 457, relying upon Noonan v. Albany, 79 N. Y. 470, supra; and discharge of sewage may be enjoined, when the actual use of the water is not impaired.

Mann v. Wiley, 51 App. Div. 169.

But not if the owner has consented. Seating v. Saratoga Springs, 39 Hun,

Nor may one relieve his land of standing water or prevent accumulations thereon by discharging it through drains or ditches upon the land of his neighbor. Vernum v. Wheeler, 35 Hun, 53.

Nor may he discharge surface water upon his neighbor's land. Clark v. Rochester, 43 Hun, 271; Deigleman v. N. Y. L. & W. R. R. Co., 12 N. Y. Supp. 83; Noonan v. Albany, 79 N. Y. 470.

Nor the water from springs. Colrick v. Swinburne, 105 N. Y. 503. But it may be drained into a natural stream without regard to any injury

that may follow therefrom. Foote v. Bronson, 4 Lans. 47.

Owners of lands have no rights in the surface water of adjoining lands. Id. A person may drain his own land, even if thereby a natural stream is increased and damage ensue to lands below. Waffle v. N. Y. C. R. R., 58 Barb. 413, affd., 53 N. Y. 11.

And he may withhold the surface water on his own land so as to prevent its running on to land of another. Wagner v. L. I. R. R. Co., 5 Supm. 163; 70 N. Y. 614.

But he is liable, if by the confinement the water does damage. Bastable v. Syracuse, 8 Hun, 587.

He need not alter its natural flow to prevent injury. Vanderville v. Taylor, 65 N. Y. 341; Garrett v. Wood, 35 Misc. 397. But he may alter it as he likes, if he do no harm and do not increase the flow. Peck v. Goodberlett, 109 N. Y. 180.

And he may restore a natural flow though it injure his neighbor. Phelps v. Nowlen, 72 N. Y. 40.

If by any diversion of surface water by one upon his own land injury results to another by his negligence, he is liable. Mitchell v. N. Y., L. E. & W. R. R. Co., 36 Hun, 177; Bastable v. City of Syracuse, 8 id. 587, affd., 72 N. Y. 64, citing, Byrnes v. City of Cohoes, 67 id. 204; Noonan v. City of Albany, 79 id. 470; McCormick v. Horan, 81 id. 86. See also Egener v. N. Y. & R. B. R. Co., 3 App. Div. 157.

Drainage agricultural lands aids access

Drainage, agricultural land; vide supra.

As to sewers, etc., in cities, see Swikehead v. Mickels, 81 Hun, 325.

Drainage Act (L. 1895, Chap. 384), held unconstitutional. Matter of Tutthill, 163 N. Y. 133. See also Matter of Lent, 47 App. Div. 349; previously held not retroactive. Matter of Town of Penfield, 3 id. 30.

Rights by Prescription.—An exception to the above general principles exists in favor of parties who have so used or detained running water for a special purpose, or in special manner, as to have a prescriptive right to such peculiar use, and a grant for such use will be presumed. In this State such a continuous and uninterrupted adverse use for twenty years establishes a prescriptive right; that period being the time necessary to raise the presumption of a grant. In such cases the natural and common-law right of the other riparian proprietors becomes subservient to the acquired right of the party claiming and establishing the prescription.

Sanders v. Newman, 1 B. & Ald. 258; Van Beuren v. Van Beuren, 3 Johns. Ch. 282; Sherwood v. Burr, 2 Day, 244; Haight v. Price, 21 N. Y. 241; Platt v. Johnson, 15 Johns. 213; Belknap v. Trimble, 3 Paige, 577; Smith v. Adams, 6 id. 435; Baldwin v. Calkins, 10 Wend. 167; Townsend v. McDonald,

12 N. Y. 381; Pollett v. Long, 58 Barb. 20, revd. on other grounds, 56 N. Y. 200; Van Hoesen v. Coventry, 10 Barb. 518; Brown v. Bowen, 30 N. Y. 519; Hammond v. Zehner, 21 id. 118; Parker v. Foote, 19 Wend. 309; Olmstead v. Loomis, 9 N. Y. 423.

An undisputed assertion and claim to use, and the use of water in a peculiar manner for over twenty years, will establish such use as a right. Olmstead v. Loomis, 9 N. Y. 423; In re Water Commissioners, etc., 4 Edw. Ch. 545; Belknap v. Trimble, 3 Paige, 577; Smith v. Adams, 6 id. 435.

The right will not be lost by nonuser. Townsend v. McDonald, 12 N. Y. 381.

Nor can the right be taken away by diversion of the stream nor diminishing it. Van Hoesen v. Coventry, 10 Barb. 518; Law v. McDonald, 9 Hun, 23; Arnold v. H. R. R. Co., 55 N. Y. 661. See Hall v. State of New York, 72 App. Div.

But the right to obstruct a harbor or navigable stream can never be so acquired. Ogdensburg v. Lovejoy, 2 Supm. 83; Crill v. City of Rome, 47 How. Pr. 398.

Nor can the right be acquired as against the public. Kellogg v. Thompson,

66 N. Y. 88, criticised, 47 St. Rep. 845.

The right is measured by the extent and nature of the previous enjoyment and the mode of user cannot be changed. Prentice v. Geiger, 9 Hun, 350, affd., 74 N. Y. 341.

Right to erect a dam may be acquired by prescription. Hall v. State of New York, 72 App. Div. 360; see also Dosoris Pond Co. v. Campbell, 25 App. Div. 179.

The use of water in a particular way may be extinguished by unity of possession and title of both the parcels of land connected with the easements. Manning v. Smith, 6 Conn. 289.

A parol license to divert water is valid. Rathbone v. McConnell, 20 Barb. 311, affd., 21 N. Y. 466.

The enjoyment must be continuous, or no easement is established. Pollard

v. Barnes, 2 Cush. (Mass.) 191; Branch v. Doane, 18 Conn. 233; Pierce v. Selleck, id. 321.

The prescriptive right, although enjoyed for a less time than twenty years, may also be established through the operation of the equitable principles flowing from the doctrine of estoppel. Brown v. Bowen, 30 N. Y. 519; Lewis v. Carstairs, 6 Whart. 193. And see fully as to a right obtained by "prescription," supra, Chap, XXXVI.

Wells and Springs.— The above principles apply, to a certain extent, to subterranean streams. It is the general rule that a person has a right to their reasonable but not to their exclusive use; yet if he divert them from their natural course by lawful acts upon his own land, no action will lie, even though the diversion were He may also dig a well intercepting under-ground currents of water without a distinct course, but cannot do so when the water has actually reached and become a part of a spring or stream having a clearly defined course, and is substracted from it.

Smith v. Adams, 6 Paige, 435; Trustees of Delhi v. Youmans, 45 N. Y. 362, affg. 50 Barb. 316; Arnold v. Foot, 12 Wend. 330; Phelps v. Nowlen, 72 N. Y. 40; Colrick v. Swinburne, 105 id. 503; Bloodgood v. Ayres, 108 id. 400; Johnson Cheese Mfg. Co. v. Veghte, 69 id. 16; Smith v. City of Brooklyn, 18 App. Div. 340, affd., 160 N. Y. 357.

The use of a spring on one's land for twenty years will not entitle the owner to a prescriptive right to its continued exclusive use in the same manner, unless it has been a use hostile or adverse to an adjoining owner. The Trustees, etc., of Delhi v. Youmans, 45 N. Y. 362, affg. 50 Barb. 316.

As to interference with another's well, vide Greenleaf v. Francis, 18 Pick. 117; Beach v. Driscoll, 26 Conn. 542; Ellis v. Duncan, 21 Barb. 230. The general principle was said to be that no one can maliciously divert water from his neighbor's well, but may dig one on his own land, if necessary, even though it interfere with that of another. Ellis v. Dunoan, 21 Barb. 230. But in Phelps v. Nowlen, 72 N. Y. 40, this was disapproved, and it was held that malice is immaterial and that if the acts occasioning the diversion were in themselves lawful, no action will lie whatever the animus with which they were done. See Merrick Water Co. v. City of Brooklyn, C2 App. Div. 454.

As to pollution of well by way of an underground vein, vide Dillon v. Acme O.1 Co., 49 Hun, 565.

And springs may be subject to a necessary use, but cannot be so entirely used as to be diverted from their natural course over another's land.

Arnold v. Foot, 12 Wend. 330.

A party may change the form or shape of a spring on his land, or increase its flow, and will not be thereby deprived of his right of easement to flow it over the land of another. Wasfle v. N. Y. C. R. R., 58 Barb. 413, affd., 53 N. Y. 11; Wasfle v. Porter, 61 Barb. 130.

The grant of a right to grant water by pipes from a spring is the grant of an easement. The use of such an easement is no breach of a cove-

nant for quiet enjoyment or warranty, but it is an incumbrance. McMullin

nant for quiet enjoyment or warranty, but it is an incumbrance. McMullin v. Wooley, 2 Lans. 394.

One may do any lawful act on his own land to his own spring and will not be liable, if it cuts off the flow to the spring of another, though it be maliciously done to effect such injury. Phelps v. Nowlen, 72 N. Y. 40. See also, as to this, Bloodgood v. Ayers, 77 Hun, 356, affd., 108 N. Y. 400; Johnstown, etc., Co. v. Veghte, 60 N. Y. 16.

An action lies, however, in some cases to prevent or redress the diversion of underground waters by a neighboring proprietor, where the act does not intercept the flow in the natural way, but creates a condition whereby all the water is drawn to one spot.

all the water is drawn to one spot.

The draining of a large territory by driven wells of a municipal corporation, the territory not belonging to it and the percolating underground waters tion, the territory not belonging to it and the percolating underground waters being used for persons and corporations having no interest in the land, renders the municipality liable. Forbell v. City of New York, 47 App. Div. 371, affd., 164 N. Y. 522; Reisert v. City of New York, 69 App. Div. 302, revd. on other grounds, 174 N. Y. 196; again, 101 App. Div. 93. See also Smith v. City of Brooklyn, 18 App. Div. 340, affd., 160 N. Y. 357; Westphal v. City of New York, 75 App. Div. 252; Covert v. City of Brooklyn, 6 id. 73, 74; Jager v. City of New York, 75 id. 258; Kinsey v. City of New York, Id. 262; Sposato v. City of New York, Id. 304.

Oil Wells .- There can be no title to the oil while in the ground. Shepherd v. McCalmont, etc., Co., 38 Hun, 37.

TITLE III. TIDE-WATER STREAMS AND ARMS OF THE SEA.

It is a well-established principle of the common law that the sovereign, or, in this country, the People of a State, on whose maritime border and within whose territory it lies, own the land under water of navigable streams and arms of the sea, or rivers, which have the flux and reflux of the tide, and have a power of disposal thereof. The riparian owners on such waters, as a matter of right, do not own the soil under water in front of their upland between high and low water, but own only to high-water mark. The shores of such waters, and the soil under them beyond ordinary high-water mark, belong to the State in which they are situated, as

sovereign, subject to the public rights of fishing and navigation. This State, deriving its title by succession from the King and Parliament of Great Britain, became, by its independence, absolute proprietor of all lands under the navigable streams within its territorial limits and within the ebb and flow of the tide, which remained ungranted by its predecessors. The State, therefore, is presumed to have title in all such lands, and those who assert title thereto as against the State must show a grant or its equivalent. Under the common law no one could erect a building or wharf upon the land below high-water mark, without license, but as construed by the courts of this State, the title to the foreshore being held in trust for the members of the community, riparian ownership includes the right to make available the easement, or right of access, by the construction of a landing pier or wharf.

For the latest review of the subject in this State, see Town of Brookhaven v. Smith, 188 N. Y. 74, revg. 98 App. Div. 212. See also City of Brooklyn v. Mackay, 13 id. 105.

Brooklyn v. Mackay, 13 id. 105.

As to the sovereignty of the State over land under navigable water. Town of Brookhaven v. Smith, 188 N. Y. 74, revg. 98 App. Div. 212; Langdon v. The Mayor, 93 N. Y. 129; Mayor v. Hart, 95 id. 443; Saunders v. N. Y. C. & H. R. R. Co., 144 id. 75; Ill. Cent. R. R. Co. v. Illinois, 146 U. S. 387; Shively v. Bowlby, 152 id. 1. See also the State Law; General Laws, Chap. II, L. 1892, Chap. 678.

All arms of the sea, and streams where the tide ebbs and flows, are, by the common law, deemed "navigable." This is not a controlling test in this State. Roberts v. Baumgarton, 110 N. Y. 380. As to navigability, see Ten Eyck v. Warwick, 75 Hun, 562. For distinction of what are and what are not navigable streams reference may be made to People v. Canal Appraisers, 33 N. Y. 461, reviewed, supra, p. 547; Curtis v. Kessler, 14 Barb. 511; Munson v. Hungerford, 6 id. 265; Morgan v. King, 35 N. Y. 454.

The above principle of ownership on tide-waters is established and shown in the following cases: Lansing v. Smith, 4 Wend. 9; the Champlain, etc., R. R. v. Valentine, 19 Barb. 484; Gould v. Hudson R. R. R. Co., 6 N. Y. 522, discredited, 71 Hun, 153; Furman v. The Mayor, 10 N. Y. 568, affg. 5 Sandf. 16; People v. Tibbets, 19 N. Y. 523; People v. Canal Appraisers, 33 id. 461; Den v. The Association, etc., 15 How. U. S. 426; Smith v. The State of Maryland, 18 id. 71; Martin v. Waddell, 16 Pet. 367; Barney v. Keokuk, 4 Otto, 324; People v. Staten Island Ferry Co., 68 N. Y. 71; Wheeler v. Spinola, 54 id. 377; Roberts v. Baumgarten, 110 id. 389; Matter of the City of New York, 168 id. 134; and see supra, p. 547. DeLancey v. Piepgras, 138 N. Y. 26; as to reservations and conditions of forfeiture.

of forfeiture.

of forfeiture.

Held, land between high and low-water mark may have been conveyed where the property is situated on Long Island sound, and is described in the deed as running along the shore, even though the land under water is not in express terms conveyed, as the title to the foreshore may have been derived from the State. Oakes v. DeLancey, 71 Hun, 49; 133 N. Y. 227. Held, the land under the water of Fort Pond bay on the northerly side of Long Island was not included in and did not pass by the use of the words "together with all havens, harbors, creeks," in the Nicholls patent of 1666, confirmed by the Dongan grant of 1686, to the freeholders and inhabitants of the town of East Hampton. East Hampton v. Vail, 71 Hun, 94.

Intruders.— A mere intruder on land is limited to his actual possession, and whatever rights a riparian owner may have do not attach to him. Watkins v. Holman, 16 Pet. 26. Ejectment will lie by the People, for made land beyond high water without proof of any title to the land. The People v. Health Commrs. of New York, 5 Den. 389; see also as to ejectment for such land, supra, p. 907, and infra, p. 943.

Occupation on the shore constituting notice of claim; when. De Lancey v. Piepgras, 138 N. Y. 26, supra.

As to the Title of the United States thereto.—As regards any conflicting claims between the respective States and the United States as to the ownership of such land within their respective borders, it has been determined that such navigable waters, and the soil under them, were not vested by the Constitution of the United States in the United States or general government, but were reserved to the States respectively within whose boundaries they are; and any grants of such lands by the United States are void.

Upon the American Revolution the title and dominion of the tide waters and of the land under them vested in the several States, within their respective borders subject to the rights surrendered by the Constitution to the United States. The title and rights of the riparian proprietors are therefore governed by the laws of the various States.

Goodtitle v. Kibbe, 9 How. U. S. 471; Pollard v. Hagan, 3 id. 212; People v. The Canal Appraisers, 33 N. Y. 461; Doe v. Beebe, 13 How. U. S. 25; Shively v. Bowlby, 152 U. S. 1.

Regulation and Disposal of Land under Water.— It has been established in this State by judicial decision that the Legislature of the State has an inherent right to control and regulate the navigable waters within the State, and to dispose of its title to the land under water within its jurisdiction. As a general rule this may be done irrespective of the claims of the riparian owner adjoining, who, by a disposition of the land beyond high water, may have his riparian advantages interfered with, and be cut off from the benefits incident to the contiguity of his property to the waters. The individual right of the riparian owner, as far as determined by the courts of this State, in the cases below cited, is considered subject to the right of the State to abridge or destroy it at pleasure, by a construction or filling in beyond his outer line, and that, too, without compensation made.

Lansing v. Smith, 4 Wend. 9; Gould v. Hudson R. R. R. Co., 6 N. Y. 522; People v. Tibbets, 19 id. 523; Furman v. The Mayor, 10 id. 567; Sage v. The Mayor, 154 id. 61; the interference, however, must be for the purposes of navigation or commerce. Matter of City of New York, 168 N. Y. 134. See there cases for a full review of the subject.

The same principles have been established in New Jersev. Langdon v. Mayor, 6 Abb. N. C. 314; Moore v. Jackson, 2 id. 211; Stevens v. The

Paterson & Newark R. R. Co., N. J. Court of Errors, etc., December, 1870. The above had long been recognized as the established law of this State.

While the law in this State must be regarded as settled as above, a modification of the general principles, if not a radical change, was laid down by the Supreme Court of the United States in several cases, and particularly in Yates v. The City of Milwaukee, 10 Wall. 497. In that case there had been an attempt by the city of Milwaukce, under a delegated power from the State. to prevent a riparian owner on a navigable stream, from docking out over flats, belonging to the State, to the channel, and to abate his wharf as a The court held that a riparian owner to high-water mark, whose land is bounded by a navigable stream, has a right of access to the navigable part of the river from the front of his lot, by making a landing wharf or pier for his own use, or for the use of the public, subject to such general rules and regulations as the Legislature might impose for the public benefit. That and regulations as the Legislature might impose for the public benefit. That this riparian right cannot be arbitrarily destroyed or impaired. That it is a right of which, when once vested, the owner cannot be deprived except in accordance with existing law; and if necessary that it be taken for the public good, then only upon due compensation. That if such an owner has built out a wharf, which does not interfere with navigation, if the authorities deem its removal necessary in the prosecution of any general scheme of widening the channel and improving navigation, they must first make such owner compensation for his property so taken for the public use. This decision walks pensation for his property so taken for the public use. This decision, unless a distinction is found between it and the above cases decided in this State, seems subversive of the principle that the State may destroy, at will, the aquarian right of a riparian owner by disposing of land in front of his upland, or by restricting the exercise of his rights. See also Dutton v. Strong, 1 Black, 25; St. Paul v. Schurmier, 7 Wall. 272; Barney v. Keokuk, 4 Otto, 324, which sustains the rule as above laid down. The principle, as laid down in the above case of Yates v. The City of Milwaukee, seems, from the tenor of the leading opinion, by Justice Miller, to hold that the owner of lands bordering on navigable waters has the common-law right to build and maintain piers and wharves from the shore, through the adjacent shallow waters, to a point where, in fact, the waters in their natural state are navigable, and that, too, without regard to the distinction whether the lands border upon fresh or tide-water. It may be remarked that the dogmas laid down in the opinion are broader than the facts before the court. It is remarked in Sage v. The Mayor, 154 N. Y. 61, at p. 78, that this case simply decided that a judicial trial was necessary, before such a wharf could be declared a nuisance. It is evident that there is still a wide field of discussion open on these important questions in general, and it is probable that in the various States local custom or law modifies the general principles.

In Barney v. Keokuk, 4 Otto, 324, the Supreme Court of the United States

held that, except in States where the false doctrine that only tide-water is navigable prevails, all streams navigable in fact are navigable in law, and the public authorities may build wharves, etc., below high-water mark, without compensation to riparian owners. In this case the plaintiff owned lots bounded by a navigable river, subject to the public easement of a street along the bank. On the river side of the street below high-water mark the city caused wharves and warehouses to be erected. Plaintiff was held not

entitled to compensation.

The following cases uphold the right of a party owning a wharf, by grant from a municipal corporation, to recover damages for a destruction of his from a municipal corporation, to recover damages for a destruction of his aquarian advantages by an addition to the wharf constructed by the same body. Van Zandt v. The Mayor, 8 Bos. 375; Taylor v. Brookman, 45 Barb. 106; Crocker v. The Mayor, 21 N. Y. 197; Langdon v. The Mayor, 93 id. 129; evidently on the ground that there had been a grant of the lands under water; see Sage v. The Mayor, 154 id. 61, 77, explaining Langdon v. The Mayor. See also infra, Chap. XLIV.

See also a case decided in the U. S. Circuit Court, Southern District of N. Y., in which it was held that where a party held his land by ancient patent from the crown, bounding him on a navigable river, his right to the riparian use of the river could not be taken by a municipality building an

riparian use of the river could not be taken by a municipality building an

outlying street without compensation. Van Dolsen v. The Mayor, 21 Blatch.

Nor can the construction of a speedway on the tide-water be considered an exercise of the reserved power of the people as trustee of the tideway and waters beyond to make improvements for the benefit of navigation. Matter

of the City of New York, 168 N. Y. 134.

The States have ownership over land covered by tide-waters within them and may dispose of them when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the right of Congress to control their navigation. Illinois Cen. R. R. Co. v. Illinois, 146 U. S. 387.

In De Lancey v. Piepgras, 138 N. Y. 26, it was held that such grants should be strictly construed and not include land beyond high-water mark.

Grant of lands under water construed. Thousand Island Steamboat Co. v.

Visger, 179 N. Y. 206.

Made Land.—Land made by the city of New York in rightfully filling up the water front and constructing piers under its ancient charters and subsequent constitutional legislation, does not become the property of the

subsequent constitutional legislation, does not become the property of the riparian owner, through the doctrine of accretion, but remains the property of the city for the benefit of the public. Sage v. The Mayor, 154 N. Y. 61. Otherwise of a wrongful dumping or pier building by a municipality; the riparian owner has title to it as an accretion. Steers v. Brooklyn, 101 N. Y. 51; Bedlow v. N. Y. F. D. D. Co., 112 id. 263.

Held, that if the State fill in the shallow water upon the bank of a navigable lake, the part filled in is to be deemed no longer navigable, and the riparian owner has a title to it as against all but the State. Ledyard v. Ten Kyck 36 Barb 102. Compare People v. Commerc of Land Office 135 Ten Eyck, 36 Barb. 102. Compare People v. Commrs. of Land Office, 135

N. Y. 447, in case of an individual.

A grant to individuals authorizing them to fill up in front of their several lands on tide-water, is a grant to each in severalty. As to the rules and their variations for drawing the boundary lines of the made land between coterminous proprietors on a curved shore, also as to how far such proprietors

are bound by an actual location acquiesced in, vide O'Donnell v. Kelsey, 4 Sandf. 202, affd., 10 N. Y. 412; also People v. Schermerhorn, 19 Barb. 541. See Beach v. Mayor, 45 How. Pr. 357, as to parties taking jointly if they desire, and that any right to land in front of water lots would pass under the terms "water rights" or "privileges," "hereditaments and appurtenances."

Grants under the Public Lands Law.—The Public Lands Law, General Laws, Chap. XI, L. 1894, Chap. 317, regulates the grant of lands under water by the State. By Article V, as amended by Laws of 1805, Chap. 208, provision was made for grants of land under water of navigable rivers and lakes, the Hudson river adjacent to New Jersey, and adjacent to and surrounding divers islands in New York bay, also Long Island and Westchester county lying on the East river or Long Island Sound. There are restrictions as to the extent of the grants in the various localities, as to which the statute will have to be consulted. Provision is also made as to use of lands under water by the United States or the State for the improvement of navigation, without detriment to private rights without due process of law.

See People v. Woodruff, 166 N. Y. 453. Thousand Island Steamboat Co. v. Visger, 179 N. Y. 206. Such grant does not determine title of State or an adverse claimant to such land. People v. Woodruff, 64 App. Div. 239.

Commissioners of the Land Office.— As to the powers and duties of these commissioners in disposing of State lands, vide Chap. XLIV.

Rights of the United States, and of the Public, as Controlling State Action.— The right of the public is considered superior to that of the State where a nuisance or encroachment is authorized. or where there is an abridgment of the common right of navigation, of which the State is considered a trustee of the public, and which is deemed inalienable. In a proper case of excess of action by the State, in authorizing encroachments on the common water highway. there would be a remedy in the United States Courts in behalf of the public against official bodies or others, and for the abatement of an undue encroachment as a nuisance. Under the Constitution of the United States, the proprietary right of the State and its grantees is subject to the authority of Congress over navigation and navigable waters. This is a restriction on the State power. Congress may interpose, whenever it shall be deemed necessary, by general or special laws; and whenever State laws militate against its constitutional powers or authority for the regulation of commerce, they will be held inoperative by the courts, at the instance of individuals, corporations, or States, where damage is shown. Offending bridges or other obstructions over navigable waters may be enjoined or removed by judicial action.

Gibbons v. Ogden, 9 Wheat. 1; People v. The Rensselaer, etc., R. R. Co., 15 Wendell, 114; People v. Tibbetts, 19 N. Y. 523; Hart v. The Mayor, 9 Wend. 571, 607; Fort Plain Bridge Co. v. Smith, 30 N. Y. 44; Baird v. Shore Line R. R., 6 Blatch. 276; U. S. v. Duluth, 1 Dill. 469. See the Passenger cases, 7 How. U. S. 283; State of Pennsylvania v. Wheeling Bridge Co., 9 id. 647, and 17 Wheat. 518, and also 18 How. U. S. 421; Renwick v. Morris, 3 Hill, 621, affd., 7 Hill, 575; People v. Central R. R. of New Jersey, 42 N. Y. 283; U. S. v. City of Moline, 82 F. R. 592; U. S. v. Romard, 89 id. 156.

283; U. S. v. City of Moline, 82 F. R. 592; U. S. v. Romard, 89 id. 156.

An act of Congress declaring a bridge a lawful structure held to legalize it, and it could not be removed as obstructing navigation. Gray v. Chicago R. R., 1 Woolw. 63; Willamette, etc., Co. v. Hatch, 125 U. S. 1; H. & St. J. R. R. Co. v. Mo. Riv. Packet Co., Id., 260.

As to when a bridge would be considered as obstructing navigation, vide Gilman v. Philadelphia, 3 Wall. 713; The Passaic Bridges, 3 Wall. 782.

As to when it would be deemed a nuisance, as erected in opposition to a franchise or State law, vide Chenango Bridge Co. v. Lewis, 63 Barb. 111.

In the absence of congressional legislation, or unless the legislation of a State conflicts with that of Congress, or with the Constitution of the United States, courts will not annul or impede the legislation of a State in its regulation of ferries, bridges, etc. Silliman v. Hud. Riv. Bridge Co., 4 Blatchf. 395; People v. N. Y., etc., Co., 68 N. Y. 71; Pound v. Funk, 5 Otto, 459.

As to what acts of Congress will restrain the State from acting, see Willamette, etc., Co. v. Hatch, 125 U. S. 1.
Riparian proprietors have the right to erect bridge piers and landing places on the shores of rivers, lakes and arms of the sea, if they conform

to State regulations, and do not obstruct the paramount right of navigation. Dutton v. Strong, 1 Black, U. S. 23.

As to the power of the United States and State governments to regulate streams for the purposes of commerce or the public good, vide supra,

Chap. II, Tit. III; also People v. Murphy, 76 N. Y. 475.

The Legislature may pass acts as to structures, etc., even if its action may involve a partial obstruction or inconsiderable detention to navigation, but it has not power to authorize any serious obstruction to those streams which are channels of commerce between the States. Woodman v. The Kilbourne Mfg. Co., 1 Abb. U. S. 158; Neaderhauser v. The State, 28 Ind.

The rights of the State also are subservient to the general public rights of navigation and fishery; and the State cannot make any disposition of land under water prejudicial to such rights. But the State may grant such lands in private ownership for the purpose of reclamation and use. Ward v. Mulford, 32 Cal. 365; and see *infra*, "Wharves."

The State may declare streams to be highways, and may control the use of a public river, as trustee for the public, and prevent the erection of bridges, dams, etc., obstructing their use. Suits may be instituted by the Attorney-General for the People. By declaring a stream a highway, the State acquires no title to the river-bed, but only declares the easement as existing. People v. The Canal Appraisers, 33 N. Y. 461; Canal Appraisers v. People, 17 Wend. 571; People v. Gutchess, 48 Barb. 656.

v. reopie, 11 wend. 511; reopie v. Gutchess, 48 Barb. 656.

A navigable stream is such as in its natural state affords a useful channel for commerce. The Montello, 20 Wall. 430; The Daniel Ball, 10 id. 557; Toledo Liberal Shooting Co. v. Erie Shooting Club, 90 Fed. Rep. 680. See also more fully, infra, as to obstructions in harbors and slips; also Barney v. W. Tel. Co., 60 N. Y. 510; Town of Brookhaven v. Smith, 188 id. 74; People v. Jessup, 28 App. Div. 524.

Jurisdiction of the State over Inland Bays and Seas .- It is asserted as a principle of State jurisdiction, that the cession to the Federal authorities, under the Federal compact of admiralty and maritime jurisdiction over the inland seas and bays of the respective States, was not a cession or alienation of their waters, or of general jurisdiction over them; and in respect of these, the States are held to retain unimpaired their residuary powers of legislation, and their rights of territorial dominion. It is held, also, that the counties and towns which are bounded generally on a bay or sound comprehend within their limits, for the purposes of ordinary civil and criminal jurisdiction, the waters between their respective shores and the exterior water line of the State.

The United States v. Bevan, 3 Wheat. 336; Manley v. People, 6 N. Y. 295; Mahler v. Transportation Co., 35 N. Y. 352; The New England Ins. Co. v. Dunham, 3 Cliff. 332; Brookman v. Hamill, 43 N. Y. 554.

Boundaries.— When the sea, bay, or navigable river is named as the boundary of land in a grant of the title of land, the line of ordinary high-water mark is intended and inferred where the common law prevails. Where the grant, however, is one of jurisdiction, the boundary would extend to low-water mark.

United States v. Pacheco, 2 Wall. 587; Palmer v. Hicks, 6 Johns. 133; Gough v. Bell, 1 Zabriskie N. J. R. 156; The Railroad Co. v. Schurmier, 7 Wallace, 272.

Where a Power or State cedes territory on the other side of a river it possesses, making the river the boundary, the Power or State retains the river to high water on the further bank. Howard v. Ingersoll, 13 How. U. S. 381.

Boundaries of the State .- See the State Law, G. L., Chap. II; Laws of 1892, Chap. 678, as amended.

Rights of Access.—Riparian owners upon the Hudson river have rights similar to those of abutting land owners upon public streets, and such rights, including that of access to the river, cannot be taken by a railroad without compensation. Hedges v. West Shore R. R. Co., 80 Hun, 310, revd., on the facts, 150 N. Y. 150.

As to cutting ice and access to river. Sanders v. N. Y. C. & H. R. Co., 71 Hun, 153, affd., 144 N. Y. 75; L. 1879, Chap. 388; L. 1895, Chap. 953, as amd. by L. 1899, Chap. 264, and L. 1904, Chap. 749; Penal Code, §§ 429, 640c.

See also p. 929.

Encroachments in a Harbor or River .-- All such encroachments, without a specific grant or authority, are, per se, nuisances, and may be abated with the exception of landing piers or wharves.

Vide Town of Brookhaven v. Smith, 188 N. Y. 74; People v. Vanderbilt, 38 Barb. 282; 26 N. Y. 287; 28 id. 306; Ogdensburgh v. Lovejoy, 2 Supm. 83; People v. Horton, 5 Hun, 516, affd., 64 N. Y. 610; and cases above cited; also Burbank v. Fay, 65 id. 57, holding that no private use can raise a prescriptive right as against the State or public.

But the right to a dam in a navigable river may be acquired by forty

years' prescription, when it does not interfere with navigation. Matter of State Res. at Niagara, 37 Hun, 537.

Remedy.— The remedy to prevent the erection of a purpresture and nuisance in a bay or navigable river is by injunction at the suit of the Attorney-General. People v. Vanderbilt, 38 Barb. 282, supra.

It would be necessary, if the intrusion was by parties in another State, to institute action in the Federal courts. People v. C. R. R. of N. J., 42 N. Y.

Buildings Beyond Low Water.— A building beyond low water is not in itself a nuisance. Whether it be so or not depends upon its effect upon the channel or navigation, and is always a question of fact. Wetmore v. Atlantic White Lead Co., 37 Barb. 71, affd., 41 N. Y. 384. This case also holds that the filling up, according to law, of navigable waters adjacent to a bank, unless made as an accretion to a public highway, does not make the land so filled in a highway, but is a gain to the adjoining proprietor, and does not bring a public right of passage over the land thus gained, in consequence of the former public right of navigation over the water filled up. Also, that if there in an encroachment on the State line without impeding navigation property the State gar interfere tion, none but the State can interfere.

Obstructions Affecting Private Rights .- Obstruction to a public stream is a nuisance, and is the subject of indictment, also of private action at the suit of any individual who sustains an injury personal and peculiar to himself; but, if unaccompanied by any individual or personal injury, does not authorize an action by a private person. Hudson R. R. R. Co. v. Loeb, 7 Robt. 418; Blanchard v. W. U. Tel. Co., 60 N. Y. 510; Delaney v. Blizzard, 7 Hun, 7.

An abutting property owner on Jamaica Bay four miles distant from a purposed turnpike road across the bay cannot enjoin it unless he shows special damage resulting to himself. Carvalho v. Brooklyn & J. B. Turnpike

Co., 56 App. Div. 522.

The sale must also show that the obstruction claimed is a nuisance. People v. Mould, 37 App. Div. 35, revg. 24 Misc. 287.

Right of Way Along the Borders of Public Rivers .-- By the civil law, a littoral right of way for purposes of navigation, anchorage or towing, existed on the banks or shores of public streams over private lands. Such right, however, has been held not to exist under the common law as prevailing in England and this country. A special custom, however, may be shown as conferring the right. The whole doctrine is discussed in the case of Ball v. Herbert, 3 Term Rep. 253.

Sea-Shore.—Anyone may pass over the sea-shore between high and low

water mark. Murphy v. Brooklyn, 98 N. Y. 642.

See as to this subject generally, Harvard Law Review, Vol. XXII, No. 2, containing the cases collected; also Barnes v. Midland R. R. Term. Co., 126 App. Div. 435.

Wharves and Slips .- Where the State makes an absolute grant of land covered by water of a bay or navigable river and the grantee builds a wharf thereon, it has been held that he has not a mere franchise to collect wharfage, but the rights that pertain to the ownership of land; and may exclude any other from the occupation. It is supposed, however, that the Legislature can only authorize the erection of wharves on the public waters by individuals for the purposes of common benefit and enjoyment. And to a certain extent they remain subject to legislative control, and cannot be used for mere storage to the exclusion and hindrance of public commerce and navigation, or for private purposes. The Legislature, by the grant of the land under water, does not divest itself of the right to regulate its use in the interest of the public.

Taylor v. Mayor, 4 E. D. Smith, 559; Board of Commissioners v. Clark, 33 N. Y. 251; Radway v. Briggs, 37 id. 256; Mayor v. Hill, 13 How. Pr. 280; Smith v. Levinus, 8 N. Y. 472; People v. Kelsey, 38 Barb. 269; Hecker v. N. Y. Balance Dry Dock Co., 13 How. Pr. 549; Penniman v. Same, 13 id. 40; Lansing v. Smith, 8 Cow. 146, 161; People v. N. Y. and S. I. Ferry Co., 68 N. Y. 71; Thousand Island Steamboat Co. v. Visger, 179 id. 206.

68 N. Y. 71; Thousand Island Steamboat Co. v. Visger, 179 id. 206.

And parties have a right to make use of public wharves for purposes of commerce, without special application therefor; but not, it seems, of a private pier. Dutton v. Strong, 1 Blatch. (U. S.) 23; Heeney v. Heeney, 5 Den. 625; Swords v. Edgar, 59 N. Y. 28. The Legislature may authorize the appropriation of piers, etc., for a ferry by a corporation under the right of eminent domain. Matter of Union Ferry Co., 98 N. Y. 139.

Under the grant of the Act of 1813 to the city of New York to build and maintain wharves, etc., the right to wharves in New York city is, in fact, a fee in the land. Williams v. The Mayor, 105 N. Y. 419. See also infra, Chan XLIV

There is an easement over wharves in the public in New York city, as against lessees of public wharves. Taylor v. Mut. Ins. Co., 37 N. Y. 275.

Leases of wharves in New York city were required to be made formerly at public auction or they were void. "Consolidation Act," L. 1882, Chap. 410, § 716. See also Starin v. Edson, 112 N. Y. 206; Lorton v. The Mayor, 33 App. Div. 140. But lessee who has held under lease cannot set the defect up. Mayor v. Sonneborn, 113 N. Y. 423.

In Post v. Pearsall, 20 Wend. 11, affd., 22 id. 425, it is held, that the public have no right to except the soil of an individual as a public leating.

public have no right to occupy the soil of an individual as a public landing against his will, although it has been so used for twenty years with his

knowledge.

Held the city of New York had a right to change location of a slip. Lorton v. The Mayor, 33 App. Div. 140.

Relative rights of adjoining littoral owners considered. Jenks v. Miller,

14 App. Div. 474, revg. 17 Misc. 461.

An act authorizing a filling up of land for a wharf, up to which there was a public highway, extends the highway, by operation of law, over the made land to the water. People v. Laimbier, 5 Den. 9. See also as to the use of such made land by the public. Waterbury v. Dry Dock Co., 54 Barb. 389, revg. 30 How. 39.

Vide as to bulkhead rights, a claim for their value substituted, same not passing by a deed of lands under water. Carroll v. N. Y. L. Ins. & T. Co.,

67 Hun, 438.

As to ejectment for wharf or right thereto, vide supra, p. 907, and Child v. Chappell, 9 N. Y. 246; Mayor, etc. v. N. Y. C. & H. R. R. Co., 69 Hun, 324. There may be summary proceedings to recover wharf property. People v.

Kelsey, 14 Abb. 372.

Where the deed to plaintiff's ancestor contained a provision that it should not prevent others from fishing on the premises or anchoring any ship thereon, except on such parts as may be covered by wharves erected thereon by the grantee, plaintiff, though recovering such premises, could take no better title than such ancestor, and a judgment awarding plaintiff the fee therein should be modified by inserting such proviso. De Lancey v. Piepgras, 138 N. Y. 26.

A conveyance of a pier carries the right to use adjacent water as a necessary appurtenance. Knickerbocker Ice Co. v. 42d St., etc., Co., 48 Super. 489; Langdon v. The Mayor, etc., 93 N. Y. 129; Bedlow v. N. Y. F. D. D.

112 id. 263.

Where the destruction of wharf rights belonging to private owners by construction of an exterior line of docks owned by the municipality involves the necessity of compensation to such owners, the measure of damages does not include the value of an existing platform or shed built out from such wharf, but only the value of such wharf right and the preferential use attached to his wharf by statute. Kingsland v. Mayor, 110 N. Y. 569, affg. 45 Hun, 198. See also Dimon v. Shewan, 34 Misc. 72.

Lateral Support. -- See White v. Nassau Trust Co., 168 N. Y. 149.

Wharfage and Regulation of Wharves .-- Statutes providing for the occupation and regulation of wharves (i. e. of 1862, Chap. 487, and of 1867, Chap. 945; 1882, Chap. 410, as to the city of New York), held to be mere police regulations and not to deprive wharf owners of any of their rights or privileges, although they may regulate their use or enjoyment. Roosevelt v. Godard, 52 Barb, 534.

Lease of wharfage by the city of New York held not a lease of the wharf or bulkhead itself. The city retains the wharf as a public wharf, to which vessels may be assigned by the harbor authorities. Eastman v. The Mayor,

152 N. Y. 468.

Such acts have been held constitutional, and also the delegation of power ever the wharves to officials, and the imposition of port charges. Mayor v. Ryan, 2 E. D. Smith, 368; Hecker v. N. Y. Bal. D. D. Co., 24 Barb. 215; Benedict v. Vanderbilt, 1 Robt. 194; Mayor v. Tucker, 1 Daly, 107.

But care must be taken not to conflict with the constitutional prohibition

of duties or a tonnage tax. Cannon v. New Orleans, 20 Wall, 577.

Wharves and Slips in New York City.—Regulated in New York city by Consolidation Act, Laws 1882, Chap. 410, § 712, amd. Laws 1887, Chap. 567; Laws 1890, Chap. 489; Laws 1892, Chap. 158; 1893, Chap. 397; Greater New York Charter, L. 1897, Chap. 378, as amd. by L. 1901, Chap. 466, § 819. As to filling in land under water in the city of New York, vide Laws 1895,

Chap. 58, amending Laws 1882, Chap. 410, and Greater New York Charter, supra. See also Mayor, etc. v. N. Y. C. & H. R. R. Co., 69 Hun, 324.

The dock commissioners in New York can authorize no private use that will

interfere with the public use of the wharves. Hoefts v. Seaman, 38 Super. 62.

Nor can the power to regulate be used so as to prevent the owners of

uplands and water fronts from the enjoyment of their property. Brooklyn v. N. Y. Ferry Co., 87 N. Y. 204.

Taxation .- It has been held where there is a mere right to collect wharfage, there is but an incorporeal hereditament, and in default of special statute, it is not taxable either as real or personal property, and that the purchaser of a bulkhead at a tax sale did not obtain the right of wharfage as part of or incident to his purchase. Boreel v. Mayor of N. Y., 2 Sandf. 552; but see this distinguished and doubted in Smith v. Mayor, 68 N. Y. 552, holding right of wharfage passed as an incident on a tax sale; The Mayor v. Hill, 13 How. Pr. 280. These later cases seem to hold that such a right is taxable. As to Brooklyn, see Tebo v. City of Brooklyn, 134 N. Y. 341.

Obstructions of Rivers, Harbors and Slips .-- Any permanent occupation and exclusive appropriation of a portion of a port or public river, unless sanctioned by the Legislature, is held to be an obstruction to its free and common use, and as such is a public nuisance. The State or corporation, or other body whose duty it is to prevent obstructions in a river, will be considered as a party aggrieved, and may by its own act, without indictment, remove such nuisance, whether any actual damage has been occasioned or not.

Hart v. Mayor, etc., of Albany, 9 Wend. 571; People v. Horton, 5 Hun, 516, affd., 64 N. Y. 610.

Nuisances.—State Board of Health may abate. The Public Health Law, G. L., Chap. XXV, L. 1893, Chap. 661, §§ 6, 25-27.

An injunction to prevent and restrain such a nuisance will also be granted at the instance of any private individual who sustains a special injury. Penniman v. The N. Y. Balance Co., 13 How. 41; Hecker v. N. Y. Bal. Dock Co., id. 549.

It has been held that the provisions of the ordinances of a municipal corporation, imposing penalties as to the use or obstruction of the public pregrated do not extend to wharves, etc.. owned by private citizens. Vandewharves, do not extend to wharves, etc., owned by private citizens. Vandewater v. City of N. Y., 2 Sandf. 258. Vide also supra.

It has been judicially decided that erecting cribs or piers, or even station-

ing vessels permanently in the harbor, or in the basins or docks thereof, is a public nuisance, unless placed there by direction or grant of a competent authority. Nor is it necessary for the removal of the obstruction that actual damage to the public should be shown. The sinking of a pier, therefore, outside of the legally established harbor lines, could not be authorized even by a city corporation, and would be a purpresture and a nuisance; and could be restrained or abated by the State, by action through the courts whether any actual damage had been occasioned by it or not. The court might either abate it by its own officers or require the party offending to do so. People v. Vanderbilt, 26 N. Y. 287; 28 id. 396; Hudson R. R. R. Co. v. Loeb, 7 Robn. 418

It has been held that occupation of basins and slips by a balance dock is for a legitimate commercial purpose, and if sanctioned by the proper officers and assented to by the owner of the pier, no other person can complain or restrain such occupation. Hecker v. N. Y. Bal. Dock Co., 24 Barb. 215;

Roosevelt v. Godard, 52 Barb. 533.

The above decision does not conflict with Penniman v. N. Y. Bal. Dock Co., 13 How. Pr. 41, in which such a structure was held a nuisance, inasmuch as the plaintiff therein sustained damage specially, by its interfering with the wharfage. A subsequent act legalized the location of the docks of the said New York Balance Dry Dock Co. in the slips.

Parties Aggrieved.— It is established by legal decision that lessees of land under water, and of bulkheads, piers, etc., have no peculiar claim to relief by injunction, against alleged obstructions, founded upon any rights as riparian owners. Their rights, if any, are in common with other people of the State, when the use of a highway has been obstructed. Any obstruction or disturbance of a highway as such is the subject of action, however, by any

of disturbance of a lighway as such is the subject of action, nowever, by any individual specially aggrieved or injured. Hudson R. R. R. Co. v. Loeb, 7 Robn. 418; People v. Vanderbilt, 26 N. Y. 287; 28 id. 396.

As to the use of wharves by the public where they are beyond the legal water line, vide Wetmore v. Brooklyn Gas Light Co., 42 N. Y. 385, and supra, p. 940. See also as to obstructions of commerce and navigation, supra, p. 929.

Local Ordinances.— The legislature may confer upon a municipality power to make ordinances to prevent obstructions of its harbor, and they may be enforced in the State courts. Ogdensburgh v. Lyon, 7 Lans. 215.

TITLE IV. FISHERIES.

The right of fishing in the sea or public waters of a State is held to be a common right; that is, a right inherent in all the people of a State by the common law. It is one of those rights held by the sovereign power in trust for all the people. This State, in the exercise of such trust, has made various regulations as to fishery in its waters, both inland and tidewater. It is held that the Legislature has power to pass such laws regulating fisheries and forbidding fisheries at specified times, within the waters of this State. right is founded on considerations of public policy, and the Legislature may delegate such right to minor bodies or officials.

Smith v. Levinus, 8 N. Y. 472; People v. Reed, 47 Barb. 235. See also Corfield v. Coryell, 4 Wash. C. C. 371, as to the power of a State to regulate the fisheries within its territorial courts, as to its own citizens and the citizens of other States.

An act was passed April 22, 1864, Chap. 288, to prevent the taking of fish from any private or artificial pond. An act was also passed April 22, 1868, Chap. 285, amended May 2, 1870, Chap. 567, appointing commissioners 1808, Chap. 285, amended May 2, 1870, Chap. 567, appointing commissioners of fisheries in the State, with specified powers, and otherwise providing regulations as to fishing in the State; continued March 13, 1873, Chap. 74. A general act was passed May 13, 1867, Chap. 898, amd., L. 1868, Chap. 3; also Chap. 785; L. 1869, Chap. 909. A consolidation act was passed April 26, 1871, Chap. 721, amd., L. 1872, Chap. 433, § 5, amd., L. of May 7, 1873, Chaps. 435, 436, 439. An act was passed as to the protection of fish in private ponds, June 7, 1873, Chap. 665. By Laws of April 3, 1840, Chap. 194, certain powers were given to the supervisors of counties as to taking fish, and rescaling all other laws on the subject then in force. This law and the and repealing all other laws on the subject then in force. This law and the others above specified probably virtually repealed the provisions of the Revised Statutes, Part I, Chap. XX, Tit. II, as to the fisheries generally, and giving the Courts of Common Pleas of certain counties certain powers as

Various special acts will be found in the statutes regulating the taking of fish in specified localities in the State. Vide also the general law of 1874,

Chap. 340, and L. 1895, Chap. 551.

The regulation of this whole subject is now contained in the Forest, Fish and Game Law, G. L., Chap. XXXI, L. 1900, Chap. XX, as amended. See Arts. III, IV, VI, and XII in particular.

The right must be so exercised, whether by State or citizens, as not to

interfere with navigation. McCready v. Virginia, 4 Otto, 391.

It is a proprietary right, and nonresidents may be, by law, excluded from enjoying it. Id.

Fishing ownership. See People v. Doxtater, 75 Hun, 472,

It has been seen above that the law gives to riparian proprietors on certain inland fresh-water rivers and streams above tide-water. ownership ad filum medium aqua. The law also gives such proprietors the exclusive right of fishing over the same, each on his own side. The right, however, is subordinate to the right of way or easement in the public over the waters as a public highway; and there can be no such diversion or obstruction of the stream as to injure or impair the rights of others in the fishery by preventing the free passage of fish, or otherwise. Such private right is also held subordinate to the power of the legislature to regulate fisheries for the general good; and the legislature, as before seen, has power to make general laws for that purpose. The presumption of the ownership of the adjoining owner in the fishery right may be removed, if there be a grant or prescriptive right existing in another, to the exclusion of the former.

Lewis v. Keeling, 1 Jones, 299; Moulton v. Libbey, 37 Me. 472; Commonwealth v. Bailey, 13 Allen (Mass.), 541.

wealth v. Bailey, 13 Allen (Mass.), 541.

As regards what are or what are not navigable rivers within the above principles giving exclusive and several right of fishery, it has been held in several of the States, that such right would not be held appurtenant to owners on great inland rivers, although not having tidewater, at least so far up as they have capacity for public use, as commercial highways; but that fishery on such rivers would be common to the public. Hooker v. Cummings, 20 Johns. 90; Carson v. Blazer, 2 Binney, 475; 3 Kent, 418; Stump v. The President, etc. of the Schuykill Nav. Co., 14 Serg. & Rawle, 71; Cates v. Waddington, 1 McCord, 580; Collins v. Benbury, 3 Iredell (N. C.), 277; Lewis v. Keeling, 1 Jones, 299; Moulton v. Libbey, 37 Me. 472; Commonwealth v. Bailey, 13 Allen (Mass.), 541; and see supra, p. 924.

The above principles relative to the private right of fishery apply only to certain fresh-water rivers above tide-water, but the right of fishing in the sea, in the bays and arms of the sea, and in navigable or tide waters, is a right common to the public; and persons using such common right of fishery may do so up to high-water line.

Lowndes v. Dickerson, 34 Barb. 586; Palmer v. Hicks, 6 Johns. 133; Rogers v. Jones, 1 Wend. 237; Delaware, etc. v. Stump, 8 Gill & J. 479.

There is no right in the public to pass over the lands of an individual in order to reach the common fishing waters, unless there be a usage or dedication to the contrary. On navigable rivers, adjoining proprietors have the exclusive right to draw the seine and take the fish on their own lands; and if an island or rock in tide-waters be private property, no person but the owner has the right to use it for purposes of fishing. Lay v. King, 5 Day, 72; The Commonwealth v. Shaw, 14 Serg. & Rawle, 9; 3 Kent, 417.

Common of Piscary.—This is a right existing in one or more persons of taking fish in waters running over lands of others. The principles regulating the right are distinguished from a general right in the public to take fish in the open sea. Although there is a common right of piscary open to all in the sea or arms thereof, it has been claimed that there may be a franchise, or a right by prescription to a several right of fishery in a portion of a

public river, or arm of the sea. The weight of authority, however, seems to be adverse to the existence of any power in the State to grant to an individual the right of taking fish in the open sea and in the creeks or arms thereof, in exclusion of the common liberty. See Jacobson v. Fountain, 2 Johns. 170; Gould v. James, 6 Cow. 369; Rogers v. Jones, 1 Wend. 237; Martin v. Waddell, 16 Pet. 367; Den v. Jersey Co., 15 How. (U. S.) 426; Lowndes v. Dickerson, 34 Barb. 586.

Shell Fish.—Shell fish, planted even in tide or navigable waters, in a bed where there is no interruption of navigation, are the exclusive property of those who plant them; but the bed must be clearly defined; and the shell fish must not have existed there in their native state.

Lowndes v. Dickerson, 34 Barb. 586; Decker v. Fisher, 4 id. 592; Fleet v.

Hegeman, 14 Wend. 42; Brinckerhoof v. Starkins, 11 Barb. 248.

Various acts have been passed in this State as to this fishery. See an act as to unlawfully taking oysters planted by others. L. 1866, Chap. 753. As to the planting and protection of oyster beds in the towns of Hempstead and Jamaica, vide Law of 1863, Chap. 493; Queens Co., Law of 1865, Chap. 343, amd., April 5, 1866; Richmond Co. and surrounding waters, L. 1866, Chap. 404; Housman v. Weir, 15 Abb. N. C. 415; Jamaica and Hempstead bays, L. 1870, Chap. 93; L. 1871, Chap. 639; Suffolk Co., L. 1870, Chap. 234, and People v. Hazen, 121 N. Y. 313; see also Laws of 1872, Chaps. 483, 659,

666, 667; Islip, L. 1874, Chap. 549.
While many of the above special provisions appear to be still in force, the subject of shell fish in general is now regulated by the Forest, Fish and Game Law, G. L., Chap. XXXI; L. 1900, Chap. XX, as amended.

See, however, as to the above special enactments (§ 234) of the Forest, Fish and Game Law, repealing such acts as are inconsistent with said general law.

The subject of shell fish is also regulated specially by L. 1887, Chap. 584 (amd. L. 1903, Chap. 79), providing for the grant of franchises for the purpose of shell fish cultivation, etc.

And see also L. 1831, Chap. 203; L. 1884, Chap. 385, amd., L. 1896, Chap.

916; L. 1897, Chaps. 175, 704.

The grantee of a perpetual franchise under Law 1887, Chap. 584, held to acquire the exclusive right to oysters planted thereon only when he performs and continues to perform the conditions of the grant; and one who plants oysters on land under water, in good faith and without knowledge of the grant of same, and protects same acquires an exclusive title to them and may maintain action for their conversion. Vroom v. Tilly, 184 N. Y. 168, affg. 99 App. Div. 516.

The franchise under the Act of 1887 is personal property. L. 1887, Chap.

As to powers of supervisors in regulating shell fisheries, vide Laws of 1849,

Chap. 194, and Hallock v. Donning, 7 Hun, 52.

A lease by one of two tenants in common of a natural bed of oysters gives the lessees no exclusive right to take oysters therefrom, even though they have expended money and labor in making the bed productive. Mott v. Underwood, 73 Hun, 509.

But it has been held that an exclusive right to oyster fisheries may be maintained by proof of grant or prescription. Gould v. James, 6 Cow. 369; Rogers v. Jones, 1 Wend. 237; McCarty v. Holman, 22 Hun, 53; Town of Brookhaven v. Strong, 60 N. Y. 56; Robins v. Ackerly, 91 N. Y. 98. This last case expressly disapproved Lowndes v. Dickerson, 34 Barb. 586, and approved Brookhaven v. Strong, 60 N. Y. 56. The occision in this latter case was expressly limited to shell fish, and no opinion as to floating fish was expressed. The question is considered as no longer open to argument in Hand v. Newton, 92 N. Y. 88, following Brookhaven v. Strong, 60 N. Y. 56, and Robins v. Ackerly, 91 id. 98. Vide also infra.

Common Law Rights.—By common law oysters planted in tide-water belong to the planter, and deposit of material thereon by the grantee of the land under water whose grant contained a reservation to the people until actual appropriation is trespass. Post v. Kreischer, 18 Abb. N. C. 192, s. c., 103 N. Y. 110.

Tenancy in Common in oyster beds. Mott v. Underwood, 73 Hun, 509.

Constitutionality of Act Regulating.—An act giving a town power to regulate oyster fisheries within its boundaries, though in waters where it had no exclusive right of piscary, is constitutional and proper. People v. Thompson, 30 Hun, 457. Vide cases, supra.

Paramountcy of United States.— The title to land under navigable waters is subject to the right of the Federal government to dredge it for the purposes of navigation without compensation to the lessee. Lewis Bluepoint Oyster C. Co. v. Briggs, 58 Misc. 55.

Game Laws.—There are many laws on this branch of the subject. For the general regulation of this subject, see The Forest, Fish and Game Law, G. L., Chap. XXXI, L. 1900, Chap. XX, as amended.

TITLE V. FERRIES.

Among incorporeal hereditaments is the right or franchise to establish and maintain a public ferry.

The right to establish ferries and to appoint others to establish and maintain them is one of the provinces of the sovereign power of the State.

Power v. Athens, 99 N. Y. 592.

The general principle as regards the right of the grantee of a ferry franchise to maintain a ferry in a particular locality is, that it is in the nature of a grant, as of an estate and interest in property, subject to be resumed by the sovereign power only in cases where the public good requires, on due compensation made to the owners of the franchise.

Vide Franchises, supra, Chap. I, Tit. III.

Exclusive Privilege.— The grantee of an exclusive ferry privilege has a good cause of action against any other person who conveys passengers, even if free of charge, across the stream within the ferry limits.

As has been seen, under the present views of the courts, a grant of a franchise is no longer considered as implying a peculiar and continuous privilege to the grantee, or a contract, on the part of the State, for an exclusion of any conflicting interest, unless there be a specification to that effect. With respect to ferries, it is held that it

is competent for the Legislature, after granting a ferry franchise to one, to grant a similar franchise to another person, the use of which might impair the value of the first franchise, although the right so to do may not be reserved in the first grant. It would be otherwise, however, if the right so to do is expressly prohibited in the first grant.

The Fort Plain Bridge Co. v. Smith, 30 N. Y. 44; People v. The Mayor, 32 Barb. 102; Aiken v. West R. R., 20 N. Y. 370; People v. N. Y., etc., Co., 68 id. 71.

As to difference between an excursion line and a ferry. See People v. Mayor, 69 Hun, 559.

City of New York.—As to rights to ferries in the city of New York, vide Benson v. The Mayor, 10 Barb. 223; to the contrary, People v. The Mayor, 32 id. 102; also Costar v. Brush, 25 Wend. 628; Mayor, etc. v. Starin, 106 N. Y. 2; Mayor, etc. v. N. J. Steamboat Co., id. 28; Starin v. Mayor, etc., 42 Hun, 549, revd., 112 N. Y. 206. See also the Railroad Law, L. 1890, Chap. 565, § 54 (as amended by L. 1892, Chap. 676); L. 1884, Chap. 193, § 1.

By the Revised Statutes provision was made as to the general regulation of ferries; and the Courts of Common Pleas were authorized to grant ferry licenses in their counties respectively for not over three years. R. S., Part I, Chap. XVI, Tit. II (1 R. S. 526 et seq.).

See as to ferries on a river where the State has only jurisdiction over one-half thereof. People v. Babcock, 11 Wend. 586.

As to rights to compensation for ferry buildings in New York city on termination of lease, see N. Y. & B. F. Co. v. Mayor, etc. of N. Y., 146 N. Y. 145.

The Present Law as to Ferry Companies.—See the Transportation Corporations Law, G. L., Chap. XL, L. 1890, Chap. 566, as amended, Art. I; also the Railroad Law, G. L., Chap. XXXIX, L. 1890, Chap. 565, as amended by L. 1892, Chap. 676.

CHAPTER XLIV.

THE COMMISSIONERS OF THE LAND OFFICE AND THEIR DUTIES.

TITLE I .- GENERAL POWERS OF THE COMMISSIONERS. II .- GRANTS OF LAND UNDER WATER.

TITLE I. GENERAL POWERS OF THE COMMISSIONERS.

This Commission was created and had its powers under various early laws of the State, the most important of which are noted for reference.

Laws of May 5, 1786, Chap. 67; March 24, 1801, Chap. 69; April 5, 1803, Chap. 88; 1805, Chap. 250; April 6, 1813, 1 R. L. 193; October 20, 1814, Chap. 199; Laws of 1815. By the Constitution the Board is to consist of the Lieutenant-Governor, Speaker, Secretary of State, Comptroller, Treasurer, Attorney-General and State Engineer and Surveyor; Const. 1846, Art. V, § 5; 1894, Art. V, § 5.

By the Revised Statutes, the Commissioners of the Land Office were to have the general care and superintendence of all lands belonging to the State, the superintendence whereof is not vested in some other officer or board. They were also to have power to direct the granting of the unappropriated lands of the State, according to the directions from time to time to be prescribed by law.

1 R. S. 197, § 1.

A majority might act, or any three of them, if the Surveyor-General be one of such three. Minutes of their proceedings were to be kept. And letters patent to be issued were to contain a reservation of gold and silver mines. 1 R. S. 198, §§ 2, 4, 5. Provision was made as to how the sale of unappropriated lands was to be made, and as to the execution of grants therefor. 1 R. S. 201, et seq; also concerning the protection of the public lands, and the payment of charges thereon, and the duties of the commissioners as to lands belonging to the count fund. ers as to lands belonging to the canal fund.

The provisions as to the sales of land were amended by Law of May 25, 1836, Chap. 467, repealing Act of May 11, 1835. See also Law of May 9, 1840, Chap. 252, as to sales; also L. 1841, Chap. 70; 1830, Chap. 322; 1831, Chap. 61; 1839, Chap. 134, as to attendance of witnesses.

The subject is now regulated by the Public Lands Law, repealing and superseding the provisions of the Revised Statutes, and many of the other provisions above cited.

Public Lands Law, G. L., Chap. XI; L. 1894, Chap. 317, as amd.

Escheated Lands.—As to the action of the commissioners of the land office with respect to escheated lands, vide Law of 1829, Chap. 259; 1833, Chap. 300; the Public Lands Law, L. 1894, Chap. 317, Art. IV (as amd. by L. 1905, Chap. 360; L. 1908, Chap. 613).

Indians.—As to the powers of the commissioners as to Oneida Indians, vide Law of 1839, Chap. 58; as to other Indians, Law of 1841, Chap. 234; 1849, Chap. 420; 1850, Chap. 37; 1851, Chap. 198.

Land office commissioners and their present powers as to Indians, see the Indian Law, G. L., Chap. V, L. 1892, Chap. 679, as amended. (See in particular § 13 and L. 1893, Chap. 229.) This act supersedes the above acts.

Form of Grant and Reservation.— The statutes, earlier and present, prescribe that all letters patent to be granted shall be in such form as the commissioners shall direct, and shall contain an exception and reservation to the people of the State, of all gold and silver mines. 1 R. S. 198, § 5; Public Lands Law, § 4 as amd.

The want of this reservation would not invalidate the grant of land under water. The People v. Mauran, 5 Den. 389. See also Public Lands Law, § 80. There is also an implied reservation that the grant of lands under tide-

water is subject to the power of the Legislature to prescribe the mode of enjoyment. People v. N. Y. & S. I. Ferry Co., 7 Hun, 105, affd., 68 N. Y. 71.

The grant, it was held, might be by letters patent, under the seal of the State, or by deed under the hands and seals of the commissioners. People v.

Mauran, 5 Den. 389.

It would take effect only from the time when approved by the commissioners and passed the secretary's office, although dated and signed by the governor before that time. Jackson v. Douglass, 5 Cow. 458.

Salt Lands in Syracuse .- Vide Law 1870, Chap. 279.

Mines.— As to the working of mines reserved to the State, and to the use and occupation of lands for that purpose, vide Law of 1867, Chap. 943; R. S., Part I, Chap. IX, Tit. XI, §§ 2, 7, and L. 1890, Chap. 411.

These acts were all repealed; and all are now abolished by the Public Lands Law, L. 1894, Chap. 317, which provides for the subject, see Art. VI,

§§ 80-85.

Lake George. As to lands in Lake George, vide Laws of 1876, Chap. 297, repealed and superseded by said Public Lands Law, with new provisions, See Public Lands Law, § 14.

Taxes on Lands Sold by the State. - Laws of 1875, Chap. 572. This act has also been modified by said Public Lands Law. See § 37.

Eminent Domain.- State Board of Health empowered to condemn land through commissioners of the land office and to abate nuisances. The Public Health Law, G. L., Chap. XXV., L. 1893, Chap. 661, §§ 10, 6.

Adirondack Park, Forest Preserve, etc.—Purchase and sale of lands in Adirondack Park were regulated, L. 1892, Chap. 707; 1893, Chap. 332; repealed by L. 1895, Chap. 395, which itself is now repealed and the subject regulated by the Forest, Fish and Game Law, G. L., Chap. XX; see Art. XIII. Purchase of land within the Forest Preserve, L. 1895, Chap. 561.

Railroads through public lands - powers as to - see the Railroad Law, L. 1890, Chap. 565, § 8.

TITLE II. LAND UNDER WATER.

Powers under early Laws.—By the above Laws of 1786, Chap. 67 and 1801, Chap. 69, and the Law of April 6, 1813 (1 R. L. 292), these commissioners were allowed to grant such lands under water of navigable rivers as they should deem necessary for the commerce of the State — the grants to be made only to proprietors of adjacent lands; six weeks' notice to be given by applicants as provided.

By Law of April 7, 1807, Chap. 177, 5 Web. 233, the powers of the commissioners were extended to land under water in the Hudson river adjacent to the State of New Jersey, subject to all the above restrictions. by said Law of 1813.) By Act of March 24, 1809, 5 Web. 473, their powers were extended to the waters adjacent to and surrounding Great Barn Island, and land between high and low water thereon. No infringement to be made on the rights of the city of New York, or on the navigation of surrounding waters. (Re-enacted by said Law of 1813.) By Laws of April 4, 1815, Chap. 199, the powers of the commissioners were extended to land under water on navigable lakes, and to lands under water adjacent to and surrounding Staten Island, provided that no grant should interfere with the rights of the corporation of the city of New York, nor extend more than 500 feet into the water beyond low-water mark. Repealed in 1828, but re-enacted in the Revised Statutes, as below.

Revised Statutes and Subsequent Laws.—The above powers of the commissioners were confirmed by the Revised Statutes and by Law of May 6, 1835, Chap. 232. The latter statute extended their powers, as below seen.

The provisions of the Revised Statutes were as follows:

R. S., Part I, Chap. IX, Tit. V, Art. 4.

§ 67. The commissioners have power to grant lands under the waters of navigable rivers or lakes, as they shall deem necessary to promote the commerce of this State; but grants to any person other than the proprietor of the adjacent lands are void.

Vide also infra, L. 1850, Chap. 283.

§ 68. The powers of the commissioners extend to lands under the waters of Hudson river, adjacent to the State of New Jersey, and also to lands under waters adjacent to and surrounding Great Barn Island, in the city and county of New York, and to the land between high and low-water mark on said island; but no grant shall be so made as to interfere with the rights of the corporation of the city of New York, or to affect the navigation of the waters surrounding the said island.

See also 1 R. L. 293; L. 1815, p. 201. § 69. The powers of the commissioners shall also extend to the lands under water adjacent to and surrounding Staten Island; but no such grant shall be so made as to interfere with any rights of the corporation of the city of New York, or to extend more than five hundred feet into the water from low-water mark.

See also 1 R. L. 293; L. 1815, p. 201; 1850, Chap. 283.

As to the mode of application to the commissioners, see 1 R. S. 208, §§ 70,

71; 1 R. L. 293; Laws of 1815, p. 201; 1850, Chap. 283.
L. 1835, Chap. 232, amending the Revised Statutes as to grants of land under water, extended the powers of the commissioners of the land office to lands under water, and between high and low-water mark, in and adjacent to and surrounding Long Island, and to all that part of the county of West-chester lying on the East river or Long Island sound, no grants, however, to be made within the boundaries of the city of New York, or interfere with the rights of the corporation of said city; and it was also provided that the commissioners should have no other power than to authorize the erection of such dock or docks as they shall deem necessary to promote the commerce of this State, and the collection of reasonable and accustomed dockage from persons using such dock or docks, the Legislature being authorized to regulate the same in such manner as they should think proper.

L. 1850, Chap. 283, also amending the Revised Statutes as to grants of

land under water, empowered the commissioners to grant, in perpetuity or otherwise, so much of the lands under the waters of navigable rivers or lakes as they should deem necessary to promote the commerce of this State, or proper for the purpose of beneficial enjoyment of the same by the adjacent owner; no such grant, however, to be made to any person other than the proprietor of the adjacent lands, and any such grant made to any other person to be void. And said powers were extended to lands under water, and between high and low-water mark, in and adjacent to and surrounding Long

Island, and to all that part of the county of Westchester lying on the East or Hudson river or Long Island sound, no grant made under the act, however, to extend beyond any permanent exterior water line established by law; and nothing contained in the act was to authorize the commissioners to grant any lands under water belonging to the city of New York, nor interfere with any property, rights or franchises of said corporation of the city of New York, or interfere with the rights of the Hudson River Railroad Com-

Cf. Rumsey v. N. Y. & N. E. R. R. Co., 114 N. Y. 423.

Publication of the Notice.— The publication of the notice is held to be absolutely necessary to confer jurisdiction upon the commissioners, and withcut it any grant made by them is void. The People v. Schermerhorn, 19 Barb. 540; distinguished in Stevenson v. Mayor, 1 Hun, 51.

It is not necessary, however, for one making title by patent to such lands to show affirmatively that notice was given. The presumption is that the patent was regularly issued, and that all preliminaries were complied with. People v. Mauran, 5 Den. 389.

Purposes of the Grant .-- A patent for lands under water cannot be invalidated in a collateral action by proof that it was granted for other purposes than to promote the commerce of the State, etc., as that it was granted to a turnpike corporation. It can only be invalidated by a proceeding directly for the purpose. People v. Mauran, 5 Den. 389.

Construction of these Grants. These grants are to be construed strictly, and nothing is to be implied or intended from them except what is specifically given by metes and bounds, and there is no implication in them that the commissioners may not grant out land beyond what is embraced in a grant, and so interfere with the riparian privileges of the first grantee. If the grants of water lots are to be construed as giving the right to erect a wharf, a reservation to the Legislature to regulate the use of it, and of the waters adjacent, will be implied. Lansing v. Smith, 4 Wend. 9, and vide supra, p. 935.

Grants made by these commissioners held presumptive evidence of the title

of the people. People v. Mauran, 5 Den. 389.

Grants of lands on a navigable stream give no rights in the bed. Matter

of State Res. at Niagara, 37 Hun, 537.

A grant for the purposes of commerce held to confer no exclusive right to use of dock on lands granted. Thousand Island S. Co. v. Visger, 179 N. Y. 206, affg. 86 App. Div. 126.

Rights as Between Riparian Owners and Railroad Companies .- A grant by land commissioners to a railroad company of land under the waters of a navigable river is valid and effectual to vest in the company all the rights that the State had therein.

Such a grant, however, does not extinguish or impair the easements or riparian rights of the owners of the uplands, such as the right of access to the navigable part of the river, the right to make a landing, wharf or pier, and the right of passage to and from the same.

Where, therefore, the road-bed of a railroad company built upon land granted by the State passes between the upland and the usual place of access to the river, and cannot be conveniently crossed, it is the duty of the company, at its own expense, to construct and maintain convenient passes or roads across or under the railroad for the passage of persons, teams, etc., from the upland to the river front. Saunders v. N. Y. C. & H. R. R. R. Co., 144 N. Y. 75.

Adjacent Owners. - Adjacent owners, under the above statute, are held to be those who are owners of the land bordering upon or adjoining the waters covering the subject of the proposed grant. The lateral limits must be perpendicular to the general course of the shore. People v. Schermerhorn, 19 Barb. 540; see People v. Woodruff, 30 App. Div. 43.

Or at right angles with the thread of the stream without regard to the

direction of lines in the land. U. S. v. Ruggles, 5 Blatch. 35; and see supra,

p. 934.

Although the commissioners are restricted to making grants to adjacent owners, it is always lawful for the State to make grants to others than such owners. People v. Canal Appraisers, 33 N. Y. 461.

One who fills in land under water without right does not become an "adjacent owner." People v. Comrs. of Land Office, 135 N. Y. 447.

The owner of an easement in a street bordering on the water is not an adjacent owner, but the owner of the fee is. People v. Colgate, 67 N. Y. 514. When a railroad easement does not carry riparian privileges. Rumsey v. R. R. Co., 114 N. Y. 423.

The upland owner has no rights before actual grant. Matter of N. Y. W.

S. & B. R. W. Co., 29 Hun, 269; Blakslee Mfg. Co. v. Blakslee Iron Works Co., 129 N. Y. 155.

But he may have damages if the grant be made to another. Bedlow v. N. Y. Floating, etc., Co., 44 Hun, 378. And he may have certiorari to review the action of the board. People v. Jones, 112 N. Y. 597.

It is to be noted that the Law of 1850, Chap. 283, amending the Revised Statutes, did not re-enact the provisions of the Law of 1835 against grants being made "in the city of New York." Vide Harrington v. Trustees of Rochester, 10 Wend. 547; Columbia Manfg. Co. v. Vanderpoel, 4 Cow.. 556; Davies v. Fairbarn, 3 How. (U. S.) 636; Dexter P. R. Co. v. Allen, 16 Barb.

A grant from the State of New York of land under water to the owner of the adjacent upland, subsequent to the execution by him of a mortgage upon the upland only, does not subject such subsequently acquired land under water to the mortgage, and the title thereto does not pass by a sale had under a judgment of foreclosure of such mortgage. Mut. Life Ins. Co. v. Voorhis, 71 Hun, 117.

See, however, where the grant has been prior to conveyance. It is appurtenant to the upland and passes without specific discription by conveyance of the upland. Archibald v. N. Y. C. & H. R. R. R. Co., 157 N. Y. 574.

Application for Grants.— The mode of application for grants must have been complied with, or the grant was held void. People v. Schermerhorn, 19 Barb. 540.

Void Grants.— A grant of land by the commissioners of a water lot to one, adjacent to land of another is void. Champlain, etc., R. R. v. Valentine, 19 Barb. 484; and see Beach v. Mayor, 45 How. Pr. 357; People v. Schermerhorn, 19 Barb. 540; City of Brooklyn v. Mackay, 13 App. Div. 105.

The other may have certiorari to review the action. 49 Hun, 365, affd., 112 N. Y. 597. People v. Jones,

But not a third person. People v. Commrs. of Land Office, 135 N. Y. 447.

Vacation of Grants.— Vide People v. Colgate, 67 N. Y. 514.

Confirmatory Grants.—Confirmatory grants might be issued to grantees or their successors in title in cases of error or accidental omission. Laws of 1881, Chap. 605. This statute was repealed and superseded by the Public 1881, Chap. 605. Lands Law, L. 1894, Chap. 317, § 10, infra.

Confirming Act.—By Laws of 1881, Chap. 625, sales theretofore made were confirmed in spite of irregularities, except where the lands are in the bay or harbor of New York or in the waters adjacent thereto. This act was repealed by the above general act of 1894. Vide Public Lands Law, § 11.

Harlem River.—By Laws of 1852, Chap. 285, all lands under water along the Harlem river, from the East to the North river, were granted to the mayor, aldermen and commonalty of the city of New York, with pre-emptive right in adjacent owners. For construction of this act, vide Mayor, etc. v. Hart. 95 N. Y. 443.

Harlem Marshes.— Title to Same.— It passed under the original Harlem patent, and not under the Dongan patent. Baird v. Campbell, 67 App. Div. 104.

Grants by the City of New York.— See also supra, p. 941. A grant by the city of lands under water binds it, even though it had no title, and it cannot by a subsequent grant from the Legislature interfere with its grantee's enjoyment without compensation. Langdon v. Mayor, 93 N. Y. 129; Kingsland v. Mayor, 110 id. 569. As to rights of the city and individuals in the hulkheads in New York, vide Kingsland v. Mayor, 110 N. Y. 569; Bedlow v. N. Y. F. D. D. Co., 112 id. 263, revg. 44 Hun, 378. As to rights of grantees, vide Duryee v. Mayor, 96 N. Y. 477. As to the powers and duties of the board of docks in New York city. People v. Woodruff, 166 N. Y. 453, affer 57 App. Div. 273. Grants by the City of New York .- See also supra, p. 941. A grant by the affg. 57 App. Div. 273.

Under the Act of 1873, and ordinance of 1856, laying out East street, it was held that one who filled up the land between his lot and the wharf or pier got the land but no riparian rights. Turner v. People's Ferry Co., 22 Blatch. 272. See supra, Chap. XLIII, Tit. III, as to lands under waters of navigable

streams, etc.

The Public Lands Law. The Public Lands Law, General Laws, Chap. XI, L. 1894, Chap. 317, as amended, now regulates this subject.

Article I makes full provision as to grants of land by these commissioners, reserving the rights of railroads under the General Railroad Law. It provides for the organization and procedure of the board, and their powers and duties. They may lease public improved lands not in use for not over one year. They are to provide for the form of letters-patent, reserving all gold and silver mines. Provision is made for return of moneys on failure of title, partition of State lands, as to trespasses, for taking testimony and proof of title, for confirming defective grants, ratifying patents issued before July 11, 1881, for making grants to successors of parties deceased, as to the time within which conditions are to be performed, and releasing condition as to actual settlement. No grants are to be made on islands in Lake George, or Esopus island. Full provision is also made as to trespassers and payment of incumbrances and assessments on public lands.

Article II provides for the definition, survey and mapping of unappropriated State lands, the sale of the same, the issuing of patents, the resale of lands, removal of occupants and other proceedings relating thereto.

Article III provides for the sale of abandoned canal lands, giving reference to the original owner and the release of land acquired without consideration.

Article IV regulates escheats.

Article V provides for grants of land under water, and notice of application therefor.

This article of the law, as amended, provides as to what may be granted of such lands, as follows:

- § 70. Grants of land under Water.—This section authorizes grants of land under water:
 - 1. Of navigable rivers and lakes.
 - 2. Of the Hudson river adjacent to the State of New Jersey.
- 3. Adjacent to and surrounding *Great Barn* island in the city and county of New York, and between high and low-water mark on such island, but not so as to affect the navigation of the waters surrounding such island.
- 4. Adjacent to and surrounding Staten Island, but not so as to extend more than five hundred feet into the water from low-water mark on said island, except where the legally established pier and bulkhead lines extend more than five hundred feet beyond low-water mark, in which case grants may be made to such lines.
- 5. Adjacent to and surrounding Long Island, and all that part of the former or present county of Westchester lying on the East river or Long Island sound, but not beyond any permanent exterior water line by law. The commissioners of the land office may grant in perpetuity or otherwise, to the owners of the lands adjacent to the lands under water specified in this section, to promote the commerce of this State or for the purpose of beneficial enjoyment thereof by such owners, or for agricultural purposes, so much of said lands under water as they deem necessary for that purpose. No such grant shall be made to any person other than the proprietor of the adjacent lands, and any such grant made to any other person shall be void. No such grant shall be made of any lands belonging to the City of New York, or so as to interfere with the rights of that city or of the Hudson River Railroad Company, or of its successor, the New York Central and Hudson River Railroad Company. In addition to the foregoing, the commissioners of the land office may authorize the use of lands of the state under water, for the purpose of improvement of navigation when the same is carried on by the federal or state government; but private rights or rights of property of individuals, if any, of any nature or description, shall not be taken away nor impaired nor impeded without due process of law.

The commissioners have absolute discretion to make or not to make a grant, and this discretionary power is not reviewable. People v. Woodruff, 54 App. Div. 1.

Under the Greater New York charter (L. 1897, Chap. 378, as amd. by L. 1901, Chap. 466, § 86), the commissioners of the land office have power to grant to a riparian owner, land under water within the city limits, notwithstanding the protest of the board of docks. People v. Woodruff, 166 N. Y. 453. See Matter of New York v. Commrs. of Land Office, 25 Misc. 202.

A grant by the State for purposes of commerce, confers no exclusive right

to use of dock erected on lands granted. Thousand Island S. Co. v. Visger, 179 N. Y. 206, affg. 86 App. Div. 126.

As to the power of the commissioners to determine title. People v. Woodruff, 64 App. Div. 239.

As to the paramountcy of the United States, see Lewis Bluepoint Oyster C. Co. v. Briggs, 58 Misc. 55.

Notice of Application .- Provision is also made for the publication of notice of application and the posting of same.

Public Lands Law, L. 1894, Chap. 317, § 71.

CHAPTER XLV.

NOTICE OF LIS PENDENS.

An Action per se Notice.— It was a general rule that, independent of statute provisions, a purchaser of real estate pending a suit affecting it was bound by the decree, and that the suit itself was constructive notice. Consequently any rights acquired in land after the commencement of an action affecting the title were subordinate to those of the plaintiff in such action, and this although the purchaser might never have heard of the suit.

Murray v. Ballou, 1 Johns. Ch. 566; 6 Barb. 133; 15 id. 520; Cleveland v. Boerum, 23 id. 201, affd., 24 N. Y. 613; 27 Barb. 252; Parks v. Jackson, 11 Wend. 442.

Provisions of Law of 1823 and of the Revised Statutes.—To remedy the injustice worked by the above legal principle, by the Law of 1823, Chap. 182, if a bill was filed affecting real estate, the bill was not to be deemed constructive notice to purchasers, unless a notice of *lis pendens* were filed with the clerk of the county in which the lands were situated, the notice to give the title of the cause and general object thereof, and description of the lands, etc.; and the county clerk was directed to index such notices in books in his office, so that all persons might search for such notices without inconvenience. The same provision substantially was incorporated in the Revised Statutes relative to bills in chancery affecting real estate. 2 R. S. 174, § 43.

Provisions of the Code of Procedure.—The following are the provisions of that Code on the subject, and the period when each amendment of the original section went into operation. This Code, with all the amendments thereto, was repealed by Laws of 1880, Chap. 245.

Code of Procedure, § 132. "In an action affecting the title to real property, the plaintiff, at the time of filing the complaint; or at any time afterwards, or whosever a section of the complaint.

or whenever a warrant of attachment under chapter four of title seven, part second of this Code, shall be issued, or at any time afterwards [amendment of 1857], the plaintiff or a defendant, when he sets up an affirmative cause of action in his answer, and demands substantive relief, at the time of filing his answer or at any time afterwards [amendment of 1866], if the same be intended to affect real estate, may file with the clerk of each county in which the property is situated, a notice of the pendency of the action, containing the names of the parties, the object of the action, and the description of the property in that county affected thereby; and if the action be for the foreclosure of a mortgage, such notice must be filed twenty days before judgment, and must contain the date of the mortgage, the parties thereto, and the time and place of recording the same. From the time of filing only, shall the pendency of the action be constructive notice to a purchaser or incumbrancer of the property affected thereby."

A general description of "all lands owned by defendants," was not sufficient.

Jaffray v. Brown, 17 Hun, 573.

Amendment of 1858.—"And every person whose conveyance or incumbrance is subsequently executed or subsequently recorded, shall be deemed a subsequent purchaser or incumbrancer, and shall be bound by all proceedings taken after the filing of such notice, to the same extent as if he were made a party to the action." Law 1858, Chap. 306.

As against a grantee by unrecorded conveyance it had merely the effect of

making him a party. Lamont v. Cheshire, 65 N. Y. 30.

So of subsequent judgment-creditor. Fuller v. Scribner, 76 N. Y. 190. But it was wholly inoperative until complaint filed. Weeks v. Tomes, 16 Hun, 349; 76 N. Y. 601.

Prior to the amendment of 1858, a grantee of the equity of redemption had to be made party, although his deed was not recorded at the time of filing the complaint and lis pendens. Hall v. Nelson, 23 Barb. 88.

After that amendment deeds not recorded before filing the lis pendens were

inoperative as against parties taking under the judgment.

Amendment of 1862.— "For the purposes of this section, an action shall be deemed to be pending from the time of the filing of such notice; provided, however, that such notice shall be of no avail, unless it shall be followed by the first publication of the summons on an order therefor, or by the personal service thereof on a defendant within sixty days after such filing." Law of 1862, Chap. 460.

Prior to the amendment of 1862, it was held that the filing of a notice under this section did not charge the grantee of an equity of redemption, unless, prior to the conveyance, the grantor had been served with the summons in the action. 12 How. 171; 17 id. 477; 7 Abb. 61; Butler v. Tomlinson, 38 Barb. 641.

Cancellation.—By the said amendment of 1862, provision was also made for the cancellation of such notices by the clerk on good cause shown. Laws of 1862, Chap. 460; see also Laws of 1866, Chap. 824.

Real Action .- It was held under the said Code of Procedure that a notice of lis pendens was unnecessary in an action to recover possession of real property, even as against a purchaser pendente lite. The plaintiff in such an action could recover only upon a legal title; a purchaser without notice was protected only against mere equities. Sheridan v. Andrews, 49 N. Y. 478.

This is not law now, having been changed by the Code of Civil Procedure.

See infra, p. 960.

Foreclosure and Partition.— The Law of May 14, 1840, Chap. 342, also provided for the filing of a special lis pendens in foreclosure suits, substantially as in the Code of Procedure. The county clerk was to index the notices, so that persons might find them without inconvenience. By this act the notice was to be filed at least 40 days before any decree could be made. See also Law of 1844, Chap. 346. Both these acts were repealed by Laws of 1880, Chap. 245.

As to the filing in a partition suit, and the effect of irregularities in filing,

vide Waring v. Waring, 7 Abb. 472.

A decree in forclosure made without affidavit of filing is not void; see Supreme Court rule 60, formerly 72; nor will an omission merely to state the place of record of the mortgage vitiate. Potter v. Rowland, 8 N. Y. 448.

As to change under the present law, see Code Civ. Proc., §§ 1670, 1595.

Notices to be Recorded and Indexed.— The name of all parties should be inserted in the notice. By Law of March 22, 1864, Chap. 53, the clerks of the different counties were directed to record, in suitable books, and index all notices thereafter filed. All notices theretofore filed might also be recorded. The party filing was to indicate the names of such of the defendants as were to be inserted in the index. The record, or a certified copy thereof, was to be evidence. Repealed by Laws of 1880, Chap. 245.

If a defendant's middle name is omitted, the notice is still sufficient to put a party upon inquiry. Weber v. Fowler, 11 How. 558; see infra as to changes

by the Code of Civil Procedure.

Kings County.— In Kings county, by Laws of 1859, Chap. 212, the notices were to be recorded by the county clerk.

Oueens County .- By Law 1867, Chap. 538, the clerk of Queens county was to record and index notices of lis pendens filed between January 1, 1820, and April 1, 1864.

Effect of.—A purchaser or mortgagee after notice filed is bound by the decree. The notice is as effectual against any disposition of the property as is an injunction. It is a substitute for actual notice. Hall v. Nelson, 14 How. 32; 23 Barb. 88; Stevenson v. Fayreweather, 21 How. 449; Harrington v. Slade, 22 Barb. 162; Zeiter v. Bowman, 6 id. 133; Jeffers v. Cochrane, 48 N. Y. 671; Murray v. Ballou, 1 Johns. Ch. 566; Cleveland v. Boerum, 23 Barb. 201; 24 N. Y. 613; Ostrom v. McCann, 21 How. 431; Ayrault v. Murphy, 54 N. Y. 203; Lamont v. Cheshire, 65 id. 30. See infra, as to changes by the Code of Civil Procedure.

When Complaint Amended.—In case of amendment of the complaint by changing the description or the parties held a new notice must be filed. Curtis v. Hitchcock, 10 Paige, 399.

The filing of the new notice seems to have been necessary only as to the

added parties. Waring v. Waring, 7 Abb. 472.

A decree made without proof of filing would be irregular, not void. Potter v. Rowland, 8 N. Y. 448. See Supreme Court Rule 60.

When it Takes Effect.—If the *lis pendens* is filed before the complaint, it takes effect from the time of filing the complaint, and not before. 12 How. 171; 7 Abb. 472; 9 *id.* 61; 17 How. 477; Leitch v. Wells, 48 N. Y. 585; Butler v. Tomlinson, 38 Barb. 641; 15 Abb. 88.

As the Code provided in 1859, a notice might be filed before the *service* of

the summons or complaint; the filing alone was necessary. Stern v. O'Connell,

35 N. Y. 104.

It has been held that a lis pendens does not operate as a notice, unless the court has jurisdiction of the subject matter. Carrington v. Brentz, 1 McLean,

The notice cannot be filed against prior incumbrancers not parties to the action. People v. Connolly, 8 Abb. 128; Chapman v. West, 17 N. Y. 125, affg. 10 How. 367.

As to judgment creditors. See Fuller v. Scribner, 76 N. Y. 190.

Amendment.—The notice may be amended by inserting a description omitted. Vanderheyden v. Gary, 38 How. 367; see also, 13 Abb. N. S. 265.

Judgment.— A judgment lien was not an incumbrance within the meaning of Code Proc. 132. A judgment is not a specific, but a general lien, subject to all prior liens, legal or equitable, irrespective of any knowledge of the judgment creditor as to their existence. Rodgers v. Bonner, 45 N. Y. 379.

Assignees, etc.— See as to the effect of a decree on an assignee in bankruptcy, taking after notice of *lis pendens*. He was bound, if he had notice and could defend. Cleveland v. Boerum, 23 Barb. 201, affd., 24 N. Y. 613; also Griswold v. Fowler, 6 Abb. 113.

An assignee (in insolvency) for a precedent liability held not a purchaser within the statute. Leavitt v. Tyler, 1 Sand. Ch. 207; see also 13 Abb. N. S.

265.

Paramount Title.—A notice of lis pendens applies to those who derive the title to the subject-matter from a party to the suit after it is commenced. does not affect one who has a paramount title superior to that of all the parties to the suit. Stuyvesant v. Hone, 1 Sand. Ch. 419; 10 Abb. Pr. N. S. 97.

Attachment Suits.— In such suits the notice held to bind only the property levied on. Fitzgerald v. Blake, 28 How. 110; 42 Barb. 513.

It will have no effect in an attachment suit to recover money. Buskhardt

v. Sanford, 7 How. 329.

The notice must be filed to make the lien effectual as against bona fide purchasers and incumbrancers. Learned v. Vandenburgh, 7 How. 379, and People v. Connelly, 8 Abb. 128; but see as to the effect generally of a lis

pendens notice in an attachment suit, Lamont v. Cheshire, 6 Lans. 235, affd., as to effect of an attachment suit with lis pendens over a judgment lien.

The omission to file the notice in an attachment suit until another creditor

has obtained a judgment against the defendant has no effect to postpone the lien of the attachment to that of the judgment. Rodgers v. Bonner, 55 Barb. 9, affd., 45 N. Y. 379.

Expiration of the Notice.— The effect of the notice was held to be lost if the action were not expedited. So held as to a delay of eight years. Myrick v. Seldon, 36 Barb. 15.

But as a general rule the right is absolute, and the court cannot cancel the notice so long as the action is pending and undetermined. Mills v. Bliss,

55 N. Y. 139.

Action to Cancel Assignment of Lease .- Under the Code of Procedure a lis pendens might be filed in an action to cancel of record a lease of land. Wilmont v. Meserole, 41 Super. 274.

Provisions of the Code of Civil Procedure.—Since September 1, 1880, the provisions of the Code of Civil Procedure have been in force as to the filing of notices of pendency of action, their effect when filed and the cancellation of same. Code Civ. Proc., §§ 1670-1674.

Little change is made further than to include actions "brought to recover a judgment affecting the title to, or the possession, use, or enjoyment of, real property," in which such notices may be filed; to provide that they shall be so filed "before final judgment;" and that where service by publication is allowed, personal service of the summons, "without the State," (if adopted instead of publication) shall be made within the sixty days after filing.

See Code Civ. Proc., § 1670.

The section is not applicable to an action brought to compel removal of encroaching wall. McManus v. Weinstein, 108 App. Div. 301; of. Moeller v.

Wolkenberg, 67 App. Div. 487.

A lis pendens held properly filed in an action by former grantor who reserved right to sue railroad company for damage to his easements, to enforce a right to sue railroad company for damage to his easements, to emote a covenant allowing him to prosecute such action and compel execution of a proper release, and have a lien declared on the property for their value. Schomacker v. Michaels, 189 N. Y. 61, revg. 117 App. Div. 125.

The statute does not permit the filing of successive notices, as in case of

cancellation for delay in making service. Lipschutz v. Horton, 55 Misc. 44.

It is not applicable in creditors' suits to set aside transfer when it is alleged

part of proceeds were used to pay off mortgage on property on which plaintiff demands a lien. Brox v. Riker, 56 App. Div. 388.

By Code Civ. Proc., § 1526, filing of notice of pendency of action, as above provided, is made to apply to actions of ejectment, thus doing away with the effect of Sheridan v. Andrews, 49 N. Y. 478; supra, p. 958.

In actions to recover purchase money. Bachman v. Wagner, 16 N. Y.

Supp. 67.

The notice is inoperative until the complaint is filed. Burroughs v. Reiger,

12 How. 171; 3 Abb. 393, n., Sp. T. See Tate v. Jordan, 3 Abb. 392.
Substituted service is as good as personal service to make the notice effective. Ferris v. Plummer, 46 Hun, 515, approved, Clare v. Lockard, 21 Abb. N. C. 173.

Failure to serve within the sixty days entitles to cancellation, though service was made before the motion to cancel. Steinmetz v. Kindred, 121 App. Div. 260: Lipschitz v. Watson, 113 App. Div. 408,

In Foreclosure, to be filed at least twenty days before final judgment directing a sale. Code Civ. Proc., § 1631.

Effect.— The only change made by the Code of Civil Procedure as to the effect of filing is to make it notice only to a purchaser or incumbrancer "from or against a defendant, with respect to whom the notice is directed to be indexed, as prescribed in the next section."

Code Civ. Proc., § 1671.

The next section, Code Civ. Proc., § 1672, provides that each county clerk must record it and index it to the name of each defendant, specified in a direction, appended at the foot of the notice and subscribed by the attorney for the plaintiff.

As to cross-noticing, see Code Civ. Proc., § 1673, supra. See as to indexing in the county of New York, Laws of 1893, Chap. 536.

The notice applies only to parties in the action and purchasers and incumbrancers from them subsequent to the notice being filed. Patterson v. Brown, 32 N. Y. 81.

See as to effect of notice as regards remaindermen or others than those taking by descent. Stamm v. Bostwick, 122 N. Y. 50. As to construction of word "purchaser." Id.

Assignee of mortgage is bound. Hovey v. Hill, 3 Lans. 167; distinguished in

Lamont v. Cheshire, 65 N. Y. 30.

A judgment lien is not an incumbrance within this section. The judgment creditor takes subject to all prior liens, legal or equitable, irrespective of any knowledge of the judgment creditor as to their existence. Rodgers v. Bonner, 45 N. Y. 379, affg. 55 Barb. 9. See also Fuller v. Scribner, 76 N. Y. 190.

Actual notice of action pending or constructive by filing of notice does not

per se invalidate title. Laches will operate to destroy the effect of the notice. Hayes v. Nourse, 114 N. Y. 595.

Pendency of action in no wise affects a purchaser for value without notice.

A lis pendens filed in an action to obtain an adjudication that certain real estate is subject to restrictive easements operates to render mortgages taken pending the action subject to the conditions contained in the final judgment.

Crocker v. Lewis, 79 Hun, 400.

An action of trespass is not within Code Civ. Proc., § 1670, nor is such an action within the principle on which lis pendens is based; and a purchaser of land, pending a suit in trespass between the grantor and another, in which the issue of title has been made, does not take subject to a judgment that may be subsequently rendered in the action, and is not concluded thereby. Hailey v. Ano, 136 N. Y. 569, revg. 16 N. Y. Supp. 589.

Cross-Noticing.— Section 1673 of the Code of Civil Procedure contains provisions similar to those of § 132 of the Code of Procedure as to cross-noticing, by a defendant setting up a counterclaim, and restricting such cross-noticing to cases where an affirmative judgment is sought by such defendant, "affecting the title to. or the possession, use or enjoyment of, real property."

Cancellation.—Provision is also made for cancellation of the notice where "final judgment is rendered * against the party filing the notice, and the time to appeal therefrom has expired. or if a plaintiff filing the notice unreasonably neglects to proceed in the action," as well as when the action is settled, discontinued or abated.

Code Civ. Proc., § 1674 (amd. L. 1892, Chap. 504, adding important pro-

visions as to creditors' actions).

As to cancellation of his pendens in attachment, see Code Civ. Proc., § 711. The right to file not resting in the discretion of the court, once properly filed the notice can be canceled only pursuant to Code Civ. Proc., § 1674, Beman v. Todd, 124 N. Y. 114; Shanley v. Levine, 44 Misc. 23; St. Regis Paper Co. v. Santa Clara Lumber Co., 62 App. Div. 538.

On motion to cancel the *lis pendens* the complaint must be examined to see

whether the action is one in which a lis pendens is proper. Krainin v. Coffev.

119 App. Div. 516.

It may be canceled when it was not properly filed. Schomacker v. Michaels, 189 N. Y. 61; not, however, merely because the action cannot be successfully maintained.

Motion to cancel must be determined upon allegations of complaint and facts clearly established, but not by looking into facts as upon a trial, or searching complaint as on demurrer. Werner v. Jackson, 115 App. Div. 176. See also Lindheim & Co. v. Central Nat. Realty, etc., Co., 111 id. 275. In ejectment on final judgment, notwithstanding statutory right to a new

trial, the lis pendens may be canceled. Jarvis v. American Forcite Powder

Mfg. Co., 93 App. Div. 234.

It should not be canceled on motion involving the merits. Swadbeck v.

Law, 106 App. Div. 552.

Held that a purchaser, who has made a payment, but not entered, having no equitable lien, a lis pendens filed by him should be canceled. Coffey, 119 App. Div. 516. This, however, must be held overruled, by later and more authoritative cases holding that such a purchaser has lien. Elterman v. Hyman, 192 N. Y. 113; Davis v. Rosenzweig Realty Co., id. 128. See also Occidental Realty Co. v. Palmer, 117 App. Div. 507.

The court may refuse to disturb the lis pendens, though undertaking is offered to be filed. Mishkind-Feinberg Realty Co. v. Sidorsky, 115 App. Div. 115; McCrum v. Lex Realty Co., 113 id. 58. See Bresel v. Browning, 109 id.

So cancellation may be refused even on deposit of a sum of money. Kennedy v. Hall, 51 Misc. 78; Schenkein v. Horowitz, 51 Misc. 80; Tishman v. Acritelli, 111 App. Div. 237; Wolinsky v. Okum, *Id.* 536.

Cancellation on failure to serve. Steinmetz v. Kindred, 121 App. Div. 260;

Lipschitz v. Watson, 113 id. 408.

Except where defendant avoided service and refused to disclose his residence, the granting of motion to cancel being discretionary. Levy v. Kon, 114 App. Div. 795.

CHAPTER XLVI.

THE LIEN OF TAXES AND ASSESSMENTS, AND SALES OF LAND THEREFOR.

I .- GENERAL PRINCIPLES OF TAXATION. TITLE

II .- THE ASSESSMENT AND COLLECTION OF TAXES ON LAND.

III .- THE SALE OF LANDS FOR TAXES, AND THE CONVEYANCE AND RE-DEMPTION THEREOF.

IV .- LOCAL ASSESSMENTS AND SALES THEREFOR.

V .- MISCELLANEOUS.

TITLE I. GENERAL PRINCIPLES OF TAXATION.

In this chapter only the general principles of taxation and the tax laws as applicable to the State at large are considered. A multitude of tax laws have been passed for specific cities, towns, and other localities, which would require volumes to review, and which cannot here be investigated.

The Power to Tax.— A power to tax individual property for the general benefit is one of the sovereign attributes and powers of a State. in the exercise of its right of eminent domain, and one which it may delegate to inferior bodies. This taxing power is unlimited except as specifically restrained by the Constitution of the State or of the United States. It can, however, be exercised only for some public object or benefit. It is for the courts to determine whether, in any particular case, the boundary of legislative power has been passed. The power to tax implies a power to apportion the tax as the Legislature may see fit. The Legislature may also grant immunity from taxation and revoke the privilege.

The right to tax is not granted by the Constitution, but of necessity underlies it. People v. Reardon, 184 N. Y. 431.

The Legislature's power discussed as to its limitations. People v. Mensching, 187 N. Y. 8.

It has power to cure retrospectively defective or irregular proceedings to levy, assess or collect taxes provided no injustice is done. Matter of Rochester T. & S. D. Co., 42 Misc. 581.

See also People v. Mayor of Brooklyn, 4 N. Y. 419; People v. Lawrence, 36 Barb. 177, affd., 41 N. Y. 137; People v. Roper, 35 id. 629; People v. Haws, 34 Barb. 69; Gordon v. Cornes, 47 N. Y. 608; Matter of Van Antwerp, 56 id. 261; Loan Assn. v. Topeka, 20 Wall. 655; Weismer v. Douglas, 64 N. Y. 91; People v. Mensching, 187 id. 8.

Without express enactment no property of the United States, the State, or a municipality is taxable. People v. Assessors of Brooklyn, 19 Abb. N. C. 158.

As regards conflict with the authority of the United States, it may be remarked that the taxing power is in the States respectively, except so far as the Constitution of the United States prevents its affecting the means and resources of the General Government, or so far as property is exempt by the Federal Constitution.

Weston v. The City Council of Charleston, 2 Pet. 49; People v. Cunningham,

35 N. Y. 629; Ward v. Maryland, 12 Wall. 418, and the cases *infra*. As to assessment on shares of a "national bank," under the Act of 1865, Chap. 97, vide Van Alen v. Assessors, etc., 3 Wall. 573; First National Bank v. Fancher, 48 N. Y. 524, overruling City of Utica v. Churchill, 33 id. 61, which was reversed in Van Alen v. Assessors, supra; National Bank v. Commonwealth, 9 Wall. 353.

Aliens holding real estate under the Law of 1845, Chap. 115, supra, Chap. III, Tit. IV, were declared subject to taxation as if citizens. See § 12 of the

act.

Different Kinds of Taxation .- The two systems of taxation, the one for municipal purposes and the other for county and State purposes, are distinct. The latter species forms the subject of the general provisions of the Revised Statute, and has been held to apply to municipalities only so far as by the provisions of the laws imposing and regulating municipal taxation, they are either expressly or impliedly adopted. Mayor v. Mutual Bank, 20 N. Y. 387.

Water taxes are legal, it is held, though water is not used; but notice of

water taxes are legal, it is held, though water is not used; but notice of levy must be given to landholder assessed for same, or the levy is unconstitutional. Dasey v. Skinner, 11 N. Y. Supp. 821.

A water rent established and collected by a board of water commissioners, directed by the act under which it was incorporated to establish a scale of rents called water rents, payable in advance or upon a stated term of credit, and authorized to cut off the supply of water if such rents are not paid, has been held not to be a tax. Silkman v. Water Commrs., 71 Hun, 37.

Tax Laws.— By the Bill of Rights of this State, passed December 1, 1827, taking effect January 1, 1830, no tax, duty, aid or imposition whatsoever, except such as may be laid by a law of the United States, can be taken or levied within this State, without the grant and assent of the people of this State by their representatives in Senate and Assembly; and no citizen of this State can be by any means compelled to contribute to any gift, loan, tax, or other like charge, not set, laid or imposed by a law of the United States, or by the Legislature of this State.

1 R. L. 48, § 12.

Tax Laws, What to State.— The State Constitution of 1846, Art. 7, § 13, provided: Every law which imposes, continues, or revives a tax, shall distinctly state the tax and the object to which it is to be applied, and it shall not be sufficient to refer to any other law to fix such tax or object. For the same provision in the present Constitution of the State, see Const. of 1894, Art. III, § 24.

Laws, How Passed .- On the final passage in either house, of all laws imposing, continuing or reviving a tax, the question shall be taken by ayes and noes, which shall be duly entered on the journals and a quorum of three-fifths in either house is necessary. Const. of 1846, Art VII, § 14; Const. of 1894, Art III, § 25.

The presumption is that the law was properly passed. Pumpelly v. Village of Owego, 45 How. Pr. 219, and see as to the passage of such law, supra, p. 17.

Former Laws.— As title is made according to laws in force at time of sale, reference may be made to the following laws. The first regular system of taxation in this State after the Peace, was adopted in 1788. Vide J. & V., Vol. II, p. 340. The laws for the assessment of taxes and sales therefor, up to the first revision of the State statutes, are collected in 1 Web., Laws of 1801, April 8, p. 547, and the Revised Laws of 1813, Chap. 52, 2 R. L. 509. The Law of 1813 had reference to all the real estate in the State. The Law of 1813 and all other subsequent acts relative to the assessment and collection of taxes, including a revival of the Act of April, 1813, passed April 23, 1823, Chap. 242, were abolished by Act of December 10, 1828, and the provisions of the Revised Statutes adopted. R. S., Part. I, Chap. XIII, 1 R. S. 387 et seq. The Revised Statutes re-enacted most of the provisions of the Act of 1823, with additions from acts passed in 1824, pp. 16, 112; 1825, pp. 33, 282, 355, 373; 1826, pp. 45, 94, 135, 327; 1827, p. 4. They, in turn, were modified by subsequent statutes and were repealed and superseded by the Law of 1896, Chap 202 Chap. 908.

Present Law.— The whole subject of taxation is now regulated in general by

the Tax Law, G. L., Chap. XXIV, Laws of 1896, Chap. 908, as amended.

The Tax Law repealed the provisions of the Revised Statutes and a multiplicity of laws regarding taxation which had been enacted from time to time since the Revised Statutes. See the Tax Law, L. 1896, Chap. 908, § 280.

It was enacted to establish a uniform procedure throughout the State.

Matter of McIntyre, 124 App. Div. 66.

The Tax Law went into effect on June 15, 1896.

The amendments are numerous and careful examination with regard to same should be made.

TITLE II. THE ASSESSMENT AND COLLECTION OF TAXES ON LAND.

Real Property To Be Taxed.—All real property within this State and all personal property situated or owned within this State is taxable, unless exempt from taxation by law.

The Tax Law, L. 1896, Chap. 908, § 3; see 1 R. S. 387, § 1.

Exemptions.—As to exemptions, vide the Tax Law, § 4, as amended; under the Revised Statutes, vide 1 R. S. 388, § 4, as amended; L. 1866, Chap. 136;

1883, Chap. 397; 1884, Chap. 537.

Among the exceptions are property of the United States; property of this State other than its wild or forest lands in the forest preserve; property of a municipal corporation of the State held for a public use, except the portion of such property not within the corporation; the lands in an Indian reservation owned by the Indian nation, tribe or band occupying them; all property exempt by law from execution other than an exempt homestead; certain

Exempt by law from execution that an exempt homestead, certain classes of persons.

Lands sold by the State, though not conveyed, are to be taxed as if the purchaser were the actual owner. The Tax Law, § 5; 1 R. S. 388, § 6.

Exempting statutes are to be strictly construed. Exemption from public taxes and assessments will not exempt from assessments for local improvement. So held as to rural cemeteries which were to be assessed as a whole and not in lots. Buffalo City Cem. v. City of Buffalo, 46 N. Y. 506; Same v. Same, Id. 503; In re N. Y., 11 Johns. 77; also infra.

These exempting statutes are not contracts and may be repealed. People

v. Commissioners, 47 N. Y. 501; People v. Cunningham, 35 id. 629.

Exemption of school property does not cover private property hired for a school. People v. Assessors, etc., 32 Hun, 457; Hebrew, etc., Ass'n v. Mayor, 99 N. Y. 488. The exemption is determined by the use, not by the extent of the property. People v. Barber, 42 Hun, 27.

An academy does not lose its exemption by leasing its building in summer

for a boarding-house. Temple Grove Seminary v. Cramer, 98 N. Y. 121.

Assessment of taxes is valid on a person to pay debts of a locality incurred before he became a resident. Pumpelly v. Village of Owego, 45 How. Pr. 473.

Lands of non-residents are liable for road-tax. Chamberlain v. Taylor. 36 Hun, 24.

As to exemptions of corporations, see infra, p. 968.

An exemption by special act is not affected by a subsequent general law. Buffalo Cem. Ass'n v. City of Buffalo, 43 Hun, 127, affd., 118 N. Y. 61.

If the tax be not a lien when the religious society acquires the land, held

it does not become a lien. Wardens, etc. v. Mayor, etc., 41 Hun, 309.

As to what is a religious society under Laws of 1852, Chap. 282, vide Young Men's Christ. Ass'n v. Mayor, 44 Hun, 102, revd., 113 N. Y. 187.

Taxes for Highways .- See Highway Law, G. L., Chap. XIX, L. 1890, Chap. 568, Art. II (as amended).

Telegraph Companies .- See L. 1881, Chap. 293, infra; The Tax Law, L.

1896, Chap. 908, § 2.

The right of a city to impose license fees on a telegraph company's poles and wires within the limits of the city is not in conflict with R. S. U. S., § 5263, which grants to telegraph companies, on certain conditions, the right to construct and operate lines over any of the domain of the United States, and over any military and post roads of the United States.

Whether such charges imposed by the city come under the police or taxing power, they do not violate the interstate commerce clause, under Const. U. S., Art. 1, § 8, subds. 3, 18, providing that Congress shall have power to regulate commerce between the different States.

Nor do such charges violate Const. U. S., Amend. 14, which provides that no State shall deprive any person of his property without due process of law, nor deny any person within its jurisdiction the equal protection of the laws. City of Philadelphia v. Postal Telegraph Cable Co., 21 N. Y. Supp. 556; s. c., 67 Hun, 21.

Cemetery Lots.— As to taxation of lots in cemeteries, etc., see Membership Corporations Law, L. 1895, Chap. 559, Art. 3, § 52, as amd.; also L. 1907, Chap. 725.

No land actually used and occupied for cemetery purposes shall be taxed.

L. 1879, Chap. 310.

The exemption does not extend to municipal water rates. Batterman v. City of New York, 65 App. Div. 576; otherwise as to benefit assessments, Matter of Mayor (Perry Ave.), 118 App. Div. 874.

Religious Parish Houses, etc.— L. 1892, Chap. 565; the Tax Law, L. 1896, Chap. 908, § 4 (as amd.); see Matter of White, 18 App. Div. 869.

Agricultural Societies.— When lands exempt, L. 1856, Chap. 183; the Tax Law, L. 1896, Chap. 908, § 4 (as amd.).

Cooper Union. See People v. Gass, 119 App. Div. 280.

Veteran Volunteer Fireman. People v. Metz, 120 App. Div. 565.

College Athletic Grounds .- People v. Wells, 97 App. Div. 312.

Railroads and buildings, etc .- The term lands would include certain fixtures and buildings, although not accompanied by the fee, e. g., railroads. People v. Cassidy, 46 N. Y. 46; see also L. 1881, Chap. 293, the Tax Law, L. 1896, Chap. 908, § 2; and infra.

See further as to assessments of railroad property, where the statutes are cited and reviewed, People v. Barker, 48 N. Y. 70; Buffalo, etc., R. R. Co. v.

Supervisors Erie Co., Id. 93.

Wharf Property.—As to taxes on, vide supra, p. 942; Law of 1881, Chap. 293; the Tax Law, L. 1896, Chap. 908, § 2; and infra. As to wharf property in Brooklyn, see Tebo v. City of Brooklyn, 134 N. Y. 341.

Bridges.— As to taxes on, vide the Transportation Corporations Law, L. 1890, Chap. 566, § 140.

Plank-Roads.— Id.; see also People v. Cummings, 166 N. Y. 110.

Hospitals.— See People v. Raymond, 126 App. Div. 720.

Lands owned by hospital and used exclusively for hospital purposes are exempt. Stony Wold Sanatorium v. Keese, 112 App. Div. 738.

Whether forest land is intended to be used for cure of consumptives should

be left to jury. Id. See also People v. Raymond, supra.

Municipal Corporations.— Lands of a municipal corporation not held for a public purpose are taxable. Clark v. Sprague, No. 2, 113 App. Div. 645-

The Terms "Land," "Real Estate," and "Real Property."-These terms as used in the Tax Law (as amd.) are now stated to include, among others, the land itself above and under water, all buildings and other articles and structures erected on or affixed to same; wharves and piers, including the value of the right to collect wharfage, etc., thereon; bridges, telegraph lines, wires, poles and appurtenances; supports, etc., for electrical conductors, etc.; railroads including the value of franchises, etc., and railroad structures; mains, pipes, etc., including the value of any franchises, etc.; trees, mines, minerals, quarries, and fossils, except mines belonging to the State.

The Tax Law, L. 1896, Chap. 908, § 2 (as amd.); see 1 R. S. 387, § 2, as amd. L. 1873, Chap. 530; L. 1881, Chap. 293.

By Law of 1873, Chap. 530, the words "and under water" were added; and by Law of 1881, Chap. 293, land under water, wharves, piers, telegraph lines, wires and poles, under-ground and elevated railroads, structures, tracks, etc., mains, pikes and tanks in streets.

etc., mains, pikes and tanks in streets.

Improvements placed on real property by owner should be included in assessment of real property for purposes of taxation. Safe deposit vaults are taxable as real estate. People v. Wells, 181 N. Y. 245.

Mortgages not to be deducted in assessing real property for the purposes of general taxation. Paddell v. City of New York, 50 Misc. 422.

As to turnpike company and taxation of its franchise and tangible property as real property. Matter of Albany and Bethlehem Turnpike Road, 94 App. Div. 509.

Place of Taxation of Real Property.—When real property is owned by a resident of a tax district in which it is situated, it shall be assessed to him. When real property is owned by a resident outside the tax district where it is situated, and is occupied, and the occupant is a resident of the tax district, it shall be assessed to either the owner or occupant. If the occupant resides out of the tax district, or if the land is unoccupied, it shall be assessed as nonresident, as hereinafter provided by article two. In all cases the assessment shall be deemed as against the real property itself, and the property itself shall be holden and liable to sale for any tax levied upon it.

The Tax Law, L. 1896, Chap. 1908, § 9, as amd. by L. 1902, Chap. 171; see 1 R. S. 389, §§ 1-3.

Nonresident Assessment. -- See the Tax Law, Art. II, § 29; 1 R. S. 391,

See as to invalidity in case requirements are not carried out. Sanders v. Saxton, 89 App. Div. 421.

Property Divided by Line of Tax District .- See the Tax Law, § 10 (as amd. by L. 1898, Chap. 537; L. 1902, Chap. 200; L. 1903, Chap. 305); 1 R. S. 389, § 4.

See People v. Wilson, 113 App. Div. 1; People v. Gray, 185 N. Y. 196.

Corporations.— See the Tax Law, § 11; 1 R. S. 389, § 6.

To Whom Assessed.—Under the Revised Statutes, as amended, land occupied by a person other than the owner might be assessed to the occupant, as nonresident lands, or to the owner if he reside in the county. 1 R. S. 389, as amended by Laws of 1851, Chap. 176, and Laws of 1878, Chap. 152. See also L. 1885, Chap. 448; Joslyn v. Rockwell, 128 N. Y. 334.

But a nonresident owner might waive the error of assessing lands to him.

Hilton v. Fonda, 86 N. Y. 339.

Except there be such waiver, an assessment to any one but the occupant was held void. *Id.*; Stewart v. Crysler, 100 N. Y. 378.

This left to the assessors a discretion. Johnson v. Learn, 30 Barb. 616, disapproving N. Y. & H. R. R. v. Lyon, 16 Barb. 651; see also Van Rensselaer v. Cottrell, 7 id. 127, affd., Selden's Notes, No. 1, 23.

Unoccupied lands not owned by a person residing in the ward or town where the same are situated were to be denominated "lands of nonresidents." On this subject see L. 1885, Chap. 448; Joslyn v. Rockwell, 128 N. Y. 334.

also *infra*, p. 971.

Held the returns must show that they are assessed as such or any sale will be void. Thompson v. Burhans, 61 N. Y. 52.

The name of the present owner or occupant it was held should appear. Dubois v. Webster, 7 Hun, 371.

An assessment against a former owner is void. Ritter v. Worth, 58 N. Y. 627; Franklin v. Pearsall, 53 Super. 271. When the owner is estopped, Zink v. McManus, 49 Hun, 583, revd., 121 N. Y. 259.

As to vacated lands, etc., vide Laws of 1855, Chap. 427, amd. by Laws of 1876, Chap. 101; repealed by the Tax Law.

Where the land belongs to one and the building to another, the assessment

must be separately made. People v. Assessors, 93 N. Y. 308.

One assessment should not include several parcels belonging to different

owners. Gehrhardt v. Schwartz, 102 App. Div. 389. As to redress for lands erroneously assessed in with land of another.

Tax Law, § 257; L. 1875, Chap. 331; Matter of Long Beach Land Co., 101 App. Div. 159.

As to Taxes on Corporations, see the Tax Law, Art. IX (as amd.); also

§ 11; L. 1880, Chap. 542, as amd. L. 1881, Chap. 361.
A foreign corporation held not taxable under Laws of 1889, Chap. 542, on real estate in this State purchased with surplus moneys as an investment,

and not used in its business. People v. Wemple, 78 Hun, 63.

By Laws of 1857, Chap. 536, the term "person" was to include corporations, and § 6 of Tit. II, of Chap. XIII, Part I, of the Revised Statutes (1 R. S. 389, § 6) was not to apply to railroad corporations, except as to their real estate, etc. This section repealed, Law 1858, Chap. 110.

The real estate of corporations shall be assessed in the tax district where

the same shall lie. The Tax Law, § 11; 1 R. S. 389, § 6.

Vide Laws, 1893, Chap. 498, in relation to the exemption of the real property of religious, charitable and educational corporations and associations

from taxation; now the Tax Law, § 4, as amd.

Where an act exempting certain property of religious corporations is passed while the assessment-books remain open for correction, and is made to take effect immediately, held the assessing officers are authorized and required to remove the assessment against such property from the books, and mandamus will lie. People v. Comrs., 142 N. Y. 348.

Mode of Assessment.—The manner in which assessments are made by the assersors, and towns and wards divided into assessment districts, is given in assersors, and towns and wards divided into assersment distributions, is given in the Revised Statutes, R. S. 300 to 397; as amended by Laws of 1851, Chaps. 176, 371; 1857, Chap. 536; 1858, Chaps. 110, 357; 1859, Chap. 312; 1862, Chap. 194; 1865, Chap. 453; 1868, Chap. 575; 1869, Chap. 855; 1878, Chap. 152; 1880, Chap. 269; 1884, Chap. 57; 1885, Chaps. 201, 411; 1887, Chap. 342; 1890, Chap. 174; 1892, Chap. 202. See now the Tax Law, L. 1896, Chap. 908, Art. II, as amended.

The Assessment and Notices.—When the assessment is finished, notices that the roll may be inspected, must be put in three or more public places in the tax district, except that in cities the local regulations are to govern. The Tax Law, § 35 (as amd. by L. 1904, Chap. 385); see 1 R. S. 393; L. 1851, Chap. 176; 1857, Chap. 536; 1858, Chap. 110.

The assessment-roll is to be finished by the 1st of August, in each year; and a fair copy left with one assessor. Id. The contents of the notice are

specified, but in the several cities notices are to conform to their respective laws. The Tax Law, § 35, as amd., supra; L. 1851, Chap. 176, as amd., L. 1857, Chap. 536.

Where a board of assessors are authorized to assess a certain amount equally upon the lands fronting on a street, their action is in a sense judicial, and notice to the land-owners is necessary, though the act of the Legislature giving the authority does nto require notice. McLaughlin v. Miller, 124

N. Y. 510.

The assessors are to meet and hear complaints, and fix the value of the property of the complainant, increasing or diminishing the assessment thereof. The Tax Law, L. 1896, Chap. 908, § 36; 1 R. S. 393, § 20; L. 1851, Chap. 176, as amd., L. 1857, Chap. 536.

Requisites of statements on grievance day. People v. Webster, 49 App.

Div. 556.

The exemption of land bought with pension money should be claimed on grievance day. Matter of Baumgarten, 39 App. Div. 174.

See Matter of Pullman, 52 Misc. 1. As to right to be heard, see Matter of Cathedral of the Incarnation, 91 App. Div. 543.

The assessors, or a majority of them, on completion of their roll, must make oath to same. The Tax Law, L. 1896, Chap. 908, § 37 (as amd. by L. 1899, Chap. 712); see L. 1851, Chap. 176, § 8, as amd. L. 1884, Chap. 57, and L. 1885, Chap. 201.

As to when the assessment-roll may be void for violation of § 21 of the Tax Law; Lawton v. City of New Rochelle, 114 App. Div. 883.

The certified roll, as corrected and verified, must be filled in cities in the office of the city clerk on or before September 1st in each year, to remain for fifteen days for public inspection, and notice thereof must be published as prescribed. At the expiration of that time the city clerk must deliver it to the supervisor of the tax district. In towns it must be filed with the town clerk on or before September 15th, and notice thereof published. Filing with the supervisor must be on or before October 1st. The board of supervisors of any county may make special provisions, however. The Tax Law, § 38 (as amd. by L. 1901, Chap. 358; L. 1904, Chap. 279); see 1 R. S. 394, § 27; L. 1880, Chap. 269, § 9.

After completion of the roll the assessors have no power to alter it in any

respect. People v. Forrest, 96 N. Y. 544.

As to the swearing to the roll, and its validity, vide Westfall v. Gere. 49

N. Y. 349.

As to the form of oath, etc., vide the Tax Law, § 37; L. 1885, Chap. 201, amd. L. 1851, Chap. 176; also L. 1886, Chap. 200, legalizing rolls irregularly verified, etc.

Held, unless the oath be in strict statutory form, the assessment is invalid. Shattuck v. Bascom, 105 N. Y. 39, distinguished in Ensign v. Basse, 107 N. Y.

But it is sufficient if a proper oath be annexed before the roll is delivered to the supervisors. People v. Jones, 106 N. Y. 330.

Provision is also made as to equalization of the assessments, and the correction of the assessment rolls by the supervisors; and a corrected copy is to be given to the clerk of the city or town, and also to the tax district collector; and a warrant for collection; and in case of failure to pay, he is to levy on personal property. The Tax Law, Art. III, amd., and § 71, as amd.; 1 R. S. 395-397, as amd.; Id. 397, § 2, as amd.

Held, after the deposit of the assessment-roll on or before the 1st of August. the assessors have no jurisdiction over taxpayers, or the roll, save for review and verification; and if their affidavit is made prior to the third Tuesday of August, and the defect appears on the paper, the tax warrant is null, and the collector is a trespasser. Westfall v. Preston, 49 N. Y. 349; Bellinger v. Gray, 51 id. 610. If affidavit is not made, the assessment is invalid. Id.

A certificate of the assessors, if required by any law, is necessary to validity and to protect the collector. Van Rensselaer v. Witbeck, 7 N. Y. 517.

The assessment-roll must be completed before the warrants can be annexed.

Bellinger v. Gray, 51 N. Y. 610.

As to the affidavits and other proof submitted to the assessors, and how far they are conclusive, vide the Tax Law, § 36; L. 1851, Chap. 176; 1885, Chap. 200; 1886, Chap. 201; People v. Barker, 48 N. Y. 70; Colman v. Shattuck, 62 N. Y. 348; Thompson v. Burhans, 61 N. Y. 52.

One assessment should not include several parcels of land belonging to different owners. Gehrhardt v. Schwartz, 102 App. Div. 389.

An assessment in the name of the "estate" of a certain person without any consisting or additional description held void. Matter of McCue v. Super-

qualifying or additional description held void. Matter of McCue v. Supervisors, 162 N. Y. 235.

Mere description of property as land on a certain street held insufficient and void. Lawton v. City of New Rochelle, 100 N. Y. Supp. 284. An accurate description is requisite. City of Rochester v. Farrar, 44 Misc. 394.

Where assessors have jurisdiction of the person and subject matter, held, the fact that they adopt a wrong basis of valuation makes the assessment erroneous, but not void. United States Trust Co. v. Mayor, 77 Hun, 182.

If regular notice of the completion of the assessment, etc., is not given for the full term as required by law the tax is invalid and a seal of lead therefore

the full term as required by law, the tax is invalid, and a sale of land therefor confers no title. Wheeler v. Mills, 40 Barb. 644.

Their decision is quasi judicial and based on their judgments as well as the proofs, and they are personally protected, and their decision cannot, as a general rule, be reviewed collaterally, nor at all, unless perhaps where there has been a flagrant disregard of facts or in an extraordinary case. Buff, etc., R. R. v. Supervisors of Erie, 48 N. Y. 93; Western R. R. v. Nolan, Id. 514; Barhyte v. Shepherd, 35 id. 238; People v. Trustee: etc., 48 id. 390; Van Rensselaer v. Witbeck, 7 id. 517; Foster v. Van Wyck, 2 Abb. App. Cas. 167. See, however, Nat. Bank of Chemung v. Elmira, 53 N. Y. 50, infra.

But they are liable, if they exceed their powers, and they cannot change or add names or lands to the assessment-roll after it is finished. Clark v. Norton, 40 N. Y. 243; Overing v. Overing, 65 id. 263; Mygatt v. Washburn, 15 id.

316.

Held the affidavit must be in the form prescribed by statute or the sale is void. Johnson v. Elwood, 53 N. Y. 431. See also on various irregularities, Coleman v. Shattuck, 62 N. Y. 348.

The assessors' action, if without jurisdiction, may be reviewed collaterally.

Nat. Bank of Chemung v. Elmira, 53 N. Y. 50.

Otherwise, their functions being quasi judicial, and having the force and effect of a judgment, their action may not be questioned collaterally. City of

New York v. Vanderveer, 91 App. Div. 303.

A stay of the collection of any tax existing at the expiration of the period for the collection of the tax under any warrant in the hands of the collector or other officer, or existing at the expiration of the term of office of the collector or officer holding such warrant, operates as an extension of the time within which he may collect such tax until such stay is terminated and thirty days thereafter. The Tax Law, § 83; see L. 1853, Chap. 69, as amd. L. 1879, Chap. 292.

City of New York .-- As to assessment and taxation in the city of New York, vide the Greater New York Charter, L. 1897, Chap. 378, as amd. by L.

1901, Chap. 466. See formerly the "Consolidation Act," L. 1882, Chap. 410; L. 1883, Chap. 226; L. 1892, Chap. 58; L. 1893, Chap. 185 (as to lands in other towns owned by the city of New York).

See also People v. Feitner, 27 Misc. 384; 43 App. Div. 199; and again 33

Misc. 293.

As to right of taxpayer to inspect tax record. Matter of Lord, 167 N. Y. 398.

The Tax Law does not apply to New York city as to the review of an

assessment. People v. Feitner, 30 Misc. 646.

As to taxation of property of the city of New York lying in other counties and being part of its water system. City of New York v. Mitchell, 183 N. Y. 245.

As to the powers of the board of tax commissioners to increase assessed valuations. People v. Wells, 91 App. Div. 172.

Assessment of Real Property of Nonresident.—In case of residence of owner outside the tax district, and where the occupant also resides outside or the land is unoccupied, the real property is then assessed as nonresident. The Tax Law, § 9, as amd. by L. 1902, Chap. 171; Id., § 29; see 1 R. S. 389, §§ 1-3; Id. 391, §§ 11, 12, as amd. L. 1890, Chap. 174, § 13.

Held that nonresident's land might be assessed, if occupied, to occupant or owner, if he reside in the county. Van Rensselaer v. Cottrell, 7 Barb. 127; and must be to one or the other. Whitney v. Thomas, 23 N. Y. 281; and vide

supra, p. 968.

As to the designation of such lands, vide the Tax Law, § 29; they were formerly described as being not owned by a person residing in the ward or town where situated; and were to be designated in a separate portion of the roll. 1 R. S. 391, § 11.

Where taxes upon land are regularly assessed against one in possession thereof claiming title thereto, and the land is subsequently sold for the non-payment of such taxes, held the purchaser acquires a good title as against said party and all persons claiming under him. Crower v. Cowdry, 139 N. Y. 471.

Neither under L. 1855, Chap. 427, in relation to the collection of taxes on lands of nonresidents, nor under the amendatory acts (Laws of 1885, Chap. 448, and Laws of 1891, Chap. 217), is any jurisdiction given to the comptroller of the State to entertain and act upon an application of the owner of land sold for taxes for a cancellation of the tax sale. The amendment of the act (§ 2) in 1891, requiring the comptroller to hear and determine all applications for cancellation made "by any person interested in the event thereof," did not change the prior rule; it refers simply to persons interested in the refunding of moneys paid on a purchase upon a tax sale. People v. Wemple, 139 N. Y. 240, revg. 67 Hun, 495, and distinguishing and limiting People v. Turner, 117 N. Y. 227.

Held, an assessment of land as nonresident when it is occupied by a resident occupant is void, and furnishes no support to a tax sale. Turner v. Boyce, 11 Misc. 502.

When the Lien Arises.—The confirmation of an assessment for taxes creates a lien on the land. Manice v. Miller, 26 Barb. 41. So held as to the city of New York. See, however, Coudert v. Huerstel, 60 App. Div. 83, holding tax not a lien until the warrant is actually issued. See also Burr v. Palmer, 53 App. Div. 358.

Held there is no lien before confirmation. Washington Heights, etc., Church

v. Mayor, etc., 20 Hun, 297.

In the case of Rundell v. Lakey, 40 N. Y. 513, a tax assessed, but not laid, was held a breach of covenant on conveyance of farm lands.

So also if the assessment roll is completed, but the supervisors have not confirmed it. Edwards v. Cogswell, 1 Supm. 416.

This decision is, however, practically overruled by Dowdney v. Mayor, 57 N. Y. 187.

Rundell v. Lakey, supra, was distinguished in Barlow v. St. Nicholas Bank, 63 N. Y. 399, holding the entry of land in an assessment-roll not an incumbrance, and the assessment and levy not a breach of covenant in a deed

executed after completion of the assessment-roll, but before the levy. See also Lathers v. Keogh, 109 N. Y. 583; Kerr v. Towsley, 45 Barb. 150; Post v. Leet, 8 Paige, 337; Dowdney v. Mayor, 57 N. Y. 187, followed in Harper v. Dowdney, 47 Hun, 227, affd., 113 N. Y. 644.

A covenant to pay taxes becoming due after a given date, held to refer to

taxes confirmed thereafter, even though assessed before. Skidmore v. Hart. 13

Hun, 441.

A corporation whose property is exempt takes property charged with tax. when it acquires title after the tax books are closed, but before the tax has ripened into a lien. People v. Wells, 89 N. Y. Supp. 847.

On Decease of Owner, Who Liable .- Taxes due at the death of a decedent should be paid from the personal estate; and taxes accruing subsequently are chargeable on the land. There is no ratable apportionment for the year.

4 Brad. 216. See also People v. Barker, 86 Hun, 285. As to the rule in New York city, see Matter of Babcock, 115 N. Y. 450. The personal liability of the person assessed is fixed when the aldermen have extended the amount of the tax on the assessment-rolls, and the tax is payable by his personal representation of the tax. sentatives in case of his death before final confirmation of the tax.

Correct Assessment Necessary .- Care must be taken in making title under a tax or assessment sale to see that the land has been properly assessed by

boundaries, or lot number, etc. See 1 R. S. 391; Tax Law, §§ 21, 29.

All proceedings prescribed by law for the assessment of land for the purposes of taxation must be substantially, if not strictly, complied with. May v. Traphagen, 139 N. Y. 478.

An assessment or advertisement by wrong number would pass no title. 2 Barb. 344; Dike v. Lewis, 4 Den. 237; Taliman v. White, 2 N. Y. 66; and see infra, Tit. III.

And it must be assessed to the proper person. 16 Barb. 651; 30 id. 616. As to the city of New York, vide Laws of 1867, Chap. 410, § 5 (repealed by Laws of 1881, Chap. 537); the Consolidation Act, Laws of 1882, Chap. 410, § 818; The Greater New York Charter, L. 1897, Chap. 378, as amd. by L. 1901, Chap. 466, § 894; Whitney v. Thomas, 23 N. Y. 281; Haight v. Mayor, 32 Hun, 153, affd., 99 N. Y. 280; Lalor v. Mayor, 12 Daly, 235, and

vide supra.

Tax laws in New York city — substantial compliance therewith sufficient persons designated as executors and trustees - striking out executors and correcting a name — alphabetical order. People v. Barker, 86 Hun, 285.

As to the proper assessment of land under Law of 1850, Chap. 298, vide Whitney v. Thomas, 23 N. Y. 281, which holds that the assessment of land to one who is neither owner nor occupant is void. This law relates to the return of taxes unpaid assessed against resident owner and the recharging of the same as if land of a nonresident. See also People v. Feitner, 107 App. Div.

Disputed Location -- An Act was passed, April 21, 1870, Chap. 325, providing for actions to determine in which counties disputed lands were taxable. Repealed by the Tax Law, L. 1896, Chap. 908. An act was passed, April 4, 1871, Chap. 287, as to assessment where farms or lots were on town or county lines. Repealed by Law of 1872, Chap. 355. By the Revised Statutes a farm or lot on a county line was to be assessed where the occupant resided; if unoccupied, it was to be assessed where each portion lay. 1 R. S. 389, § 4.

The Act of 1872 repealed the provisions of the Revised Statutes (Harris v. Supervisors, 33 Hun, 279), but the above provision was re-enacted by Laws of 1886, Chap. 315, as an amendment. By Laws of 1883, Chap. 342, as amended by Laws of 1886, Chap. 59, where property lies on the boundary between towns or cities, the occupant may elect his residence and the tax be laid accordingly on the whole. The place of residence, etc., might be determined by a jury. Gordon v. Becker, 71 Hun, 282.

The taxation of real property divided by the line of a tax district is now provided for by the Tax Law, L. 1896, Chap. 908, § 10 (as amd. by L. 1898,

Chap. 537; 1902, Chap. 200; 1903, Chap. 305).

Taxation Omitted .- If taxation on any land or property is omitted, the assessors of any tax district upon their own motion or on application of any taxpayer therein, are to enter it for taxation, as of the current year. The Tax Law, § 33; see also § 53, formerly L. 1865, Chap. 453.

The assessors have no discretion but must assess. People v. Goff, 52 N. Y. 434, approved in People v. Wemple, 117 N. Y. 77.

This act applies to omissions from taxation under subsequent acts. People v. Assessors, etc., 92 N. Y. 430, approved in People v. Wemple, 117 N. Y. 77.

Release by Legislature.— The Legislature may release property which has been assessed for taxation, and its power to do so may be exercised in any way and at any time during the proceedings for taxation. People v. Com'rs of Taxes, 142 N. Y. 348.

Redress for Errors in Taxation .- As to review by certiorari, see the Tax Law, L. 1896, Chap. 908, Art. XI, as amended; formerly L. 1880, Chap. 269.

A suit in equity will not lie to restrain the collection of a tax on the sole ground that it is illegal, nor where there is a remedy at law. There must exist, in addition, special circumstances bringing the case under some recognized head of equity jurisdiction. The charge that a municipal body intends to collect the tax, and assess and collect similar taxes, is not sufficient. Dows v. City of Chicago, 11 Wall. 108. See also Pumpelly v. Village of Owego, 45 How. Pr. 220; Comins v. Supervisors, etc., 3 Supm. 296.

Any injunction is not to be against the assessors, who are quasi judicial

officers; but against the parties acting, i. e., the ministerial officials. As a general rule, however, injunctions will not be granted to restrain the collection of a tax or assessment. Mohawk & Hudson R. R. v. Archer, 6 Paige, 83; Susquehanna Bank v. Supervisors Broome Co., 25 N. Y. 312; Western R. R. v.

Nolan, 48 id. 513.

The presumption is the determination of the tax assessors is correct. People

Wells, 184 N. Y. 275.

Only objections specified on grievance day will be reviewed. People v.

Gray, 185 N. Y. 196.

The collection of an assessment will not be enjoined on the ground that the act under which it was imposed is unconstitutional, nor on the ground that the officer making the assessment failed to comply with the statute providing therefor, there being an adequate remedy at law in both cases. U. S. T. Co. v. Grant, 18 N. Y. Supp. 534, affd., 137 N. Y. 7.

A taxpayer at large not privately interested cannot enjoin collection of a

tax, though he may have that remedy where he is specially injured. But he may in either case have *certiorari*. Tifft v. Buffalo, 65 Barb. 460; People v. Morgan, 65 id. 473.

The action of the assessors, however, may be reviewed by certiorari, e. g., as if property not liable to taxation is put upon the assessment-roll. Genesee, etc., Bank v. Supervisors, 53 Barb. 223; People v. Trustees, etc., 48 N. Y. 390; Western R. R. v. Nolan, Id. 513.

A certiorari brings up the merits as well as questions of jurisdiction and regularity. People v. Assessors of W. Albany, 40 N. Y. 154. See as to scope, People v. Feitner, 51 App. Div. 196; as to distinction between certiorari

and mandamus, see People v. Keefe, 119 id. 713.

The taxpayer's right to certiorari is absolute. People v. Davenport, 119 App. Div. 790; People v. Feitner, 41 id. 544; see also Matter of City of New York, 117 id. 811; People v. Feitner, 92 id. 518. What must be shown.

People v. Feitner, 95 App. Div. 481; 86 id. 46; 61 id. 156.

Before a taxpayer can be said to be aggrieved, and so entitled to a review of his assessment under the Laws of 1880, Chap. 269, he must establish that his property is assessed at a higher proportionate rate than property generally in the town; proof that some property is assessed at a lower rate of valuation is not sufficient, if upon the whole the average rate of assessment is no lower. People v. Badgley, 138 N. Y. 314.

But their action will not be reversed, where there is any evidence to support

People v. Williams, 17 Abb. N. C. 376.

And the writ will be quashed where the relator refused to attend in person before the assessors and refused to file a proper inventory.

As to proposal by a trustee to submit to taxation not working an estoppel.

People v. Dederick, 40 App. Div. 570.

Their action cannot be reviewed collaterally unless under a flagrant disregard of facts; and the tax, after it has reached the treasury, cannot be recovered back. An entirely illegal tax collected, it has been held, could be recovered from the county if taken by wrongful act of the officers. Buff., etc., R. R. v. Supervisors of Erie, 48 N. Y. 93; Newman v. Supervisors, 45 id. 676; Genesee, etc., Bank v. Supervisors, 53 Barb. 223; Hill v. Supervisors,
12 N. Y. 52. See also U. S. T. Co. v. Grant, 137 id. 7.
And their judgments may be reviewed for fraud, mistake or other cause,

giving jurisdiction to courts of equity. Western R. R. v. Nolan, 48 N. Y.

Held relief might be given under Chap. 542, Laws of 1880, as amended by Chap. 463, Laws of 1889. to a corporation exempt from taxation under the act which has paid a tax imposed upon it, although such payment was not made under coercion. People v. Wemple, 141 N. Y. 471.

The statutory authority (Tax Law, §§ 250-256) to review errors in tax assessments held to be exclusive. People v. Priest, 95 App. Div. 44; see also

People v. Feitner, 163 N. Y. 384.

See as to defenses which should have been brought up by certiorari. City

of New York v. Tucker, 91 App. Div. 214.

An action, however, would lie in equity where the case is brought within some acknowledged head of equity jurisprudence; where the tax is upon land which is liable to be sold; where the conveyance to be executed would be conclusive evidence of title; where the tax was not void on its face; or where there might be otherwise a multiplicity of suits. Western R. R. v. Nolan, 48 N. Y. 513.

In general as to actions in equity, see Niver v. Village of Bath-on-the-Hudson, 27 Misc. 605; Mercantile Nat. Bank v. Mayor, etc., of New York,

172 N. Y. 35.

As to removal of tax lease as a cloud on title, vide Bensel v. Gray, 62 N. Y. 632; 80 id. 517; Stewart v. Crysler, 21 Hun, 286; 100 N. Y. 378; Sanders v. Yonkers, 63 id. 489; Crook v. Andrews, 40 id. 547; Smith v. Town,

20 N. Y. Supp. 333.

As to rules of pleading applicable to petition and return in certiorari proceedings. See People v. Stilwell, 190 N. Y. 284; see also People v. Onderkirk, 120 App. Div. 650; People v. Supervisors, 54 Misc. 323; See also reople v. Feitner, 43 App. Div. 198; People v. O'Donnel, 113 id. 713; People v. Wells, 181 N. Y. 245; 84 App. Div. 330; People v. Priest, 169 N. Y. 432; Matter of Tilyou, 57 App. Div. 101; People v. Com'rs, 55 id. 186; People v. Feitner, 49 id. 385.

As to procedure and rules of evidence, see People v. Priest, 90 App. Div.

520.

Recovery on Erreoneous Taxation.—Held, where there has been jurisdiction of the person, i. e., the person being a resident, no action will lie to recover back an erroneous tax or assessment. So held as to personalty. Genesee, etc., Bank v. Supervisors, etc., 53 Barb. 223; Mygatt v. Supervisors, etc., 11 N. Y. 563. See also U. S. T. Co. v. Grant, 137 N. Y. 7.

. Held, while the assessment of the tax is in force, no action will lie for the recovery of the tax paid, although the property was not subject to taxation. Bank of Commonwealth v. Mayor, 43 N. Y. 184.

An action will lie to recover an assessment paid which was afterward

declared void. Peyser v. Mayor, 70 N. Y. 497.

A voluntary payment of a tax which is erroneous but not illegal, made without first taking proceedings by certiorari to set aside the assessment, cannot be recovered back. United States Trust Co. v. Mayor, 77 Hun, 182.

A payment, although under protest, made at a time when the receiver of taxes had no power to compel payment, is voluntary. Id.

Where an assessment, valid on its face, but void for want of jurisdiction, is paid in good faith, without notice of its invalidity, an action to recover the amount so paid may be maintained. Mutual Life Ins. Co. v. Mayor, 79 Hun, 482; Boas v. Mayor, etc., 85 Hun, 311.

Or one paid by mistake on the wrong lot may be recovered, as being made under a mistake of fact. Mayer v. Mayor, 63 N. Y. 455; Pinchbeck v. Mayor,

12 Hun, 556.

Tax paid on lands severed from Borough of Queens, but assessed by the city of New York, held recoverable as paid under a mistake of fact and payment not voluntary in the legal sense, as the assessment was not void on its face and not known to be void by the taxpayer. Betz v. City of New York, 119 App. Div. 91.

An action does not lie, however, against the person whose tax has been

paid by mistake. Hubbard v. Blanchard, 113 App. Div. 788.

Recovery of money paid for taxes on property already condemned. Lesster Payment of tax under mistake of law cannot be recovered. Van Hise v. Board of Supervisors, 21 Misc. 572.

Where an assessment is void the party is excused from making a preliminary application to correct it. People v. Feitner, 39 Misc. 474.

A mere volunteer held not entitled to recover back money paid. Matter of

McCue v. Supervisors, 162 N. Y. 235.

Collector's Return of Unpaid Taxes .- It is further provided that the collector is to return to the county treasurer an account of unpaid taxes. Tax Law, §§ 82, 83, as amd.; see 1 R. S. 399, § 10.

As to Apportionment and sales for taxes where there are future estates, vide, p. 252.

TITLE III. THE SALE OF LANDS FOR TAXES AND THE CONVEYANCE AND REDEMPTION THEREOF.

To divest the owner of lands by a sale for taxes, or local "assessments," every preliminary step must be shown to be in conformity with the statutory requirements regulating the sale. The power given is a naked one not coupled with any interest, and is in derogation of a common law right; therefore every prerequisite to the exercise of the power must precede it.

The sale of certain lands for unpaid taxes and their redemption therefrom is now provided for by the Tax Law, which repealed and superseded the former statutes regulating this subject. It also prescribes in detail the procedure as to such sales and redemption. See the Tax Law, L. 1806. Chap. 908, Arts. VI, VII, as amended.

Reference should be had to these articles of the Tax Law for the particulars of this procedure.

For the law immediately preceding the Tax Law, see L. 1803. Chap. 711, as amended by L. 1895, Chap. 895, which repealed the former laws and provided for sales by the comptroller or county treasurer, and redemption. It is upon this law that the corresponding provisions of the Tax Law are based.

See Newell v. Wheeler, 48 N. Y. 486; 5 Hill, 286; 4 id. 92; Leggett v. Rogers, 9 Barb. 411; Stryker v. Kelly, 2 Den. 323; Doughty v. Hope, 3 id. 594; 1 N. Y. 79; Varick v. Tallman, 2 Barb. 113; see also Tallman v. White, 2 N. Y. 66; Bush v. Davison, 16 Wend. 550; Jackson v. Esty, 7 id. 148; 50 Barb. 639; Sanders v. Downs, 141 N. Y. 422; Lester v. MacDaniel, 5 Misc. 190; Armstrong v. County of Nassau, 101 App. Div. 116.

A power to sell for taxes imposed on lands does not authorize a sale for taxes imposed on their owners or occupants, and not nominatim on the lands; nor will a power to sell for taxes authorize a sale for an assessment for local benefit.

A party claiming under a tax sale has the onus of proof as to all the proceedings, except when otherwise provided. Sharp v. Speir, 4 Hill, 76, approved, Adams v. S. & W. R. R. Co., 10 N. Y. 328.

And a defect in tax sale must be shown with reasonable certainty. Andrus

v. Wheeler, 22 App. Div. 596.

A party who fails to object to the validity of a sale under a repealed act does not thereby waive his rights; the order of sale is a nullity and does not estop even a consenting party. Matter of McIntyre, 124 App. Div. 66.

The Statute must be complied with in all its parts, except in nonessentials.

People v. Golding, 55 Misc. 425. See People v. Ladew, 189 N. Y. 355.

PRIOR LAWS AND CHANGES.

Nonresident and Unoccupied Lands, and where there are no Chattels, etc.—The Revised Statutes defined lands of nonresidents as unoccupied lands, the owners not residing in the ward or town where the same are situated. Lands where there is not sufficient personal property to satisfy the tax, and lands vacated by removal of occupant, are to be proceeded against in the same way as nonresident lands.

1 R. S. 389, §§ 2, 3, as amended by L. 1851, Chap. 176; L. 1855, Chap. 427, § 5, amd. by Laws of 1876, Chap. 101.

Laws 1866, Chap. 528; 1878, Chap. 152, partly repealed by Laws of 1893, Chap. 711; 1885, Chap. 453; Newman v. Board of Supervisors, 45 N. Y. 676. For the corresponding provisions of the present law as to nonresident lands and levy, vide The Tax Law, L. 1896, Chap. 908, §§ 9 (as amd., L. 1902, Chap. 171), 29, 71, 120.

The procedure is now to levy on personal property, Tax Law, § 71, and on return of unpaid taxes by the collector, Tax Law, §§ 82 (amd. L. 1901, Chap. 517), 83, 89, 100 (as amd. L. 1898, Chap. 362, and L. 1902, Chap. 171), to

sell same; Tax Law, § 120.

Held that occupied lands owned by one who is not a resident of the town, but a resident of the county, may be assessed either to the owner or occupant; but an assessment of such land to one who is neither the owner nor occupant is void. Parsons v. Parker, 80 Hun, 281.

An owner of land is under no obligation to inform the assessors of his

ownership. Id.

Act of 1855, Chap. 427 .- Held this act was not an amendment of the Revised Statutes, but an independent act and operated to repeal any prior enactments inconsistent with it. Caulkins v. Chamberlain, 37 Hun, 163.

Property assessed and returned as resident's land cannot be sold under

this act. Bennet v. Peck, 112 N. Y. 649.

The Laws of 1893, Chap. 711, supra, abolishes large portions of this act of 1855, Chap. 427, and Laws of 1878, Chap. 152.

A list of unpaid taxes is to be prepared and published as provided. Vide Laws of 1855, Chap. 427; 1878, Chap. 152; and delivered to the comptroller, L. 1881, Chap. 402; 1893, Chap. 711.

See for the present law as to lists of unpaid taxes, publication, etc., the Tax Law, §§ 82 (as amd. by L. 1901, Chap. 517), 83, 100 (as amd. by L. 1898, Chap. 362; L. 1902, Chap. 171), 120, 121.

Advertisement by Comptroller.- The comptroller was then to advertise that the lists are deposited, and the lands for sale, at the Capitol at Albany,

once a week, for twelve weeks, in all the newspapers in the State designated by the county supervisors for publishing the Session Laws. L. 1855, Chap. 427, § 41. This was amended by L. 1878, Chap. 152. The newspapers are to be selected by the comptroller. *Id.*The regular statutory notice is absolutely essential to the validity of the sale. Thompson v. Burhans, 61 N. Y. 52.

By the Act of 1893, the comptroller was to return the tax list to the sale.

county treasurer of nonresident taxes, and if the same remain unpaid for six months from February 1st after the levy, then the county treasurer is to make the sale. This does not apply to Forest Preserve lands. L. 1893, Chap. 711, § 30.

For the corresponding procedure under the present law preparatory to sale by the comptroller, see the Tax Law, §§ 120, 150 (as amd. by L. 1898, Chap. 362; L. 1901, Chap. 261; L. 1902, Chap. 171; L. 1903, Chap. 170); and as to sales by county treasurers, the Tax Law § 151 (as amd. L. 1898, Chap. 362; L. 1905, Chap. 445).

See as to publication, Morton v. Horton, 189 N. Y. 398.

See also in general, the Tax Law, Arts. VI and VII, as amended.

Sale.—On the day prescribed, and from day to day, the comptroller, under the former law, was to sell sufficient of each parcel assessed to pay the taxes, interest, and charges, and the purchasers were to pay the purchase money within forty-eight hours after the last day of the sale, and in default thereof, the comptroller might sue, or, in his discretion, resell. L. 1855, Chap. 427, §§ 44 (amd. by Laws of 1881, Chap. 402), 45.

See for corresponding provisions of the present law, the Tax Law, §§ 122, 125, 126; and as to sales by county treasurers, §§ 151 (as amd, by L. 1898,

Chap. 362; L. 1905, Chap. 445), 157.

Sale under a warrant of supervisors for taxes, some legal and some illegal,

held void. People v. Hagadorn, 36 Hun, 610, affd., 104 N. Y. 516.

Sale for taxes must be strictly carried out according to law. O'Donnell v. McIntyre, 37 Hun, 615.

Errors in copies of lists filed with town clerks do not justify canceling

the sale. People v. Chapin, 38 Hun, 272; 104 N. Y. 369.

Sections 42 to 62 of the above Act of 1855, Chap. 427, were repealed by the above general act of 1893, Chap. 711. This act provided that the sale should be conducted in the same manner and the treasurer have the same powers as in case of sale for taxes by the comptroller. L. 1893, Chap. 711, § 37.

For the present law, see the Tax Law sections, supra.

Certificate.— The comptroller was to give to the purchaser a certificate in writing describing the lands purchased, the sum paid, and the time when

he will be entitled to a deed. Law of 1855, Chap. 427, § 46.

If the purchase money was not paid in three months from the conclusion of the sale, any sale might be canceled, and a new purchaser or the People substituted. L. 1855, Chap. 427, §§ 47, 48 as amd. by L. of 1878, Chap. 152, and L. 1881, Chap. 402; and a certificate issued. L. 1855, Chap. 427, § 48.

As to necessity of seal, Lockwood v. Gehlert, 127 N. Y. 241.

The change of purchaser was to be noted in the sales book. L Chap. 427, § 49. See also similar provisions, Law of 1840, Chap. 252.

The certificate is not a cloud on title, where the tax was illegally laid.

Clark v. Davenport, 95 N. Y. 477.

Where held by city, and there are no charter restrictions on doing so, the city may surrender the certificate and take a mortgage on the land for the amount. City of Buffalo v. Balcom, 134 N. Y. 532.

These sections, 49 to 62, were repealed by the above general act of 1893, Chap. 711, which made full provision as to the certificate to be given.

For the provisions of the present law as to the certificate, see the Tax Law, §§ 125, 126, 157.

Redemption .- The owner or occupant or any other person, might redeem within two years from the last day of sale, by paying the sum mentioned

in the certificate, with interest at ten per cent. from date of certificate. L. 1855, Chap. 427, § 50. Undivided specific parts of lots might be so redeemed, and the conveyances made accordingly. §§ 51-56. Amended as to despoiling the land or timber and occupation within two years from sale, Laws 1881, Chap. 402; also in Laws of 1893, Chap. 711.

A person conjointly assessed with another person might redeem the whole. and recover the proportion of redemption money from the other, no suit to be brought until after expiration of time to redeem. § 57. See also

Laws of 1893, Chap. 711.

If the lands are not redeemed, a proportionate value of the lands sold might be recovered (§ 58); and see post, Tit. V, as to apportionment and redemption where lands have been sold, and there are joint interests; also §§ 57, 58.

Every judgment so recovered under §§ 57, 58, was to have preference over mortgages and judgments executed since April 23, 1823, if an entry to that effect is made on the docket. §§ 59, 60. As to the lien of judgments

obtained under these provisions, vide §§ 57-60.

The comptroller held bound to give a certificate of the amount due; otherwise, if the party is thereby prevented from redeeming, he will not be prejudiced. Van Benthuysen v. Sawyer, 36 How. 245; s. c., 36 N. Y. 150.

These sections, 50 to 62, were repealed by the above general act of 1893: and the time of redemption limited to one year, and any taxes paid by

the holder of the certificate and interest to be repaid.

For the present provisions as to redemption, see the Tax Law, §§ 127, 128. 134 (as amd. by L. 1902, Chap. 171), 135, 136, 137, 139, 152 (as amd. by L. 1904, Chap. 535). As to prohibition of spoliation, see the Tax Law, § 129.

Notice to Redeem .- The comptroller was required to give a specific notice for each county, six months before the expiration of the two years allowed for redemption, that unless the lands were redeemed by a certain day, they will be conveyed to purchasers. L. 1855, Chap. 427, §§ 61, 62. The notice is to contain full particulars. So also in Laws of 1823, Chap. 242. So also Laws of 1892, Chap. 266, repealed by L. 1893, Chap. 711.

The notice was to be published once a week, for six weeks, in the county newspaper designated for publishing the Session Laws, or if none such, in two selected by the comptroller; the publication to be completed at least eighteen weeks before the two years' time for redemption expires. It must

be published in the body of the newspaper. §§ 61, 62.

The publication must be fully completed as the law requires (see Doughty v. Hope, 3 Den. 594; 1 N. Y. 79), and a subsequent publication will not rectify. Id. See also as to notices prior to 1850. Bunner v. Eastman 50 Barb. 640.

These sections were amended by Laws 1892, Chap. 266, and repealed by L. 1893, Chap. 711, which repealed also the Act of 1855, Chap. 427, §§ 33 to 39,

42 to 62, 65, and 68 to 93.

The Law of 1893, as amd. L. 1895, Chap. 895, provided that three months before the expiration of the year, six weeks' notice should be published, which should be completed within the year, and specify the amount necessary to redeem, etc. Particulars were given as to the publication of the notice.

If the redemption is prevented by any misconduct of the public officer through whom the redemption is to be effected, the title will not pass by the deed. Van Benthuysen v. Sawyer, 36 N. Y. 150, supra.

Unless the notice is published as required at the time, the title is invalid, and will not be saved by any recitals in the deed. Westbrook v. Wiley, 47 N. Y. 457; Bunner v. Eastman, 50 Barb. 639.

And the lands must be sufficiently described. Sharp v. Spier, 4 Hill, 76. The time to redeem cannot be extended by law after the sale. Dikeman

v. Dikeman, 11 Paige, 484.

The deed takes effect back by "relation," for bringing trespass. Pierce v. Hall, 41 Barb. 142.

For the present provisions as to the giving of notice, etc., see the Tax Law, § 130.

The Deed.—If no person redeems such lands within such two years, the comptroller was to execute to the purchaser, his heirs, or assigns, in the name of the People of the State, a conveyance which should vest in the grantee, an absolute estate in fee simple, subject to taxes or other liens or incumbrances to the State. L. 1855, Chap. 427, § 63.

Laws 1885, Chap. 448, making comptroller's deed conclusive, qualified Joslyn v. Rockwell, 128 N. Y. 334.

By Laws of 1893, supra, the deed by the county treasurer at the end of the year is to be given, as above, executed by the treasurer under seal. Provisions are made for its record, etc., as a deed. L. 1893, Chap. 711, § 34.

See also as to comptrollers' deed, L. 1893, Chap. 711, § 11.

For the present law, empowering the comptroller to execute a deed in the name of the people of the State within one year from the time of sale, see the Tax Law, L. 1896, Chap. 908, §§ 131 (as amd. by. L. 1898, Chap. 339; L. 1902, Chap. 344); also L. 1855, Chap. 427, § 65, as amd. by L. 1885, Chap. 448, § 1; and empowering the county treasurer; see the Tax Law, §§ 153 (as amd. L. 1897, Chap. 490; L. 1898, Chap. 339), 154.

When an action to cancel tax sale deed cannot be maintained. Saxton, 182 N. Y. 477. See also Raquette Falls Land Co. v. Hoyt, 109

App. Div. 119.

No Title Passes, When .- If the tax had been paid, the deed passes no title. Bank of Utica v. Mersereau, 3 Barb. Ch. 528; Jackson v. Morse, 18 Johns. 441; 15 Barb. 337.

Or if the lot was described by a wrong number or name. Dike v. Lewis, 4

Den. 237; Tallman v. White, 2 N. Y. 66

The recitals in the deed are not proof of fact sufficient to give title unless

made so by statute. Hoyt v. Dillon, 19 Barb. 644.

The lands must be regularly assessed, and the collector's affidavit made, as to the assessment-roll being correct, etc. Curtis v. Van Dyke, 15 Barb. 337; Tallman v. White, 2 N. Y. 66.

Sales to the comptroller or an employee are void. Laws of 1862, Chap. 285.

See now Penal Code, § 48a (added by L. 1893, Chap. 692).

See also as to irregularities in the roll. Colman v. Shattuck, 62 N. Y. 348. Where an irregular assessment was validated by law, a sale before the validating act is not made good. Matter of Clementi v. Jackson, 92 N. Y. 591.

One parcel of land cannot be sold to discharge a tax upon another parcel, no matter how small such tax may be. Laws of 1885, Chap. 448, does not apply to deeds of lands, a part of which are actually occupied at the expiration

of the time for redemption, which deeds have been recorded in violation of the provisions of Laws of 1855, Chap. 427, § 68. Turner v. Boyce, 11 Misc. 502. Deeds made to the State on a sale, at which bids were refused pursuant to the injunction of § 66, Laws of 1881, Chap. 402, create no title in the State and mend none, but merely withdraw such lands from the sale and are only evidence that the State paid the tax because of previous ownership.

Form of Deed and Validity .- The deed would be good if not made in the Form of Deed and Validity.—The deed would be good if not made in the name of the people. And as to form of deed, Bank of Utica v. Mersereau, 3 Barb. Ch. 528, 577; 9 Barb. 406. The deed is to be signed and sealed by the comptroller, and witnessed by the deputy comptroller, surveyor-general, or treasurer. The sale was made presumptive evidence of the facts stated. L. 1855, Chap. 427, § 65, amd. L. 1860, Chap. 209; L. 1885, Chap. 448; and see now the Tax Law, § 131 (as amd. L. 1898, Chap. 339; L. 1902, Chap. 344), Wood v. Knapp, 100 N. Y. 109. This § 65 was amended by L. 1885, Chap. 448, as to Clinton, Delaware, Essex, Franklin, Fulton, Greene, Hamilton, Herkimer, Lewis, Saratoga, St. Lawrence, Sullivan, Ulster, Warren and Washington counties, making provisions as to the regularity of sales in those counties, and again by L. 1891, Chap. 217, making provisions applicable to all the counties in the State except Cattaraugus and Chautauqua. See also L. 1893, Chap. 398. Pending proceedings were not to be affected. L. 1893, Chap. 398. Pending proceedings were not to be affected.

Under the original provision of the Revised Statutes, 1 R. S. 412, § 81 (amd. by L. 1850, Chap. 183), the comptroller's deed was conclusive evidence of regularity. Vide 2 Barb. 113; Beekman v. Bigham, 5 N. Y. 366; Tallman v. White, 2 N. Y. 66; also 50 Barb. 640, as to what it was conclusive of.

By Laws of 1860, Chap. 209, where the party claiming is in possession, it was presumptive evidence, whatever the date of the deed. Now repealed by Laws 1893, Chap. 711, supra.
By Laws of 1886, Chap. 820, deeds executed under Laws of 1850, Chap. 298,

were to be presumptive evidence that the sale and proceedings prior thereto

and notices within the two years were correct.

Under the above Law of 1850, the deed was not even presumptive evidence of the facts giving the comptroller authority to sell, but merely as to his acts, Beekman v. Bigham, 5 N. Y. 366.

It is held, in a sister State, that the Legislature has no authority to make a tax deed conclusive evidence that the tax warrant was sufficient.

Corbin v. Hill, 21 Iowa, 70.

Likewise see Joslyn v. Rockwell, 128 N. Y. 334; Cromwell v. MacLean, 123 id. 474; People v. Turner, 117 id. 227; Ostrander v. Darling, 127 id. 70.

Under the Laws of 1893, Chap. 711, an absolute estate in fee is carried

subject to claims of the county and State. By said Law of 1893, after two years, conveyances and certificates theretofore made are conclusive evidence

of the sale and proceedings prior thereto. See now the Tax Law, § 131 (as amd. L. 1898, Chap. 339; L. 1902, Chap. 344), as to comptroller's deeds; also L. 1855, Chap. 427, § 65, as amd. L. 1885, Chap. 448, § 1; and as to treasurer's deeds, the Tax Law, §§ 153, 157.

Notice to Occupant .- Under the said Law of 1855 the grantee, or his heirs or assigns, was to serve a written notice on any person occupying such land, within two years from the expiration of the time to redeem. The notice within two years from the expiration of the time to redeem. might be served as provided. And no conveyance was to be recorded until the expiration of the said notice, and the evidence of the service of such notice was to be recorded with such conveyance. L. 1855, Chap. 427, §§ 68, 69. This clause was contained in substance in Laws of 1813, 1819, 1823, 1830, 1836, 1837 and 1844, Chap. 266.

If no notice is given, the sale is void as to every part of the land sold. Leland v. Bennett, 5 Hill, 286; 3 Barb. 528; vide Smith v. Sanger, 4 N. Y.

An error in the notice would not vitiate. 9 Barb. 406.

It cannot be waived by an occupant. Jackson v. Esty, 7 Wend. 148; Comstock v. Beardsley, 15 id. 348; Bush v. Davison, 16 id. 550; 15 Barb. 337. It must follow the statutory words or it is void. Becker v. Holdridge, 47 How. Pr. 429; Simonton v. Hayes, 32 Hun, 286.

Held, a camp or hunting lodge does not constitute an "actual occupancy" within the meaning of the statute (Laws of 1855, Chap. 427, § 68) requiring service of notice of a tax sale on occupant. People v. Campbell, 67 Hun, 590.

Under the Laws of 1893, Chap. 711, notice is also to be served upon occupants, if any, as provided, and provision is also made as to period of redemption. See §§ 14, 15, 16.

The Tax Law makes provision in detail for notice to occupants; vide the Tax Law, L. 1896, Chap. 908, §§ 134 (as amd. L. 1902, Chap. 171), 135, 136.

Notices to Occupants in the City of New York .- As to notices to occupants and persons last assessed and sales for taxes and assessments in the city of New York, vide Laws of May 25, 1841, Chap. 230; April 18, 1843, Chap. 230; 1843, Chap. 235, as modified or repealed by Act of April 8, 1871, Chap. 381; and Paillet v. Youngs, 4 Sandf. 50. See also the Consolidation Act, Laws of 1882, Chap. 410, § 943; the Greater New York Charter, L. 1897, Chap. 378, as amd. by L. 1901, Chap. 466, § 1043.

As to notice under the Law of 1843, vide People v. Cady, 105 N. Y. 299. As to notice under Law of 1871, vide Willis v. Gehlert, 34 Hun, 566;

Franklin v. Pearsall, 53 Super. 271.

Certain sales prior to 1855 were held invalid in Bensel v. Gray, 80 N. Y. 517.

Brooklyn.— As to deeds taken before notice served, etc., see L. 1874, Chap. 353.

Redemption by Occupant or Deed to be Absolute.— The occupant might within the six months redeem as above, and the comptroller was to give a certificate thereof, which might be recorded in the book of deeds; otherwise, the grantee was to file an affidavit of the service of the notice within one month after service, the comptroller was to give a certificate of the facts, and the conveyance to the comptroller's grantee was to become absolute. Vide Bank of Utica v. Mersereau, 3 Barb. Ch. 528; L. 1855, Chap. 427, §§ 70-73; as to New York city, see Lockwood v. Gehlert, 127 N. Y. 241.

The occupant or any other person may at any time before the service of such notice redeem by filing in the office of the comptroller evidence of occupancy, and paying the above sums; and the receipt of the treasurer and comptroller's certificate shall be presumptive evidence that the redemption was correct. L. 1855, Chap. 427, §§ 74 (amd. by L. 1885, Chap. 453), 75. Ostrander v. Darling 127 N. Y. 70.

A mere encroachment will not make an occupant. It must be substantial.

Smith v. Sanger, 4 N. Y. 577, revg. 3 Barb. 360.

The title does not vest under the comptroller's deed until the notice has been served, and the six months expired. Bank of Utica v. Mersereau, 3 Barb. Ch. 528; Hand v. Ballou, 12 N. Y. 541.

If land was occupied at the time of sale, the occupant was entitled to

notice under the provisions of the Revised Statutes; 1 R. S. 412, § 83.

As to conveyance or redemption in certain northern counties, vide Laws of

1885, Chap. 448.

The above §§ 70 to 75 of the Laws of 1855, Chap. 427, supra, were abolished by said Laws of 1893, Chap. 711, supra, and full provision made as to redemption. Laws of 1990, Chap. 556, was also abolished.

Redemption by occupants is now regulated by the Tax Law, §§ 134 (as amd.

by L. 1902, Chap. 171), 135, 136, 137.

Invalid Sales.—Provision is also made in the Laws of 1855, Chap. 427, §§ 83, 85, as to the canceling of invalid sales, and refunding of the money paid. Reid v. Supervisors, etc., 14 N. Y. Supp. 594, revd., 128 N. Y. 364.

Held, the comptroller might exercise full discretion as to vacating sale. People v. Chapin, 103 N. Y. 635.

Held, that the law was intended for the benefit of the purchaser and not for arbitrary exercise by the comptroller, without notice.

Darling, 127 N. Y. 70.

The Legislature had the right to enact by § 1 of Chap. 163 of the Laws of 1885, as to the city of Brooklyn that a purchaser at a tax sale "shall take a good and sufficient title in fee simple absolute to the property sold of which the said deed shall be presumptive evidence," and the burden of disproving the authority of the registrar of arrears to deliver a tax deed is upon the person questioning the same. Fortman v. Wheeler, 84 Hun, 278.

The right of a purchaser from the State of lands which it had bid in at a tax sale to demand repayment on the ground of failure of title arises only when the title of the State has been canceled and set aside by the comptroller. and the Statute of Limitations commences to run, if at all, only from that

time. Matter of Harris, 12 Misc. 223.

The petition in proceedings under Laws 1884, Chap. 107, to confirm title under a tax sale, brought by one other than the purchaser at such sale. must show that the purchaser has parted with his title, and that the petitioner is the grantee and is entitled to an absolute title in fee; a statement therein that the purchaser has contracted to convey all his right, title and interest in the premises to the petitioner is insufficient. Matter of Anderson, 79 Hun. 170.

The above sections 83 to 85, were repealed by said Law of 1893, Chap. 711, which also provided for refunding the purchase money on failure of title. The subject of invalid sales and the refunding of the purchase money is

now regulated by the Tax Law, §§ 140, 155.

See also Tax Law, § 132, and Wallace v. International Paper Co., 84

App. Div. 88, holding this section constitutional.

Sale for valid and invalid taxes held void. Nehasane Park Assn. v.

Lloyd, 167 N. Y. 431.

When an official act, authority for which has been expressly conferred by statute, has been performed in a manner substantially regular, the courts will presume that the conditions essential to its validity have been

fulfilled. Fortman v. Wheeler, 84 Hun, 278.

As to validity of sale and deed to purchaser under Law 1885, Chap. 448, though irregularities existed. People v. Turner, 145 N. Y. 451; and vide supra, p. 979.

As to vacating sale, the comptroller may be compelled to act. v. Chapin, 105 N. Y. 309.

Held, his decision as to who is entitled to money refunded cannot be rectified, if wrong. The record of deeds is no notice to him. People v. Chapin, 104 N. Y. 96.

As to refunding by comptroller to purchaser at an illegal sale. People v. Roberts, Comtproller, etc., 144 N. Y. 234.

By force of the provision of Chapter 217 of the Laws of 1891, which empowers the State comptroller to hear and determine applications for the cancellation of tax sales, made by "any person interested in the event thereof," no jurisdiction is conferred upon the comptroller to entertain the application of the original owner of land sold for taxes to cancel the sale. People v. Wemple, 139 N. Y. 240, revg. 67 Hun, 495. See also as to cancellation, People v. Lewis, 127 App. Div. 107.

Lost Certificates .- On proof of lost or unduly withheld certificate, the comptroller may issue the deed to the person entitled. Law of 1835, Chap. 11; 1855, Chap. 427, § 64. See now the Tax Law, § 131, as amd. by. L. 1898, Chap. 339, and L. 1902, Chap. 344.

Notice by Purchaser to Mortgagee. By Laws of 1840, Chap. 387; 1844, Chap. 266; 1850, Chap. 298, and 1855, Chap. 427, no sale for a tax or assessment shall affect the lien of any recorded mortgage, unless written notice be given by the purchaser to the mortgagee, his representatives, etc., to redeem within six months after notice, or be barred, etc. See L. 1855, Chap. 427, §§ 76-79.

By Laws of 1844, Chap. 266, a memorandum had to be filed with the comptroller within two years from the sale, to entitle him to notice; other-

wise his right to redemption was barred.

The above provision under Laws of 1840, Chap 387, were general in their application, and were repealed by § 114 of Chap. 298, of the Laws of 1850. The Act of 1850, Chap. 298, and the Laws of 1855, Chap. 427, had similar general provisions as to notices to mortgagees, in the State.

This act of 1840 and the substituted sections of the act of 1855, as amended, were abolished by said general law of 1893, Chap. 711, and the provisions were re-enacted in said Laws of 1893, Chap. 711, §§ 18 (amd. L. 1895, Chap. 895), 19. These provided that the lien of the mortgage was not affected by the tax sale, except upon notice served as provided. These provisions of the law of 1893 apparently embraced all mortgages.

Under the present law written notice must be given by the purchaser to the mortgagee within one year from the expiration of the right to redeem. See the Tax Law, §§ 138 (amd. L. 1897, Chap. 373), 139 (amd. L. 1897,

Chap. 373, and L. 1901, Chap. 605), generally on this subject.

As to the rights of mortgagees to redeem in the city of New York, vide Laws of May 6, 1819, Chap. 170; May 25, 1841, Chap. 230; 1843, Chap. 230, as amd.; Id. Chap. 235; also Laws of 1871, Chap. 381; amd. 1879, Chap. 434; the Consolidation Act of 1882, Chap. 410, §§ 936-940; the Greater New York Charter, L. 1897, Chap. 378, as amd. by L. 1901, Chap. 466, §§ 1036-1040.

As to necessity of mortgagee filing description of his mortgage under

the above acts, see Chard v. Holt, 136 N. Y. 30.

Act of 1855, Chap. 427, Not to Apply to Certain Cities.—Section 91 of the Act of 1855, Chap. 427, Not to Apply to Certain Cities.—Section 91 of the Act of 1855, Chap. 427, provided that the preceding provisions of the act (except §§ 2, 3, 8, 12, 13 and 14) should not apply to the city and county of New York, the city of Albany, the city of Brooklyn or the village of Williamsburgh, Kings county. The words, "County Treasurer" were to apply to the city chamberlain of New York. Said section 91 was abolished by Laws of 1893, supra.

The Tax Law provides that Arts. VI and VII (relating to sales for unpaid taxes, redemption, etc.), shall not affect any law relating to the sale of real estate for taxes in any city. The Tax Law, § 158.

Repeal of Former Acts.—Section 92 of the above Act of 1855, Chap. 427, repealed the Law of April 10, 1850 (Chap. 298), relative to taxes on lands of nonresidents, and providing for the sale of land in the counties where of nonresidents, and providing for the sale of land in the counties where they were assessed, and also repealed the Act of April 6, 1850 (Chap. 183), as regards the publication of notices. But the repeal or anything contained (except § 30, in relation to the cancellation of overcharged taxes, and §§ 89 and 90, in relation to the taxes of the years 1852, 1853), were not to affect any tax levied or assessed in the years 1849, 1850, and 1851, nor any proceeding for the collection thereof by sale or otherwise, nor the rights of any person which have accrued or may accrue by reason of such sale or proceeding, nor the powers of county treasurers in relation to the taxes of 1852 and 1853, except as provided in sections 89 and 90.

This § 92 was repealed by L. 1893, Chap. 711, supra, which in turn was repealed by the Tax Law, L. 1896, Chap. 908.

Deeds under Repealed Law of 1850.—By Laws of 1866, Chap. 820, all deeds executed pursuant to law by the treasurer and county judge of any county, upon any sale under Laws of 1850, Chap. 298, shall vest an absolute fee simple, subject to claims by the people of the State for taxes or other liens, and shall be presumptive evidence of the regularity of the assessments and other proceedings. Repealed by the Tax Law, § 280.

Taxes in Cities and Counties.—As to taxes and sales in the different cities and counties, vide the various local acts applicable to each. Taxes and sales for draining swamp and marsh lands, vide the Revised Statutes, Part III, Chap. VIII, Tit. XVI, as amended by L. 1869, Chap. 888, and numerous other amendatory acts which cannot here be more specifically

As to taxes in the city of New York, vide Laws of 1871, Chap. 381; the Consolidation Act, L. 1882, Chap. 410; the Greater New York Charter, L. 1897, Chap. 378, as amd. by L. 1901, Chap. 466.

As to sales for taxes, assessments and water rates in New York city,

see the Consolidation Act, L. 1882, Chap. 410, § 926 et seq. (as amd.); the Greater New York Charter, L. 1897, Chap. 378, as amd. by L. 1901, Chap. 466, § 1017 et seq.: as amended by L. 1908, Chap. 490.

In Counties with upwards of 300,000 inhabitants, vide infra, Tit. V, "Mis-

cellaneous."

As to taxes in the city of Brooklyn, vide Laws 1875, Chap. 548; 1883, Chap. 114; Terrill v. Wheeler, 123 N. Y. 76; L. 1885, Chap. 163; 1888, Chap. 583; 1889, Chap. 368; 1895, Chap. 1015.

As to deeds under tax sales in Brooklyn, Laws 1894, Chap. 353. As to tax sales in Brooklyn and rights of mortgagees, Sutherland v. Brooklyn,

87 Hun, 82.

TITLE IV. OF THE LIEN OF LOCAL ASSESSMENTS AND THE SALE THEREFOR.

Powers of a State to Assess for Local Improvements.— The raising of money for local improvements by assessing a particular class of persons is held an exercise of the taxing power inherent in the Legislature; and this power to tax implies the power to apportion the tax as the Legislature sees fit. The legality of acts for this purpose has been well settled (vide supra, p. 35). It is in the discretion of the Legislature also to provide that the whole or any part of the

lands sold for charges imposed by law, be sold in fee or otherwise. and that the proceedings be conducted by judicial forms or through judicial tribunals.

The power so to take lands for public uses results from the right of eminent domain, which is restricted only by the constitutional provision that just compensation in some form shall be made to the owner. The State may also delegate the power to take land, or to assess the owners of land benefited by improvement, in proportion to the amount of such benefit; and the justice of the assessment or the propriety of the improvement, is not a matter of judicial inquiry. On these heads, vide People v. Cravel, 36 Barb. 177; People v. Mayor of Brooklyn, 4. N. Y. 419, overruling 6 Barb. 209, and 9 id. 535; In re Church St., 49 id. 455; People v. Flagg, 46 N. Y. 401; and see fully, supra, p. 35; also Tit. I, supra; and Doughty v. Hope, 3 Den. 594; 1 N. Y. 79; Trustees, N. Y. Epis. School, 31 id. 574; Striker v Kelly, 2 Den. 323; Matter of Van Antwerp, 56 N. Y. 261.

A statute delegating power to charge the property of individuals with the expense of local improvements must be strictly pursued, and any departure in substance from the formula prescribed by the statute vitiates the

When the statute authorizing an assessment for a local improvement provides that the assessment shall be made against both the "owners or occupants and upon the lands deemed to be benefited," a failure to make the assessment against the owners or occupants, by omitting to name them, as well as against the land, is a jurisdictional defect which will vitiate the assessment. Felthousen

v. Amsterdam, 69 Hun, 505.

A law imposing an assessment without notice or hearing is unconstitutional. Stuart v. Palmer, 74 N. Y. 183.

Powers granted to one set of officers cannot be delegated to another. Merrit v. Portchester, 29 Hun, 619.

Reduction of damages by amount of assessment on property of the owner for benefit is constitutional. Genet v. Brooklyn, 99 N. Y. 296.

The Legislature may fix the area of assessment and apportion the burden, and its action is final. Spencer v. Merchant, 100 N. Y. 585.

Various provisions have been enacted by the Legislature relative to assessments for improvements applicable to the different cities of the State. They are local in their nature and cannot be reviewed here. Only a review of the general principles of the intricate law on the subject, which is applicable more or less to different localities, is here attempted.

An assessment is a tax. Astor v. Mayor, 62 N. Y. 580.

An assessment for a local improvement is not a "tax" within the meaning of a law providing for selling lands for taxes, and the provisions of the Constitution, as to the passage of the law. Sharpe v. Speir, 4 Hill, 76, approved in Adams v. S. & W. R. R. Co., 10 N. Y. 328; In re Ford, 6 Lans. 92; Sharp v. Johnson, 4 Hill, 92.

On being confirmed it becomes a lien. Gilbert v. Havemeyer, 2 Sandf. 506. This is modified in many instances by local statutes. As to city of New

York, vide infra.

It would take preference over prior mortgages. Dale v. McEvers, 2 Cow. 118.

It may be laid on premises indirectly benefited, but not within the actual limits of the improvement. Stephenson v. Mayor, 3 Supm. 133.

The Legislature may authorize a municipality to assess through its officers the cost of local improvements. Matter of Zborowski, 68 N. Y. 88.

Assessments, When Void.—An assessment made by a body having no power to make it is a nullity, and not even an apparent lien. Heywood v. City of Buffalo, 14 N. Y. 534.

If the assessment is not made according to the charter or authority of the

corporation or officers making it, it is void. Sharpe v. Speir, 4 Hill, 76; Matter of Hearn, 96 N. Y. 378. But where assessors have jurisdiction of the person and subject-matter, and parties make no objection, although the assessment is erroneous, it is not void, and it can be reviewed only by writ of error or certiorari. City of Poughkeepsie, 37 N. Y. 511; Sandford v. Mayor, 33 Barb. 147.

An assessment for a local improvement, or any award made without legal notice to the owner of the land, is void. Ireland v. City of Rochester, 51 Barb. 414; Jordan v. Hyatt, 3 id. 275; McLaughlin v. Miller, 124 N. Y. 510.

Any law imposing an assessment and taking lands in violation of the Constitution of 1846, Art. 1, § 7, is void; that section providing that "when private property is taken for public use, the compensation to be made therefor, when such compensation is not made by the State, shall be ascertained by a jury, or by not less than three commissioners appointed by a court of record, as shall be prescribed by law. House v. Rochester, 15 Barb. 517; Rochester Water Works v. Wood, 60 id. 137. But see In re Commissioners of Central Park, 51 id. 277.

An assessment is void also, if not assessed against the owner or occupant, when required by the law. Chapman v. City of Brooklyn, 40 N. Y. 372; Newall v. Wheeler, 48 id. 486; Platt v. Stewart, 8 Barb. 493.

Or if application is not signed by a majority of persons designated by any law, or if the assessment is not made distinctly and severally against the owner and his land; or the lands are not sufficiently described; or the specified notice is not given; or the collector's affidavit is not made, if the law so require. Sharp v. Johnson, 4 Hill, 92.

Or if not certified by the assessors, if so required. Platt v. Stewart, 8

Barb. 493.

Or if illegal expenses are added in. People v. Yonkers, 39 Barb. 266.

Or where notice is not published in certain newspapers to be designated as provided. In re Douglass, 12 Abb. N. S. 161; s. c., 46 N. Y. 42.

See as to when such direction is mandatory only in certain cases.

N. Y. P. Epis. School, 47 N. Y. 556.

Or where notice of presentation of a report of commissioners is not made, if required by the law. In re Ford, 6 Lans. 92; McLaren v. Pennington, 1 Paige, 102.

Or where there has been no demand of the assessment, if so provided by

law. Striker v. Kelly, 2 Den. 323; Bennet v. Mayor, 1 Sandf. 485.

Or if the publication of notice of redemption is not duly made. Iα.

Or the affidavit of collector, if required, is not made. Sanders v. Id.Leavey, 38 Barb. 70; Doughty v. Hope, 3 Den. 594, affd., 1 N. Y. 79; Sharp v. Johnson, 4 Hill, 92.

And all the assessors must act or it is void. Doughty v. Hope, 3 Den. 594, affd., 1 N. Y. 79. But see In re Church St., 49 Barb. 455, as to this,

and supra, p. 350; also In re Palmer, 1 Abb. N. S. 30.

A ratification of a void assessment by a common council does not make it valid. Doughty v. Hope, 3 Den. 594, affd., 1 N. Y. 79.

Where there is authority to sell a lot, an undivided half may not be sold. Jordan v. Hvatt. 3 Barb. 275.

The Legislature cannot by subsequent law legalize an invalid sale for assessment. Hopkins v. Mason, 61 Barb. 469; Sharp v. Speir, 4 Hill, 76, affd., 10 N. Y. 328. See also Sharp v. Johnson, 4 Hill, 92.

The commissioners are confined to the land which the notice describes as required for the improvement. In re Commissioners of Central Park, 51 Barb. 277, and the whole extent of the land required must be therein

Any provision by which more land is taken for a street than is necessary therefor would be unconstitutional and void, unless by assent of the owner.

direct or implied, e. g., as by his accepting the award made. In re Albany St., 11 Wend. 149; Embury v. Conner, 3 N. Y. 511.

After a report on a street opening is confirmed, the commissioners are functi officiis, and it cannot be altered or sent back for correction. In re Central Park, 60 Barb. 132.

The objection that more than one lot of a person is included in one assessment is not a valid ground for vacating, nor that expenses are charged on all lots assessed, but the assessment of each lot per foot. In re Anderson, 60

Nor that the assessors have not fairly distributed the expenses, unless there is palpable evidence of fraud or misconduct. Lyon v. City of Brooklyn, 28 Barb. 609.

An assessment for a sewer through private property is invalid, where the municipal authorities were trespassers. Matter of Rhinelander, 68 N. Y. 105. An assessment cannot include cost of changing gas pipes in a street. Matter of Deering, 93 N. Y. 361.

See as to certiorari to review a sewer assessment. People v. Reis, 109

App. Div. 748.

work is done or afterwards. Elmendorf v. The Mayor, 25 Wend. 693; Doughty v. Hope, 3 Den. 249, affd., 3 N. Y. 511; 5 Barb. 49; Laimbeer v. the City of New York, 4 Sandf. 109; 8 Barb. 95; Manice v. The Mayor, etc., of New York, 8 N. Y. 120; Wetmore v. Campbell, 2 Sandf. 341; 1 Abb. N. S. 449; 31 How. Pr. 16; In re Lewis, 51 Barb. 83; Howell v. City of Buffalo, 37 N. Y. 267.

Rule as to district of assessment. Matter of Rogers Av., 22 N. Y. Supp. 27.

City of New York .- As to acts for collection of taxes and assessments and water rates, and as to the review thereof, and the opening of streets, vide Laws of 1853, Chap. 579; 1857, Chap. 677; 1859, Chap. 302; 1861, Chap. 308; 1862, Chap. 483; 1869, Chap. 920; 1870, Chaps. 366, 383; 1871, Chaps. 381, 573. These acts were for the most part repealed by Laws of 1881, Chap. 537. For the law following this general repeal, vide the Consolidation Act, L. 1882, Chap. 410, and also infra, this title. The Act of 1882, Chap. 410, states it is for the consolidation and declaration of the special and local acts affecting public interests in the city of New York. By Law of April 8, 1871, Chap. 381, taxes and assessments therein, and Croton water rents, and the interest and charges laid or theretofore laid, were to be a lien on the real estate assessed superior to all other charges. No assessment was to be deemed confirmed so as to be a lien until the title thereof and date of confirmation was entered, with the date of entry, in a record to be kept in the office of the clerk of arrears. But the books could be changed, though title might have passed on the faith of them Reid v. Mayor, etc., New York, 9 N. Y. Supp. 697. Provision was also made as to notice and collection of taxes, and the sale of lands; and other laws on the subject were repealed. These matters regulated by the "Consolidation Act." Laws of 1882, Chap. 410, § 915, as to the liens, and §§ 926 to 954, inclusive, as to sales. The provisions as to the lien were similar to those of the Law of 1871, Chap. 381.

Sewerage, etc., assessments in 23d and 24th wards of New York city, L.

1893, Chap. 714.

Assessments as to streets, L. 1889, Chap. 449. See also Mayor, etc. v. Tif-

fany, 68 Hun, 158. Matter of Board of Street Opening, 86 id. 267.

After the consolidation the Greater New York Charter was passed in 1897 and this Act, as amended, now regulates these matters. See the Greater New York Charter, L. 1897, Chap. 378, amd. by L. 1901, Chap. 466; as to liens, § 1017; and as to sales, §§ 1027 to 1054.

In Certain Towns and Counties.— Assessments, etc., in towns in counties (other than New York and Kings) having upwards of 300,000 inhabitants. Law of 1885, Chap. 411, amd. 1892, Chap. 202; repealed by the Tax Law, L. 1896, Chap. 908.

Entry and Confirmation. In Dowdney v. Mayor, etc., 54 N. Y. 186, it was held that entry of an assessment is necessary to make it a lien within a covenant against incumbrances. But this case was distinguished in De Peyster v. Murphy, 66 N. Y. 622, holding confirmation sufficient.

As to proof of confirmation and expiration of the lien, vide Fisher v.

Mayor, 67 N. Y. 73, 77.

Confirmation is necessary to create a lien. If the amount of an assessment be retained by a vendee and the assessment be vacated, held, he must pay it to the vendor though another valid assessment for the same improvement be laid and confirmed. Lounsbury v. Potter, 37 Super. 57.

Review and Remedies of Parties Unlawfully Assessed .--Erroneous or illegal assessments may be reviewed on certiorari by the Supreme Court. Suits in equity will be allowed only in certain cases, for which see supra, p. 973. Such actions would lie only to prevent a multiplicity of suits, or where the assessment is an apparently valid lien and cloud on the title, and the invalidity does not appear upon the face of the proceedings, so that extrinsic evidence is necessary to show its invalidity. And the injunction will be allowed, where such an assessment is void, to prevent its collection. But, as a general rule, courts of equity will not interfere where there has been an error of judgment, but they may interfere where there has been unfairness or partiality.

Heywood v. City of Buffalo, 14 N. Y. 534, 544; Woodruff v. Fisher, 17 Barb. 224; Wiggin v. Mayor, 9 Paige, 16; Whitney v. Mayor, 1 id. 848; Scott v. Onderdonk, 14 N. Y. 9; Ireland v. City of Rochester, 51 Barb. 414; Allen v. City of Buffalo, 39 N. Y. 386; Hatch v. City of Buffalo, 38 id. 276; Tilden v. Mayor, 56 Barb. 340; Longly v. Hudson, 4 Supm. 353; Marsh v. Brooklyn, 59 N. Y. 280; Guest v. Brooklyn, 69 id. 506; Boyle v. Brooklyn, 71 id. 2; Clark v. Dunkirk, 12 Hun, 181; Knapp v. Brooklyn, 97 N. Y. 520; People v. Reis, 109 App. Div. 748.

The procedure on certiorari was fully regulated by Laws of 1880, Chap. 269; amd. Laws of 1887, Chap. 342. These laws were repealed and superseded by the Tax Law, L. 1896, Chap. 908, Art. XI. Vide People v. Coleman, 41 Hun, 307; People v. Jones, 43 id. 131, affd., 106 N. Y. 330; People v. Hicks, 105 id. 198.

Proceedings to vacate an assessment are abated by the death of the

Proceedings to vacate an assessment are abated by the death of the petitioner. Matter of Palmer, 43 Hun, 572; 115 N. Y. 493.

The burden of proof as to improper items is on the petitioner. Matter of Johnson, 103 N. Y. 260.

A grantee who takes subject to a future assessment is not estopped to contest it. Matter of Perrine, 19 Abb. N. C. 117.

Laches may defeat any application. Matter of Woolsey, 95 N. Y. 135; Matter of Flushing Ave., 101 id. 678.

In Mann v. City of Utica, 44 How. Pr. 334, it is held that an action will lie to restrain a sale under an illegal assessment, but that a subsequent act is valid making the assessment a legal one; and in People v. Brooklyn, 14 Abb. N. S. 115, that proceedings will not be vacated on certiorari for an irregularity which does not go to the entire assessment.

A suit in equity and injunction will lie, where only a nominal sum has been

awarded. Baldwin v. City of Buffalo, 29 Barb. 396.

Money wrongfully paid may be recovered back. Chapman v. City of Brooklyn, 40 N. Y. 372; Bennet v. Mayor, 1 Sandf. 485; Purssell v. Mayor, 85 N. Y. 330; Strusburgh v. Mayor, 87 id. 452.

Even before vacation of a void assessment. Bruecher v. Portchester, 101

N. Y. 240.

But a mere irregular assessment must be vacated before action brought, though a void assessment need not be. Bruecher v. Village of Portchester. 17 Abb. N. C. 361; Jex v. The Mayor, 103 N. Y. 536.

The right of action accrues on a void assessment when the money is paid.

Parsons v. Rochester, 43 Hun, 258.

Continued ownership in the plaintiff is held not essential. Schultz v.

Mayor, 103 N. Y. 307.

An action to cancel and annul a certificate of sale upon a void assessment is maintainable, when the defect does not appear upon the face of the proceedings. Newell v. Wheeler, 48 N. Y. 486; Trimmer v. City of Rochester, 134 id. 76.

As to when property owners would be estopped, even if the assessment were invalid, by adopting the improvements, vide People v. Curtis, 45 How. Pr.

Payment pending proceedings is no bar. Matter of Mehrbach, 97 N. Y.

601; Purssell v. Mayor, 85 id. 330.

Voluntary payment before proceedings is a bar pro tanto. Matter of Hughes, 93 N. Y. 512.

But payment under a threat of sale is not voluntary. Bruecher v. Vil-

lage of Portchester, 17 Abb. N. C. 361.

As to payment under protest to carry out a contract of sale. Vaughn v. Village of Portchester, 43 Hun, 427, revd., 115 N. Y. 637.

Nor is payment under judgment in foreclosure voluntary. Brehm v. The

Mayor, 104 N. Y. 186. Proceedings of assessors cannot be reviewed as to the merits of the pro-

ceedings. Patterson v. Mayor, 1 Paige, 114.

The confirmation is a judgment and conclusive as such. Dolan v. Mayor, 62 N. Y. 472; Methodist, etc., Church v. Mayor, etc., 55 How. Pr. 57, and see supra, Tit. II.

But not as to constitutionality of the act, for that question is not before

the officers. Matter of Dept. Pub. Parks, 85 N. Y. 459.

The validity of certificates under assessment sales may be determined under proceedings to determine claims to real property. Supra, Chap. XLII; Burnĥam v. Onderdonk, 41 N. Y. 425.

By Law of April 11, 1842, Chap. 154, the validity of assessments ordered to be paid by order of Court of Chancery out of lands directed to be sold could be tested. Amended by Laws of 1855, Chap. 327, as *supra*, Chap. IX, Tit. VI. Repealed by the Tax Law, L. 1896, Chap. 908, see Art. XI of said law.

An assessment will be vacated for including illegal interest, though a very small sum. Matter of Willis, 30 Hun, 13.

Regularity of proceedings to open a street cannot be questioned on an assessment for improving the street. Merritt v. Portchester, 29 Hun, 619.

Acceptance of an award waives irregularities. Tingue v. Portchester, 101

N. Y. 294.

By Laws of 1875, Chap. 331, provision is made for correcting erroneous assessments on premises assessed erroneously in with the premises of another. Repealed by the Tax Law, supra; see for corresponding provision, Tax Law, § 257.

It was held, in Matter of Striker, 10 Hun, 308, that a paid assessment may

An owner of land incumbered by an assessment for a local improvement, apparently valid and enforceable by a sale of the premises, may in good faith pay it, and thereafter, on discovering that it was illegal, recover back the money paid.

While in an action for that purpose, the burden is upon plaintiff to prove that he made the payment in ignorance of the facts making the assessment invalid, where the evidence on his part tends to show such ignorance, the question is one of fact for the jury. Tripler v. Mayor, 139 N. Y. 1; see same case reported on former appeal, 125 id. 617. City of New York.—By Law of 1858, April 17, Chap. 338, assessments for local improvements might be vacated for fraud or legal irregularity on application to a judge of the Supreme Court, who might vacate the assessment, and it was to be canceled. The land might be reassessed at the expense of the city.

By Laws of 1872, Chap. 580, actions to vacate certain void assessments ere forbidden. This act was held constitutional, and it was held that were forbidden. the only constitutional right to action would be against an attempt to enforce a pretended but illegal lien. Lennon v. Mayor, 55 N. Y. 361. It referred to certain local improvements in said city. It was amended in 18,3 and by Laws of 1874, Chap. 312, "substantial error" was substituted for "legal irregularity," provision was made for the vacation of assessments, and other remedies were prohibited. This does not apply where there was a total want of jurisdiction in the assessing officers. Matter of 2d Ave., etc., 66 N. Y. 395. The act was sustained in Eno v. Mayor, 68 N. Y. 214; Laws of 1872, Chap. 580, amd. by Laws of 1874, Chap. 313, interpreted in Matter of Delancey, 52 N. Y. 80; vide also Lennon v. Mayor, 55 N. Y. 361; Matter of Welsh, 30 Hun, 372.

One who takes subject to assessments may apply under this act. Matter of Gantz, 85 N. Y. 536.

Laches in moving may defeat the motion. Matter of Woolsey, 95 N. Y.

An assessment declared void at the suit of one owner is not a cloud on the title of another. Chase v. Chase, 95 N. Y. 373.

The Act of 1858 held repealed by Laws of 1880, Chap. 550, as to future assessments. Matter of Smith, 99 N. Y. 424.

The remedy provided by the amendment of 1874, was exclusive. Rae v.

Mayor, 39 Super. 192

By Laws of 1868, Chap. 193, the judge might enforce the cancellation by attachment. The order was to be entered in the office of the clerk of the Supreme Court, and a certified copy filed with the officer having charge on the assessment lists. As to the construction of this section, vide 19 How. Pr. 317; 17 Abb. 321.

The order affects only lands described in the proceedings. Delancey, 52 N. Y. 80.

The Act of 1868, being amendatory of the Act of 1858, is to be considered

repealed by the Act of 1880, Chap. 550. Vide supra.

There must have been actual fraud. 12 Abb. 118; 23 How. Pr. 118. See act to prevent fraud, etc., Laws of 1862, Chap. 483, as to street openings in said city.

Inquiry as to whether the work was well or ill done cannot be made

under these acts. In re Lewis, 51 Barb. 82.

By Laws of 1870, Chap. 383, § 27, on assessments for local improvements in New York city, if there was fraud or irregularity, the assessment might be vacated or modified, but not vacated for proceedings to collect the same by sale, but the sale might be set aside. Matter of Smith, 52 N. Y. 526; Matter of Pelton, 85 id. 651; Matter of Upson, 89 id. 67; Matter of Trustees, etc., 92 id. 116.

As to objections to an assessment, and their presentation to the board of revision in the city of New York, vide In re Dunning, 60 Barb. 377; Matter of Folsom, 2 Supm. 55, affd., 56 N. Y. 50; Matter of Astor, 2 Supm. 488, affd., 56 N. Y. 625; Matter of Lowden, 89 id. 548; see also L. 1880, Chap. 550,

as affecting prior acts and remedies.

By the Consolidation Act, Laws of 1882, Chap. 410, § 897, suits to vacate assessments in the city of New York are prohibited.

This held to apply to all assessments without exception. Mayer v. Mayor,

101 N. Y. 284.

The Consolidation Act was amended, Laws 1895, Chap. 613, as to vacating and reducing assessments. See Scudder v. Mayor, etc., of N. Y., 146 N. Y. 245.

As to remedies to vacate, provision is made for application to a judge of the Supreme Court, and no assessment is to be vacated by reason of fraud or irregularity; but the sale may be vacated. The Consolidation Act, L. 1882, Chap. 410, §§ 897-899.

For the provisions of the present law pertaining to the city of New York, see the Greater New York Charter, L. 1897, Chap. 378, as amd. by L. 1901, Chap. 466, which supersedes the earlier statutes and now regulates this

whole subject for the city of New York; §§ 958-964.

Towns.— Act in relation to assessments for public improvements in towns. and providing for the review and correction thereof. Laws 1894, Chap. 579. See also the Town Law, L. 1890, Chap. 569, Art. X, as amended. See L. 1893, Chap. 387 by which provision is made for taxes and assessments. See also p. 986.

TITLE V. MISCELLANEOUS.—AS TO TAXES AND ASSESSMENTS.

Taxes Paid by Tenants or Occupants .- By the Revised Statutes, where the tax on any real estate shall have been collected of any occupant or tenaut. and any other person by agreement or otherwise, ought to pay such tax or any part thereof, such occupant, etc., may recover the same by action, or retain it out of rent due or accruing from him to such person for the land taxed. 1 R. S. 419, § 4.

This provision has been re-enacted in the Tax Law, § 78.

Apportionment of Taxes Where Several Persons Have Joint Interests in Lands.— See fully as to this, supra, Chap. IX, Tit. VI, and Norsworthy v. Bergh, 16 How. 315; Powers v. Barr, 24 Barb. 142.

Judgments for moneys advanced to pay taxes on the lands of the plaintiff and another were not to be entitled to the priority conferred by §§ 73, 74, of Tit. III, Chap. XIII, Part I of the Revised Statutes, unless at the time of docketing the plaintiff caused an entry to be made by the clerk in the docket thereof, specifying that such judgment has priority as a lien on certain lands over mortgages and other judgments. 2 R. S. 361, § 14. This provision was repealed by Laws of 1877, Chap. 417, but the same enactment contained in Tit. III, Chap. XIII, Part I of the Revised Statutes, supra, was not repealed. The provisions of said title were to the effect that when lands were sold for taxes, assessed conjointly on the lands of another, who shall not very him the lands of another. who shall not pay his proportion of the taxes, the person whose lands were sold might redeem and recover from the other person a joint proportion of the redemption money and interest. And if the land should not be redeemed, but conveyed by the comptroller, such owner might recover from such other person the some proportion of the land conveyed that he ought to have paid of the tax, interest and charges, for which the land should have been sold. 1 R. S. 410, §§ 73, 74. It is provided that every judgment obtained under the last two sections should have priority as against the lands of the defendant therein on which the tax was assessed to all mortgages executed and all judgments recovered since April 23, 1823. 1 R. S. 411, § 75.

These provisions of the Revised Statutes (1 R. S. 410, § 73, 74; 411, § 75), however, were superseded by L. 1855, Chap. 427, §§ 57-59; and this was in turn superseded by L. 1893, Chap. 711, § 8.

The Tax Law now regulates this matter, substantially re-enacting the original provisions of the Revised Statutes, and providing for priority of judgments obtained, if at the time of docketing such judgment the plaintiff cause an entry to be made by the clerk in the docket thereof, specifying that such judgment has priority as a lien on certain lands, over mortgages and other judgments, pursuant to the Tax Law, which entry shall be a part of such docket. Tax Law, L. 1896, Chap. 908, § 128.

Undivided Interests, etc.—Parties may pay tax on undivided interests when the tax is levied in gross, and it shall be a lien on the residue only. And taxes may be paid for one year and not for others, and overcharge deducted. Laws of 1855, Chap. 427, §§ 28, 30; see now the Tax Law, §§ 107, 108.

Certificate, etc., May be Recorded.— Every conveyance or certificate executed by the comptroller on sales of land for taxes may be recorded in like manner as a deed. 1 R. S. 420, § 10; see now Tax Law, § 131 (as amd. by L. 1898, Chap. 339; L. 1902, Chap. 344).

Sales for Taxes for Opening Roads.— All sales and redemption of land for taxes on opening and improving roads were to be conducted in the manner before prescribed as to annual taxes. 1 R. S. 410, § 11.

For the present law see L. 1897, Chap. 286, § 12, amending the Highway Law. The procedure is assimilated to that in the case of annual taxes. Id.

Insolvent Discharges.— Insolvent Discharges do not affect taxes to the State or United States. Code Civ. Proc., §§ 2184 and 2218; following 2 R. S. 39, §§ 29, 30, repealed by Laws of 1880, Chap. 245.

Apportionment Between a Dowress and Other Owners.—Vide supra, Chap. 1X, Tit. VI, and Linden v. Graham, 34 Barb. 316.

Any portion of the property may be sold to satisfy a tax on another portion. 24 Barb. 142.

As to sales made of lands held by tenants for life and remaindermen, vide 16 How. Pr. 315.

The statutes on this subject are held not to apply to cases where the tax has been paid. Id.

Taxes and Assessments as Between Dowress and Heirs.— Vide supra, p. 168.

Indian Lands.— As to sales of same for taxes, vide Fellows v. Denniston, 23 N. Y. 420, referring to the various statutes.

Taxes against Owners of Rents Reserved in Leases for Life over Twenty-one Years.— By Laws of 1846, Chap. 327, and 1851, Chap. 371, such rents are taxable, and a warrant issued by a county treasurer to a sheriff to collect a tax against such owners of rents on lands in his county was to be a lien on and bind therein real and personal estate from the time of actual levy, and the sheriff was to proceed as under an execution under a justice's judgment. In case of the warrant being unsatisfied, the property was to be sequestered by the Court of Chancery. The same provisions were made applicable against nonresidents of the United States to whom are owing debts by resident of a county for the purchase of any real estate, and these warrants were a lien on their real estate, and it might be sold as under execution. Id. See Laws of 1858, Chap. 357, as to mode of assessment.

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By Law of June 18, 1873, Chap. 809, this Law of 1846, Chap. 327, was amended. See also as to such taxes, Cruger v. Dougherty, 1 Lans. 464, affd.,

43 N. Y. 107.

For this provision as to the taxation of rents reserved in leases "in fee" or for one or more lives or for a term more than twenty-one years and chargeable upon real property within the State, see Tax Law, § 8.

chargeable upon real property within the State, see Tax Law, § 8.

Debts due by inhabitants of this State to persons not residing within the United States for the purchase of any real estate are now taxable by the

Tax Law, § 2, subd. 5.

Comptroller's Books Evidence.—Extracts from the comptroller's books, certified, are made evidence. Laws of 1849, Chap. 180. See now Code Civ. Proc., § 933.

Special and Local Provisions.—Special provision has been made by various statutes and charters, applicable to various cities and towns in the State respectively, for which the laws applicable to each locality will have to be consulted.

Covenants in Leases to Pay Taxes, etc .- Under such covenants the lessor may recover amounts of unpaid taxes from the lessee, without first paying the tax. Miller v. Knox, 48 N. Y. 232.

Sale of Land Under State Bond or Lien.—Laws of 1875, Chap. 572: L. 1893, Chap. 711, § 4; Tax Law, § 124.

Resale and Purchase for the State. - Id.

Soldiers' Monuments.— Taxes for soldiers' monuments. See Membership Corporations Law, L. 1895, Chap. 559, Art. X, as amended.

Forest Preserve. - Taxation of land within Forest Preserve. Laws 1895, Chap. 395, § 274; see now Tax Law, § 80; also People v. Kelsey, 180 N. Y. 24.

Pension Money — Real Property Purchased With.— Such property shall be assessed, but on application may be exempted to the extent of the pension money used in the purchase. Tax Law, § 4, subd. 5. See People v. Williams, 6 Misc. 185.

See where payment of tax on real estate purchased with pension money can-

not be recovered. Van Hise v. Board of Supervisors, 21 Misc. 572.

The exemption must be claimed on grievance day. Matter of Baumgarten,

Mortgages.— See as to exemption of mortgages and recording tax thereon, p. 643.

Block Indexing in New York City, System of Block Tax and Assessment .--Maps in New York city provided for. See Laws 1892, Chap. 542; 1893, Chap. 536.

Taxes in Towns in Counties Containing Upwards of 300,000 Inhabitants. - See L. 1885, Chap. 411, legalizing certain unpaid taxes and authorizing the redemption of certain lands in such towns. This act referred to lands of nonresidents and also certain lands generally, and repealed Revised Statutes, Part I, Chap. XIII, Tit. II, Art. 2, §§ 9, 11, 12, 13, as far as applicable to taxes thereafter to be assessed in said towns. Amended as to personal property and form of assessment-roll by L. 1892, Chap. 202. Repealed, Tax Law, § 280.

Curing defects .- For an exhaustive opinion tracing the history of attempts to cure defects in tax deeds, or to bar remedies because of such defects, see People v. Lewis, 127 App. Div. 107.

CHAPTER XLVII.

MECHANICS' LIENS AND OTHER LIENS ON REAL ESTATE.

TITLE I.— MECHANICS' LIENS.
II.— OTHER LIENS ON REAL ESTATE.

TITLE I. MECHANICS' LIENS.

These liens given by statute on lands and buildings and other structures for the better security of mechanics and others erecting buildings or supplying materials are of comparatively recent creation.

Formerly many acts now repealed had been passed applicable to the different counties and cities of the State; for the details of which reference should be had to the acts themselves, as also to decisions mostly applicable to the county of New York, but in many cases also applied elsewhere.

There various acts were superseded by a general act, L. 1885, Chap. 342, amd. by L. 1886, Chap. 382; 1887, Chap. 420; 1888, Chaps. 316, 543; 1889, Chap. 380; 1891, Chap. 255; 1892, Chaps. 629, 677; 1893, Chaps. 300, 405; 1895, Chaps. 161, 673, establishing a uniform system including all cities and counties in the State.

For provisions as to practice and proceedings thereunder including the foreclosure of the liens the above acts should be consulted.

The various statutes on the subject of Mechanics' liens have been recently codified and embodied in the Lien Law, G. L., Chap. XLIX, Laws of 1897, Chap. 418.

Vide the Lien Law, Art. I, as amended.

The intention of the Legislature was to assimilate and harmonize the entire law embraced in the subject into a complete and harmonious statute. Schaghticoke Powder Co. v. Greenwich & Johnsonville Ry. Co., 183 N. Y. 306.

The proceedings for the enforcement of mechanics' lien were also provided for at the same time by L. 1897, Chap. 419, by which the Code of Civil Procedure was amended by the addition to Chap. XXII of a title to be known as Title III, being said law of 1897.

See Code Civ. Proc., §§ 3398-3419, for these proceedings.

For the various provisions of these two acts of 1897 (L. 1897, Chaps. 418, 419), reference should be had to same, as only an outline of their provisions can be given here.

The Lien.— A contractor, subcontractor, laborer or material man, who performs labor or furnishes materials for the improvement [993]

of real property, with the consent or at the request of the owner thereof, or of his agent, contractor or subcontractor, shall have a lien for the principal and interest of the value or the agreed price of such labor or materials upon the real property improved or to be improved and upon such improvement, from the time of filing a notice of such lien as prescribed in this article.

Lien Law, L. 1897, Chap. 418, Art. I, § 3; vide L. 1885, Chap. 342, § 1, as amd. by L. 1895, Chap. 673, which superseded L. 1872, Chap. 669; L. 1870, Chap. 529; L. 1880, Chap. 440, § 1.

This lien extended to the owner's right, title and interest existing at the time of filing the notice of lien, and a general assignment made thirty days prior to such filing, or a removal of part of the property at any time before the discharge of the lien does not affect the rights of the lienor.

Lien Law, § 4; see L. 1885, Chap. 342, § 1.

Provision is made against advance payments, or mortgages or incumbrances made for the purpose of avoiding the provisions of the law.

Lien Law, § 7; see L. 1885, Chap. 342, § 2. See also Gilmour v. Colcord, 96 App. Div. 358.

Notice of Lien.— The contents of the notice of lien are specifically set forth in the Lien Law. Among other things the name and residence of the lienor, the name of the owner and his interest as far as known, and the property subject to the lien with a description sufficient for identification must be stated.

Lien Law, § 9 (amd. by L. 1905, Chap. 96); see L. 1885, Chap. 342, § 4.

The notice may be filed at any time during the progress of the work and the furnishing of the materials or within ninety days after the completion of the contract or final performance of the work or final furnishing of the materials, dating from the last item, in the office of the clerk of the county where the property is situated. And a minute of the filing, etc., must be entered in a book to be called the "lien docket."

Lien Law, § 10; see L. 1885, Chap. 342, § 4.

Service may be made thereafter in the manner prescribed, but until such service, an owner without knowledge is protected in any

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payment made in good faith to any contractor or other person claiming a lien; and failure to serve does not otherwise affect the lien.

Lien Law, § 11; see L. 1885, Chap. 342, § 4.

Priority.—A lien has priority over a conveyance, judgment or other claim not recorded, docketed or filed at the time of filing such notice of lien; over advances on mortgage or incumbrance after such filing; and over the claim of a creditor who has not furnished materials or performed labor, in case of an assignment for the benefit of creditors made within thirty days before the filing of such notice. They also have priority over advances made on a contract by owner for an improvement which contains an option to the contractor, his successors or assigns to purchase the property, if such advances were made after the labor began or the first item of material was furnished. Priority is also given with reference to the property on which the work was done or the materials used, and priority arises in the order of the filing of notices, except that laborers for daily or weekly wages have preference over all other claimants without reference to the time of filing notice.

Lien Law, § 13; see L. 1885, Chap. 342, § 20, and § 5, as amd. L. 1896, Chap. 915.

Duration of Lien.— No lien shall be a lien for longer than one year after the notice has been filed, unless within the time an action to foreclose is commenced and a lis pendens filed with the county clerk in the county where the lien is filed, or unless an order be granted within one year from the filing of such notice by a court of record, continuing such lien, and such lien be redocketed. Such continuance may be for only one year, though there may be successive continuances. And an action to enforce another lien in which lienor is made defendant shall be deemed an action by him to enforce his lien. Failure to file the lis pendens does not abate the action as to any person liable for the payment of the debt specified in the notice.

Lien Law, § 16; see L. 1885, Chap. 342, § 6, as amd. L. 1895, Chap. 161.

Discharge.— Provision is also made for the discharge of the lien generally or by payment into court.

Lien Law, §§ 18, 19; see L. 1875, Chap. 392, § 7; L. 1880, Chap. 440, § 13 and L. 1885, Chap. 342, § 24, subds. 1, 4, 5; L. 1885, Chap. 342, § 24, subds. 2, 3, 7.

In General.— The Lien Law also defines the terms "owner." "lienor," etc., and makes provision for liens under contracts for public improvements (§ 5, as amended, L. 1902, Chap. 37, §§ 12, 17. 20, 24); liens for labor on railroads (§ 6); assignment or lien (§ 14); the filing of assignments of contracts and orders (§ 15); and for building loan contracts, requiring same and any modification to be in writing, acknowledged and filed within ten days in the office of the clerk of the county in which any part of the land is situated, otherwise the interest of each party to be subject to liens filed thereafter (§ 21); for liberal construction of the article (§ 22); and for enforcement in accordance with the provisions of the Code of Civil Procedure (§ 23).

A schoolhouse for a common school district held a "public improvement." Terwilliger v. Wheeler, 81 App. Div. 461.

As to assignments, see Armstrong v. Chisholm, 96 App. Div. 465. Van Kannel Revolving Door Co. v. Astor, 119 App. Div. 214.

See as to building loan mortgage. Penn. Steel Co. v. Title G. & T. Co., 50

As to the assignment of the whole or any part of a mechanic's lien. First Nat. Bank of Warwick v. Mitchell, 46 Misc. 30.

Enforcement.— For the provisions as to the enforcement of mechanics' liens, see the Code of Civil Procedure, Chap. XXII. Tit. III. Provision is made therein for the consolidation of such actions; as to the persons who shall be parties in a court of record; as to action in a court not of record; and generally as to service, trial, execution, appeals, judgment in case of failure to establish lien, offer to pay into court, preference, judgment directing delivery of property in lieu of money for deficiency, discharge of lien, etc.

Code Civ. Proc., §§ 3398-3419 (L. 1897, Chap. 419, as amd.).

Construction.—While a mechanic's lien law must receive a liberal construction to secure the beneficial purpose had in view by the Legislature, yet as it creates a remedy unknown to the common law, it may not be extended to cases not fairly within its general scope and purview. Spruck v. McRoberts, 139 N. Y. 193. See Lien Law, § 22.

Life Estates .- What constitutes ownership. See Lien Law, § 2. Life estate held such. Lang v. Everling, 3 Misc. 530.

Demolition .- This is not within the statute. Thompson-Starret Co. v. Brooklyn Heights Realty Co., 111 App. Div. 358.

Consent of Owner.— Where vendor permits trustee to take possession before payment, on his default, a lien may be enforced against premises for the erection of a permanent structure thereon. Schnaufer v. Ahr, 53 Misc. 299. See also Barnard v. Adorjan, 116 App. Div. 535.

As to the breadth of the present law on the point of consent, see Kerwin v.

Post, 120 App. Div. 179.

The consent must be actual and expressed to the particular work done.

Tinsley v. Smith, 115 App. Div. 708.

Consent of lessor will not be implied from the knowledge of his collector of rents. Seklir v. Krizer, 48 Misc. 25.

Consent must be affirmative and more than mere acquiescence. Eichler v. Warner, 46 Misc. 246.

See as to consent. Pope v. Heckscher, 109 App. Div. 495. McDowell v. Syracuse Land & Steamboat Co., 44 Misc. 627.

Liability of Main Contractor and Owner. Kruger v. Braender, 3 Misc. 275; Hutton v. Gordon, 2 Misc. 267; Reynolds v. Patten, 5 Misc. 215.

Sufficiency of the Notice.— Moore v. McLaughlin, 21 N. Y. Supp. 55; Kelly v. Bloomingdale, 139 N. Y. 343. Name of owner held not essential if description of property sufficient. Walkan v. Henry, 7 Misc. 532; Spruck v. McRoberts, 139 N. Y. 193. As to verification, Cream, etc., Co. v. Squier, 2 Misc. 438; 21 N. Y. Supp. 972.

In general, see Finn v. Smith, 186 N. Y. 465; Hurley v. Tucker, 53 Misc. 464; Norton and Gorman Contracting Co. v. Unique Construction Co., 121 App. Div. 585; Vitelli v. May, 120 App. Div. 448; Hecla Iron Works v. Hall, 115

App. Div. 126.

Abandonment of Contract by Contractor. Watson v. Cone, 21 N. Y. Supp. 224. Failure to complete the work. Blakelee v. Fisher, 21 N. Y. Supp. 217; Kelly v. Bloomingdale, 139 N. Y. 343.

Where there are Divers Contractors.—Separation of interests. Vogel v. Whitmore, 72 Hun, 317. See also in this connection, Lien Law, § 13.

Taking Another Security.— A mere promise to give notes does not affect the right to acquire a lien. Keogh Co. v. Eisenbery, 7 Misc. 79.

The only effect of taking notes is to suspend enforcement of the lien during the period for which credit is given; it does not deprive claimant of his right to acquire a lien. *Id.*

Priorities of Liens.— See Lien Law, § 13; Hondorf v. Atwater, 75 Hun, 369.

As Between Lienor and Trustee in Bankruptcy. — See Crane Co. v. Pneumatic Signal Co., 94 App. Div. 53.

Preference.— See Am. Mortgage Co. v. Merrick Construction Co., 120 App. Div. 150.

Heirs and Devisees.—When notice filed after death of owner is not effective. Tubridy v. Wright, 7 Misc. 403; 154 N. Y. 519.

Extension of the Lien.— An order continuing a mechanics' lien may be granted although no action for the enforcement of the lien has been commenced.

The right of a lienor to a continuance of his lien is not affected by the fact that he has commenced an action at law to collect the debt.

Every continuance of a mechanic's lien, where no shorter time is specified in the order, is limited in duration to one year from the making of a new docket. Matter of Gould Coupler Co., 79 Hun. 206.

docket. Matter of Gould Coupler Co., 79 Hun, 206.

See the earlier rule in Bigelow v. Doying, 59 Hun, 403, to the effect that the refiling of the lien within the year continued it indefinitely, unless canceled or removed in some of the ways provided by statute.

Payment.—Payment in good faith to contractor exonerates, though owner knew there was a subcontractor. Drall v. Gordon, 51 Misc. 618.

Payments before due are not prohibited, if not made to avoid the statute. Tommasi v. Archibald, 114 App. Div. 838; Tommasi v. Bolger, 100 N. Y. Supp. 367; Behrer v. McMillan, 114 App. Div. 450.

Defenses. Failure to Complete in Time Specified.—Hecla Iron Works v. Hall, 115 App. Div. 126; see Bradt v. City of New York, 110 id. 396.

Destruction of Building Before Completion.—See as to the rights of the parties. Clarke v. Koeppel, 119 App. Div. 458.

Completion After Default.- Martin v. Flahive, 112 App. Div. 347.

Discharge of Lien Generally.— A lien other than one for a public improvement may be discharged: 1. By the certificate of the lienor, duly acknowledged or proved and filed in the office where the notice of lien is filed, stating it is satisfied and may be discharged. 2. By failure to begin foreclosure action or order continuing lien, within one year from the filing of notice of lien. 3. By order vacating or canceling such lien of record, for neglect to prosecute. 4. By an undertaking executed to the clerk of the county where premises are situated before or after the beginning of an action. Lien Law, § 18.

Or such lien may be discharged by payment of money into court. Lien Law.

See also particular provisions for the discharge of lien for public improve-

ment. Lien Law, § 20, as amd. by L. 1902, Chap. 37.

For the earlier statutes providing for cancellation of mechanics' liens, see L. 1875, Chap. 392, § 7; L. 1880, Chap. 440, § 13; L. 1885, Chap. 342, § 24, subds. 1, 4, 5, for discharge generally; L. 1885, Chap. 342, \$ 24, subds. 2, 3, 7, by payment into court; and L. 1878, Chap. 315, \$ 13, as amd. by L. 1896, Chap. 682, as to discharge of lien for public improvement.

Although discharged by giving undertaking the lienor may proceed to establish his lien and then sue the sureties; or he may bring all parties into equity, where judgment establishing the lien may be had and a personal judgment against the judgment debtor and the sureties directed. Mertz v. Press,

99 App. Div. 443.

The failure of a contractor to carry out his contract is no defense against a subcontractor. Wright v. Roberts, 43 Hun, 413, affd., 118 N. Y. 672; Thomas

v. Stewart, 132 N. Y. 580.

But notice must be filed within 90 days after completion of work. Mc-Mahon v. Hodge, 21 N. Y. Supp. 971; Jones v. Moores, 67 Hun, 109, affd., 142 N. Y. 661.

The only authority of the court to discharge liens on motion is that contained in the statute. Matter of Rudiger, 118 App. Div. 86. Who may apply. Russell & Erwin Mfg. Co. v. City of New York, *Id.*, 88.

As to leave to sue bond, see Goldstein v. Michelson, 45 Misc. 601.

Consent of Owner.—Held not presumed from mere fact that he knew of the work in progress. Spruck v. McRoberts, 139 N. Y. 193. See also Butler v. Acquehonga Land Co., 86 App. Div. 439.

Or where he had leased with no covenant as to building. Havens v. West

Side, etc., Co., 20 N. Y. Supp. 764; Cowan v. Paddock, 137 N. Y. 188. As to his liability under contract of sale and building loan, see Miller v.

Mead, 127 N. Y. 544; Schmalz v. Mead, 125 id. 188.

Acceptance of Order.—Liability of owner under. Beardsley v. Cook, 67 Hun, See White v. Livingston, 69 App. Div. 361.

Mistakes.—See as to mistakes in statement of lien, Ringle v. Wallis Works, etc., 4 Misc. 15; 85 Hun, 279; Cunningham v. Doyle, 5 Misc. 219.

Effect of Deposit to Remove Lien .- Money deposited to discharge a mechanic's lien stands for the land, and depends upon the validity of the lien on the land. Raven v. Smith, 76 Hun, 60.

Foreclosure of Lien.— See generally now, Code Civ. Proc., §§ 3398-3419, L. 1897, Chap. 419, which regulates this subject fully; also Lien Law, L. 1897, Chap. 418, § 23.

A personal judgment may be granted when the lien is invalid. Terwilliger

v. Wheeler, 81 App. Div. 460; Gilmour v. Colcord, 96 id. 359; see Maneely v. City of New York, 119 id. 376.

The lien of one furnishing material to subcontractor is enforceable only to the extent of the sum due from the contractor to the subcontractor, though there is a larger sum due the former from the owner. Wright v. Schoharie Valley Ry. Co., 116 App. Div. 542.

The Code provisions held not to confer jurisdiction on courts to entertain action against the State for the foreclosure of a lien against a contractor with the State. Mason v. Trustee of N. Y. State Hospital, etc., 50 Misc. 40.

As to the effect of failure to institute foreclosure proceedings within three months in case of lien for public improvement. Clonin v. Lippe, 121 App. Div. 466.

Suit Against Sureties .- Casey v. Conners Bros. C. Co., 53 Misc. 101; Vitelli

v. May, 120 App. Div. 448.

v. May, 120 App. Div. 448.

For the earlier procedure, see L. 1885, Chap. 342; L. 1875, Chap. 392;
L. 1878, Chap. 315; see also under these earlier statutes, as to parties,
Garland v. Van Rensselaer, 71 Hun, 2; as to practice, see Schillinger, etc.,
Co. v. Arnott, 14 N. Y. Supp. 326; O'Brien v. McCarty, 71 Hun, 427; Sheffeld v. Robinson, 73 id. 173; Ringle v. The Wallis Works, etc., 85 id. 279;
Raven v. Smith, 71 id. 197; Wright v. Rensens, 21 N. Y. Supp. 485; Cassidy
v. McFarland, 139 N. Y. 201; Townsend v. Work, 79 Hun, 81; Eagan v.
Laemmele, 5 Misc. 224; Robbe v. Squier, 5 id. 220; Staubsandt v. Lennon,
3 id. 90; Kruger v. Breender, 3 id. 275, as to when purchaser under takes 3 id. 90; Kruger v. Braender, 3 id. 275, as to when purchaser under, takes title; Robbins v. Arent, 4 id. 196; as to appeal, Ogden v. Alexander, 140 N. Y. 356; McCarty v. Gallagher, 4 Misc. 188.

Mechanics' Liens for Public Improvement.—As to Mechanics' liens for public improvement, vide generally, Lien Law, §8 5 (amd. L. 1902, Chap. 37), 12, 17, 20; formerly Law of 1878, Chap. 315, amended 1881, Chap. 429; 1891, Chap. 255; 1892, Chap. 629. As to New York city, see Consolidation Act, 1882, Chap. 410, §8 1824 to 1838; Goodrich v. Gillies, 21 N. Y. Supp. 400. See now the Greater New York Charter, L. 1897, Chap. 378, as amended by L. 1901, Chap. 466, § 1608.

The foreclosure of these actions against the city since the repeal of the

Consolidation Act, is now under the Code. McDonald v. The Mayor, etc. of

New York, 113 App. Div. 625.

Mechanics' Liens Against Railroad. See Lien Law, § 6; L. of 1875, Chap. 392.

FORMER LOCAL ACTS AND DECISIONS.

The following statutes and decisions made under the various local acts now superseded, are given here, as they may be of value in connection with proceedings had under those acts, and some of them state principles applicable under the present law.

City of New York.—The first act was passed April 20, 1830. Another act was passed April 29, 1844, both of which were superseded by the provisions of the Act of July 11, 1851, Chap. 513, which repeals them. § 13. That act was in its turn repealed by the Act of May 5, 1863, Chap. 500, to take effect on July 1, 1863; amended L. 1868, Chap. 79; restricted in certain particulars by Law of 1866, Chap. 572. As to what the lien attached to under the Law of 1851, vide Hauptman v. Catlin, 20 N. Y. 247; Ernst v. Reid, 49 Barb. 367. As to when the lien operated under Law of 1851. Carman v. McIncrow, 13 N. Y. 70; under Law of 1844, Loonie v. Hogan, 9 N. Y. 435. As to the word "owner" under the Law of 1844, McDermott v. Palmer, 11 Barb. 9, overruled by Loonie v. Hogan, 9 N. Y. 435, revd., 8 N. Y. 483. No lien lies om a public building under a contract with a public officer. Poillon lien lies on a public building under a contract with a public officer. Poillon v. Mayor, 47 N. Y. 666; Brinckerhoof v. Board of Education, 37 How. 499; 6 Abb. N. S. 428. No lien can be placed if the owner has parted with his interest before filing. Ernst v. Reid, 49 Barb. 367. Unless the conveyance were made in fraud of the lien. Meehan v. Williams, 36 How. 73. In an action to foreclose the lien under the Law of 1863, Chap. 500, the lien must be continued as required, or the action will be dismissed, and the lien cease. Grant v. Vandercook, 57 Barb. 165; O'Donnel v. Rosenberg, 14 Abb. N. S. 59; Huxford v. Bogardus, 40 How. 94. See also as to the action to foreclose, Hallahan v. Herbert, 11 Abb. N. S. 326; and as to the effect of the lien and foreclosure on those having equitable interests and as to the effect of the lien upon lands under contract; also as to the effect of the Law of 1863 on liens theretofore created. As to cessation of the lien, vide also 19 Abb. Pr. 132; 6 Abb. N. S.

172. As to continuance of the lien under an order, showing that the continuance must be docketed, Barton v. Herman, 8 id. 399. The person for whom the building was erected and who contracted to pay, held the owner. 12 Abb. 129. A lien cannot be created as against a person not having the fee. A purchaser is not bound to notice any lien filed against a former owner after his grantor's deed was recorded. Noyes v. Burton, 17 How. 449; s. c., 29 Barb. 631.

Mechanics' Liens in Kings and Queens Counties.— An act relative to the security of mechanics in Kings county was passed June 8, 1853, Chap. 335; and also an act, April 14, 1858, Chap. 204, applicable to the counties of Kings and Queens. By an Act of April 24, 1862, Chap. 478, the first act was repealed, and also the latter act as far as the same applied to the counties of Kings and Queens, and a new act passed in their place, providing for the security by lien of mechanics and materialmen in those counties. As to the discharge under Act of 1862, vide Mushlitt v. Silvermann, 50 N. Y. 360.

Counties of Westchester, Putnam, Dutchess, Rensselaer, Rockland, Chemung, and the Town of Newburgh.—As to mechanics' liens in these counties, vide Law of April 16, 1852, Chaps. 108 and 384, repealing an Act of April 14, 1851, as far as it related to the counties of Westchester, Rensselaer and Putnam. Vide next Act of 1854, Chap. 402, infra. As to Law of 1852, Chap. 384, vide Blauvelt v. Woodworth, 31 N. Y. 285; also Ombory v. Jones, 19 id. 324.

Westchester, Putnam, Oneida, Rockland, Cortland, Orleans, Broome, Niagara, Livingston, Otsego, Lewis, Orange, and Dutchess.—An act was passed relative to these counties by Laws of April 17, 1854, Chap. 402, repealing other acts affecting those counties. This Act of 1854 was amended by Law of 1871, Chap. 188, as to the duration of liens and the judgment. See as to effect of the amendment on prior liens. Trim v. Willoughby, 44 How. 189. By Law of 1872, Chap. 691, this Act of 1854 was extended to the county of Erie, except city of Buffalo.

Law of 1854.—As to the effect of the amendment of the law of 1854, by Law of 1869, supra, as to prior claims, Moore v. Mausert, 5 Lans. 173. As to what interest may be attached under said Law of 1854. Copley v. O'Neil, 1 Lans. 214. As to continuing liability of owner when he has paid his contractor in full. Thompson v. Yates, 28 How. 142.

The commencement of an action does not extend the lien beyond a year. People v. Hall, 3 Lans. 136.

Richmond County.— Laws of 1846, Chap. 184, and laws of 1850, Chap. 160. Vide, Act of 1858, Chap. 204, infra.

Onondaga.—Laws of 1864, Chap. 366; amended 1866, Chap. 788. See Lumbard v. The Syracuse, etc., R. R., 64 Barb. 609.

Town of Kingston.—Laws of 1845, Chap. 205. Vide act of 1858, Chap. 204, infra.

City of Buffalo.- Laws of 1851, Chap. 517. Vide act of 1858, Chap. 204. infra.

Ulster County.— Laws of 1851, Chap. 169, and of 1852, Chap. 384, § 14, vide Act of 1858, Chap. 204, infra.

Saratoga Springs.— Laws of 1857, Chap. 663. Vide act of 1858, Chap. 204, infra.

Cities in the State and Certain Villages.— For all cities (except New York), and the villages of Syracuse, Williamsburg, Geneva, Oswego, Auburn, Canandaigua, Laws of 1844, Chap. 305. Vide also Act of 1858, Chap. 204, infra. This Act of 1844 was amended as to the details of procedure by Act of April 29, 1871, Chap. 872, which latter act repealed Act of July 11, 1851, Chap. 517. By Act of April 14, 1858, Chap. 204, § 1, it is enacted as follows:

Il the provisions of the act entitled, 'An act for the better security of xhanics and others erecting buildings in the counties of Westchester, Oncida, Cortland, Broome, Putnam, Rockland, Orleans, Niagara, Livingston, Otsego, Lewis, Orange, and Dutchess,' passed April 17, 1854, are hereby extended and declared to be applicable to all the counties of this State, except the city and coanty of New York and the county of Erie;" and all inconsistent acts and parts of acts were thereby repealed. By the Law of 1869, Chap. 558, the Law of 1854 was made no longer applicable to the counties of Kings, Queens, New York, Erie, and Onondaga, and the Act of 1869 was made applicable to them. By Law of 1873, Chap. 489, this latter act was amended in many particulars. By Law of 1870, Chap. 194, the county of Rensselaer was excepted from the operation of the above Act of 1869, Chap. 558. It will therefore be observed that many of the provisions relative to mechanics' liens in counties of this State, other than New York and Erie, were changed by this Law of April 14, 1858; and see further change, Law of 1873, infra. change. Law of 1873, infra.

Dockets Subject to the County Courts.—By laws of 1845, Chap. 235, the docket of all liens and judgments under the Laws of 1844, Chaps. 220, 305 were made subject to the control and jurisdiction of the county courts of each county, the same as judgments therein.

Repeal of all Prior Laws, with Certain Exceptions.—By Law of May 12. 1873, Chap. 489, all prior acts as to all counties in the State, except Kings, Queens, New York, Erie, Onondaga, and Rensselaer, were repealed, saving rights and proceedings under existing laws.

See-list of statutes repealed. Laws of 1885, Chap. 342, § 27.

Held, no lien lies on a public building under a contract with a public officer. Poillon v. Mayor, 47 N. Y. 666; Brinckerhoof v. Board of Education, 37 How. 499; 6 Abb. N. S. 428.

No lien could be placed, if the owner had parted with his interest before

filing. Ernst v. Reid, 49 Barb. 367.

Unless the conveyance were made in fraud of the lien. Meehan v. Williams, 36 How. 73.

The person for whom the building was erected and who contracted to pay,

held the owner. 12 Abb. 129.

When a mechanic's lien will bind the landlord's interest. Lowry v. Wool-

sey, 83 Hun, 257.

A lien could not be created as against a person not having the fee; purfield against a former owner after his chaser not bound to notice any lien filed against a former owner after his grantor's deed was recorded. Noves v. Burton, 17 How. 449, s. c., 29 Barb.

A lien cannot be acquired under a contract with the equitable owner, unless the legal owner consented thereto. McGraw v. Godfrey, 16 Abb. Pr. N. S. 358.

Subject of the Lien .- A conditional interest held not the subject of a lien. 10 Abb. 179.

Liability of a Married Woman's Interest .-- McGraw v. Godfrey, N. Y. Common Pleas, 1873.

Sale Without Notice.-A sale of land in good faith before the notice of lien is filed prevents the acquisition of any lien. 4 E. D. Smith, 721; 3 id. 677; 1 Daly, 338. So held also where a general assignment had been made. 2 E. D. Smith, 594, 616.

Held, a mechanic's lien does not exist until the notice is filed and only affects such interests as the owner then has. Munger v. Curtis, 42 Hun, 465.

Apportionment of Lien. - Where a lien is apportioned on different houses. vide 1 Daly, 396; 16 Abb. 371.

Subcontractor and Purchaser .- Adverse rights of subcontractor and purchaser. 1 Daly, 338.

Contractor and Subcontractor.—The owner might show that nothing was due the contractor, and defeat a subcontractor's lien. 1 Daly, 18; 28 How. Pr. 142. But after the notice of lien is filed, see Schneider v. Hobein, 41 How. Pr. 232.

Subsequent Liens.—A judgment and sale of owner's interest held to cut off subsequent liens. 16 Abb. 371.

Rights of Purchasers.—Where the contractor had transferred his interest held a subcontractor had no lien against the purchaser, if transfer made before the subcontract. 1 Daly, 338. A purchaser not having actual knowledge of the lien is not bound by a lien filed against the grantor of his grantor after the deed giving title to the latter was recorded. 29 Barb. 631.

TITLE II. OTHER LIENS ON REAL ESTATE.

The following, among the minor liens on real estate, are to be noted:

Notices under Unsafe Building Act as a Lien in the City of New York.—Under Act of April 19, 1862, Chap. 356, amended by Law of 1863, Chap. 273, relative to the construction of buildings, it was provided that notice of certain penalties for violating the act were to be served, and filed in the county clerk's office in the city of New York, in the same manner and with like effect as a "lis pendens;" and any judgment recovered upon the suit named in the notice so filed was to be a lien upon the property described therein from the time of such filing, and might be enforced against said property in every respect, notwithstanding the same might be transferred subsequent to the filing of said notice. Repealed by Laws of 1881, Chap. 537. See also Law of April 20, 1871, Chap. 625, providing that judgments for penalties shall be a lien on the premises from the time of filing notice of lis pendens; repealing Laws of 1866, Chap. 873; 1867, Chap. 939; 1868, Chap. 634. This act was amended by Laws of 1874, Chap. 547; Laws of 1881, Chaps. 424 and 687. See also the Consolidation Act, Laws of 1882, Chap. 410, § 506, amended by Laws of 1885, Chap. 456; 1887, Chap. 566; 1892, Chap. 275; which largely recast this part of the Consolidation Act without affecting this provision. See now the Greater New York Charter, L. 1897, Chap. 378, as amd. by L. 1901, Chap. 466, § 407, as to the present law.

Water Taxes .- As to these see Chap. XLVI, supra.

Bonds of Collectors and Receivers of Taxes.— Various laws affecting various localities, and often obscurely created in the tax laws or charters of cities and villages, establish such bonds when filed as liens on real estate in the respective counties. Some of these are below indicated.

By the Revised Statutes, Part I, Chap. XI, Tit. III, bonds of collectors of towns and their sureties, on being filed, were made liens in the counties where filed. 1 R. L. 346, §§ 19, 20; see also 2 R. L. 126, § 1; L. 1823, p. 400, § 26; for the present law, see Town Law, L. 1890, Chap. 569, §§ 52, 53; Chatfield v. Campbell, 35 Misc. 355, affd., 75 App. Div. 631, as to foreclosure.

See also as to collectors' bonds to extend time for collection of taxes, Laws of 1872, Chaps. 10 and 142; 1873, Chap. 5; 1874, Chap. 4. These bonds were to have all the effect of other collectors' bonds.

New York City.—By Laws of 1843, Chap. 230; 1849, Chap. 187; 1851, Chap. 148, such receivers and their deputies were to execute bonds with two sureties, which were liens on the real estate of them and their sureties, when filed in the office of the comptroller of the city. Prior to said city were made liens from the time of filing with the county clerk. The office of collector was abolished by the above Law of 1843, Chap. 230, taking effect April 1, 1844. By Law of 1873, Chap. 767, the Act of 1843 was amended so that

bonds of the receiver and his sureties were to be a lien on all the real estate held jointly or severally by the receiver or his sureties within the county at the time of filing, unless real estate of the value of the bond was specified in it, owned by the sureties or one of them, in which case the lien was to be on the real estate so described, and on all the real estate of the receiver, and on no other, and was to continue until satisfied, but not to exceed ten years from the expiration of the term of office of the receiver, unless an action on the bond were pending. The deputy receiver was also to give bonds with sureties. Former bonds were to be deemed no longer a lien unless suit had been brought within ten years as above, or was brought within six months after passage of the act. If accounts were settled, certificates might be filed to that effect, and the bonds canceled. The Acts of 1849 and 1851, supra, were repealed by Laws of 1881, Chap. 537. See also the Consolidation Act, Laws of 1882, Chap. 410, § 835, which contained like provisions.

For the present law as to the bonds of collectors and receivers of taxes, see

For the present law as to the bonds of collectors and receivers of taxes, see the Greater New York Charter, L. 1897, Chap. 378, as amd. by L. 1901, Chap. 466, §§ 152, 153, 158, continuing the above provisions generally.

Liens for Draining Swamp Lands.—Revised Statutes, Part III, Chap. VIII, Tit. XVI; L. 1869, Chap. 888; 1871, Chap. 43, exempting the county of West-chester from the provisions of the Act of 1869; also L. 1873, Chap. 243; 1881, Chap. 608; 1886, Chap. 636.

Department of Health in the City of New York.—By Laws of May 25, 1867, Chap. 956, judgments in favor of this department, if so stated on their face, were to be liens against property on which a nuisance was abated. The lien might be removed by order of a judge of the court on eight days' notice. By law of 1873, Chap. 383, the sanitary department was substituted for the department of health.

By \$ 633 of the Consolidation Act, L. 1882, Chap. 410, such judgments were to be liens, as other judgments; and by \$ 632, where the Board of Health, its assignee, or any person acting under its authority, incurred any expense in executing any of its orders, a notice of lien was to be filed as in mechanics' lien cases, and indexed with mechanics' liens. It was to be a lien for four years unless sooner enforced or discharged. Unless the owner of the property took steps to remove the lien within two months after notice filed, the notice became conclusive evidence that the amount claimed therein was due. The lien had precedence of all other liens, except those of taxes and assessments.

The Board of Health might discharge liens created by the Metropolitan Board of Health, or the Department of Health, which succeeded it, as those bodies might do. § 596.

These provisions have been re-enacted substantially in the Greater New York Charter, L. 1897, Chap. 378, as amd. by L. 1901, Chap. 466, §§ 1290, 1291, 1276, 1278.

Governor's Abatement of a Nuisance.—By L. 1882, Chap. 308, the expenses of the Governor's abatement of a nuisance were to be paid by the county, and were a lien upon the land and might be recovered by action. Repealed by the Public Health Law, L. 1893, Chap. 661.

Filling Vacant Lots in the City of New York.—By the Consolidation Act, the expenses of filling up such lots where the owners have neglected to do so after notice by the city were a lien like an assessment. Consolidation Act, L. 1882, Chap. 410, § 880.

Oil Wells.—By Law of 1880, Chap. 440, provision is made for liens for work on oil wells, to be entered in the county clerk's lien docket, and to continue for six months, or until judgment rendered thereon in case of proceedings begun within the six months, and also for one year after the determination of the appeal. These provisions were repealed by the Lien Law, L. 1897, Chap. 418, § 120.

CHAPTER XLVIII.

MEMORANDA FOR SEARCHING FOR CONVEYANCES, INCUMBRANCES, ETC.. IN THE VARIOUS OFFICES.

DEEDS, MORTGAGES AND OTHER INSTRUMENTS. MORTGAGES TO UNITED STATES LOAN COMMISSIONERS. ASSIGNMENTS UNDER UNITED STATES BANKRUPT ACT. NOTICES OF Lis Pendens, AND FORECLOSURE NOTICES. INSOLVENT ASSIGNMENTS. ORDERS APPOINTING TRUSTEES OF ABSCONDING, ETC., DEBTORS. GENERAL ASSIGNMENTS. MUTUAL INSURANCE NOTES. JUDGMENTS (COUNTY CLERK). SURROGATES' DECREES. JUDGMENTS (UNITED STATES).
ORDERS FOR RECEIVERS UNDER SUPPLEMENTARY PROCEEDINGS. SHERIFF'S AND MARSHAL'S CERTIFICATES. MECHANICS' LIENS. FORFEITED RECOGNIZANCES. UNSAFE BUILDING NOTICES. BONDS OF RECEIVERS AND COLLECTORS OF TAXES. TAXES AND ASSESSMENTS. OTHER LOCAL LIENS AND SEARCHES. MISCELLANEOUS.

As has been before seen, the various conveyances through which title to land is made are matters of record in the offices of the respective clerks, or registers, if any, of counties where the land is situated. Every purchaser should require a complete title of record, and is entitled to such a title; and where conveyances are not recorded, or otherwise made matter of notice, a bona fide purchaser or incumbrancer for value without notice, whose deed is recorded, is protected against them. The chain of title having been ascertained by inspection of the record, for a period satisfactory to the examiner, written requisitions for searching the records for any prior or other conveyances, or for incumbrances, or liens of record that may affect the property, are usually issued to the clerks of the various offices, or to individual searchers, abstract companies or title insurance corporations, on the responsibility of whose certified returns the conveyancer is authorized to rely. By this means much

of the labor of the examination of title is saved to the professional man, and delegated to experts. The liability of the clerks or experts of the various offices or companies, who may undertake to make searches for liens, for negligence or omissions that may cause damage to parties employing them, is well established. They are also liable for the acts or omissions of others whom they may delegate to do the work.

Vide Morange v. Dix, 44 N. Y. 315; Thorn v. Shiel, 15 Abb. N. S. 581; Young v. Brush, 28 N. Y. 667.

But damages cannot be recovered except where there is a substantial injury. Palliser v. Title Ins. Co. of N. Y., N. Y. Law Journal, Dec. 1908; Kimball v. Connolly, 2 Abb. App. Cas. 504; and by the party for whom the search was made. Day v. Reynolds, 23 Hun, 131.

The register can have but one fee for one requisition, no matter how many

the lots. Matter of Parsons, 54 Super. 451.

A brief digest drawn from the subject-matter of the antecedent pages, showing the periods for which search should be made for the respective instruments or liens, is here given:

SEARCHES IN COUNTY CLERKS' (OR REGISTERS') OFFICES.

Deeds, Mortgages, and Other Instruments .- These are usually searched for in the county clerk's office of the county in which the land is situated, or in the register's office in counties having a register, for a period of at least forty years back, against parties holding or having held any estate or interest in the land, from the date of the conveyance to them to the time of record of the conveyance from them respectively.

By some search is made from as far back as the coming of age of the person searched against, since the decision in Tefft v. Munson, 57 N. Y. 97. It has been held that intending purchasers of real estate need not search against holders in chain of title outside their record holding. Abraham v.

Mayer, 7 Misc. 250.

In modern practice when search is made by an abstract company or title insurance corporation, it may suffice to give the locus putting upon the searcher the responsibility of ascertaining the names to be searched against and of determining the periods during which the search is to continue.

Where conveyance is made by dones of a power (e. g., trustees, assignees, executors, etc.), whether voluntary or by operation of law, search should be continued against the donor, testator, or creator of the power, until the record of the deed by which the power has been exercised.

Deeds with a Defeasance or Given as Security should also be searched against under mortgages. Supra, Chap. XXIII, Tit. II.

Married Women.—As under the law of this State, even prior to the Laws of 1848-9, married women could pass title without the husband, supra, Chap. III, Tit. III, searching in the husband's name alone would not be sufficient. Under the present law the search is made against her (vide, p. 89), and it is not usual to search against the husband with respect to any period since 1848.

Powers. - Donees of powers, from the time of the instrument creating them. Supra, Chap. XII, Tit. III. Where a power is given, the distributees, as well as the deceased, or his executors, or the donor of the power, should be searched against, as the persons who may be entitled to the proceeds may take subject to the exercise of the power (vide pp. 274, 275) and have manifested an election to take the land rather than the proceeds and thus have ousted the dones of the power. Mellen v. Mellen, 139 N. Y. 210. Powers of Attorney.—The principal, and not the attorney, is searched against.

Deceased Person.—Searching to the time of the decease of a person would not be sufficient, as the deed might be recorded subsequent to his decease. The search should be continued against such person and his heirs or devisees, as the case may be, down to the record of the deed from the heirs or devisees or executors, if these last have a power to sell. A search against the deceased by name will include a search against his executors, although it would not always include the testamentary trustee, who may act without qualifying as executor. Supra, Chap. XVII, Tit. III. It is safer to search against the executors nominatim, as they might have conveyed as executors, without naming their testator. It will be necessary also to see whether there was a change of the testamentary trustee; vide infra.

Trusts.—Those having the *legal* estate are alone searched against. It will be necessary to see if there was a substituted trustee, so as to continue a search against him. Conveyances by trustees are indexed in some counties also under the name of the beneficiary, as well as in the name of the trustees.

Foreclosure.— When there has been a foreclosure, search must be made until filing of notice of pendency of action and complaint.

It is also prudent to continue searches until the record of referee's deed, as sometimes rights or claims are disclosed by instruments recorded pendente lite, which have influence upon the chain of title.

Assignments of Mortgages.— These are usually noted in the margin of the record of the mortgage by the county clerk or register; but it is not safe to rely on such notation, as the mortgage may be assigned under a general assignment, or other general instrument, which may have been recorded with conveyances, or the notation may have been delayed or omitted. Vide supra, Chap. XXVI, Tit. III.

Leases.—Those for three years and upward are to be recorded. Supra, Chap. XXVI, Tit. III. They are covered by requisition to search for conveyances.

Decree.— Where title is deduced through a suit or proceeding, it is safer to search for conveyances against the plaintiff after the filing of *lis pendens*, as well as from his previous ownership, and up to the record of the deed under the decree, as the notice of *lis pendens* does not, as a rule, include and bind the plaintiff's interest.

Conditional Bills of Sale.—Search should be made for conditional bills of sale by locality and by names for one year past. *Vide* Lien Law, L. 1897, Chap. 418, § 114.

SEARCHES IN THE OFFICE OF U. S. LOAN COMMISSIONERS.

From January 10, 1837, the date of the passage of the law creating the commissioners. Supra, p. 754. They are also to take the mortgages given under acts of 1792, and 1808, to the Loan Commissioners. Vide, supra, p. 758. The mortgages under the old acts are probably all paid off or otherwise settled. Their office in the city of New York is to be in the register's office, and in other counties in the court house; and the books are to be kept at the county clerk's office. State Finance Law, G. L., Chap. X, §§ 83, 86. See L. 1837, Chap. 150. It is usual to search by name only, or with a brief memorandum of the property, as well as the name of the party. The searches are certified to by the commissioners. Although their books are deposited by law with the clerks or registers of the counties, the commissioners are not allowed access to them; as the books are kept under lock and key, at least in the county of New York.

SEARCHES IN THE U. S. COURTS.

Petitions under United States Bankrupt Act.—Under the Act of 1867, searches should be made from June 1, 1867, the date of the taking effect

of the Bankrupt Act, to August 31, 1878, when it ceased to have effect. The search should be from time of the commencement of bankruptcy proceedings against the party, as the assignment relates back to that period. Search is generally made for the full time of the operation of the act. Supra,

Chap. XXXII.

Searches under the present act should be made against all names coming into the chain of title since the act took effect (July 1, 1898) for the same period as search is made for conveyances. It is not necessary that there be an instrument of assignment to the trustee, or receiver, they take by virtue of the adjudication. Title of the trustee relates to the time of adjudication under the present act, and not to the time of filing the petition. Where a petition has been filed, a receiver may be entitled to possession, so that it is not safe to disregard a pending bankruptcy proceeding merely because no adjudication has been had.

When about to foreclose a mortgage, or begin other action, or when examining an action, search should be made for petitions not only against all persons in the claim, but against all lienors whose interests are to be cut

off, or to be regarded as having been cut off.

The search is generally made for "petitions, orders, and decrees in bankruptcy," with the clerks of the United States District Courts; and search should be in the district where the bankrupt resides, and where he carries on his business. Under the earlier law the assignment itself was to be recorded with the county clerk or register of deeds of the county where the land was situated within six months after its execution; under the Act of 1898 a certified copy of the decree of adjudication is to be filed in the office where conveyances of real estate are recorded in every county where the bankrupt owns real estate not exempt from execution, within thirty days after the adjudication. Supra, p. 796.

Judgments (United States).— These are to be searched for in the offices of the clerks of the circuit and district courts of the district, against all parties having held the property situated in the district within ten years back from the time of the search. The search against each name must commence ten years before the requisition and continue until record of deed out of that person. Vide supra, p. 868, as to the time of searching in these courts. These judgments might formerly be liens for other counties than those of the district, if docketed with the county clerks therein in any part of the State. Supra, p. 869. Before 1840, they were considered liens in any part of the State, without filing the transcript. Ib. Many examiners search beyond ten years, as the land may have been sold under a judgment prior thereto; supra,

Real property is sometimes condemned in the Federal Courts for violation of the Internal Revenue Laws. Vide supra, Chap. XXVII. These decrees of condemnation are never searched for, but there can be no doubt that they vest all title to the property in the United States, and can be gotten rid of, after the term at which they were entered, only by proceedings for remission. Supra, p. 721. It would be difficult to frame a safe requisition to cover the points, for the property is usually described in the information only by the street number (though sometimes a description by metes and bounds is given), and the street numbers are apt to change.

Search should also be made for suits in equity pending against the persons

searched against.

SEARCHES IN THE COUNTY CLERKS' OFFICES.

In counties where no register's office has been created by law, requisitions as to deeds, mortgages, leases, and the like, as above mentioned, are made to the county clerk of the county where the land in question is situated.

Judgments. Judgments, being a lien as against third parties for only ten years, the search is to be in the different county clerks' or registers' offices where the lands are located, against all or any of those who have held the land within that period, down to the time of the record of the conveyance from them respectively. Supra, Chap. XXXVII, Tit. I.

Where a person in the chain has died within 31/2 years, search should be made for 131/2 years back (Code Civ. Proc., § 1380) although this is done infrequently.

Extension of Lien. If the judgment is suspended by injunction or appeal, the time of the lien is extended for the period it is suspended, if a notice to that effect is filed and noted. Supra, Chap. XXXVII, Tit. I.

As to lien of judgment suspended on appeal, vide Code Civ. Proc., §§ 1256,

1259; also supra, p. 863.

Deceased Party.—It is not necessary to search against a party for judgments entered after his decease; for although, under the Revised Statutes, a judgment might be entered within a year of a party's death, if he died after verdict, such a judgment would not bind real estate. Supra, p. 870. When the person searched against for judgments is dead, search should be made for longer antecedent time. Code Civ. Proc., § 1380.

Judgments against Executors or Administrators.— These are not binding on land of the decedent, except when expressly so made by the terms of the judgment, and as to specific real property therein described. Code Civ. Proc., §§ 1814, 1823; also supra, p. 870.

They should be searched for, however, and then examined to determine

whether they have been made liens.

Surrogate's Decrees.— These must be searched for for the same periods as judgments. Supra, p. 861.

Trustees.— A personal judgment would not be a lien on the technical legal estate of a trustee, therefore they are not searched against.

Searches should, however, be made against him "as trustee."

Notices of Lis Pendens .- From April 17, 1823, in the county clerk's office where the land is situated, during the time the party has held the property. If before the amendment of 1858, the search should be down to the record of the deed resulting from the suit. And even since that amendment, and the amendment of 1862, it is more desirable to search until that period.

Where the examination of the title is of an undivided interest only, it is better to search for notices of lis pendens against all the parties in interest, as a notice of lis pendens filed by the party whose interest is under examination in a partition suit in which he is plaintiff would not be docketed or

noted against him.

Condemnations by City Authorities .- These may often proceed without notice and search should be made, through a surveyor, for all condemnations or taking of land for public purposes. This should be a locality, and not a name search.

Notices of Foreclosure by Advertisement.—By Code Civ. Proc., § 2388, as formerly by Law of April 9, 1857, Chap. 308, such notices, which are in the nature of lis pendens notices must be filed with the county clerk.

Insolvent Assignments .- These were first filed about 1755, in the county clerk's office of the place where they were executed. Supra, Chap. XXXI. Code Civ. Proc., §§ 2175, 2194 and 2211 provide that they must be recorded as conveyances also, in the proper office.

Appointment of Trustees of Absent, etc., Debtors .- These were to be filed with the county clerk. The appointment vested the trustees with the estates of the debtor from the first publication of notice of their appointment. Supra, Chap. XXXI, Tit. II. These provisions were embraced in the Law of March 21, 1801, re-enacted in 1813. Vide 1 R. S. 157. They are now repealed, Laws of 1880, Chap. 245. There appears to be no orders appointing trustees filed in the county clerk's office in New York county before November 15, 1831.

General Assignments.- From April 13, 1860, in the office of the clerk of the county of the residence of the debtor at the date of the assignment. It

has been held, however, that these assignments do not operate as notice to purchasers unless recorded among conveyances, in the county clerk's or register's office. Vide Supra, p. 711.

Mutual Insurance Notes .- From March 23, 1836. This is an obscure and generally unknown lien on the building insured, created for the benefit of the Madison Mutual Insurance Company, in favor of deposit notes when filed with a county clerk, and appears to be still in force. Supra, p. 641.

The search is seldom made.

Orders for Receivers under Proceedings Supplementary to Execution (County Clerk).- From April 23, 1862. Against all parties from the time of acquiring down to the conveyance of the land by them. Before May 4, 1863, the search is to be made with the county clerk where the judgment-roll (or a transcript from a justice's judgment) is filed; after that period, with the clerk of the county where the real estate is situated, or where the judgment-debtor resided. Supra, Chap. XXXIX. It might be well, also, to search against the receiver.

The scarch should be made against lienors, etc., as noted under the head

of Petitions, under U. S. Bankrupt Act, for the same reasons as that search

is advisable.

Sheriffs' or Marshals' Certificates (County Clerk) .- Sheriffs' certificates were first filed under Law of 1820 (supra, p. 883) with the county clerk where the land is situated. They are to be searched for against all parties holding since that period, from the time they respectively acquired the property until at least the time when they parted with it respectively. It seems desirable that the search should be continued for at least a year beyond a conveyance from the party, as the land might have been sold under a judgment obtained before the party acquired the property, and the sale made under that judgment subsequent to its conveyance out of him. In that case neither the judgment search nor the return to the search for sheriff's certificates might show the lien or sale under it, if the usual judgment search only were made, and the search for certificates were made only to the time of the transfer by deed. Many examiners continue their search for these certificates down to a period ten years from the time of the conveyance by the party searched against. Marshals' certificates of sales in the United States courts were also filed with county clerks from about the same period.

Exemption under Homestead Act. Since 1850. See Chap. XXXVIII, Tit. III.

Mechanics' Liens. — For the regulation of these liens see L. 1897, Chaps. 418, 419, and Chap. XLVII, supra. The lien ceases ipso facto in a year from filing, unless continued by order, or action be commenced thereon and lis pendens filed. In the city of New York the clerk is to search against the property, if so required, without reference to individuals. The notices of lien are filed in the county clerk's office where the land is situated. Supra, Chap. XLVII.

Search is made only for one year last past.

Forfeited Recognizances (City of New York).—These were filed with the county clerk of New York, by Law of May 7, 1844, as judgment liens. In other counties judgments may be obtained on them. Supra, p. 859.

Consolidation Act, L. 1882, Chap. 410, § 1480.

Unsafe Building Notices (City of New York).— These became liens on being filed with the county clerk under certain circumstances, as stated. Supra, p. 1002.

Bonds of Collectors and Receivers of Taxes .- These are to be searched for either in the offices of the county clerk, or comptroller, or county treasurer, as indicated in the acts applicable to various localities. Supra, p. 1002.

Liens in Favor of Department of Health .- Supra, pp. 872, 1003; Consolidation Act, L. 1882, Chap. 410, §§ 596, 632. These are indexed with mechanics' liens and continue for four years. The above act relates to the city of New York.

Greater New York Charter, L. 1897, Chap. 378, as amd. by L. 1901, Chap.

Jury Fines as Liens .- Supra, p. 862. Code Civ. Proc., § 1117.

Oil Wells .- Supra, p. 1003.

SEARCHES FOR TAXES.

Taxes and Assessments, and Water Rates .- These are made liens from the time of their confirmation, unless otherwise provided. Searches are to be made for them with the various local officers or others, who have charge of the proper bureaux, and who also search for sales made by reason of the said liens.

Taxes on lands of residents of towns are held to be payable from the time the assessor's rolls are made up. Rundell v. Lakey, 40 N. Y. 513, doubted.

109 N. Y. 50. See supra, p. 971.

Taxes in the City of New York are liens from the first Monday of October each year (Greater New York Charter, § 914) and assessments ten days after entry (Greater New York Charter, § 159).

Taxes to the United States.— The collateral inheritance tax (Act of June 13, 1898, 30 St. at L. 448) has for the present been repealed; it applied only to personalty or legacies. As to its being a lien, see said Act, § 30.

In Comptroller's Office, for taxes, sales for same and cancellations thereof, as to properties in Forest Preserve and other counties affected by general tax laws. Vide Chap. XLVI, supra.

SEARCH IN SURBOGATE'S OFFICE.

Wills.—Where a title is passed through a supposed intestacy, wills of real estate should be searched for in the surrogate's office of the county, from the decease of the party having the estate until at least four years thereafter; and a longer period is desirable to avoid contingencies of infancy, marriage, insanity, etc. Vide supra, Chap. XVI; Code Civ. Proc., § 2628.

The will, however, may have been proved in any county where there were

assets. Code Civ. Proc., §§ 2475, 2476.

MISCELLANEOUS.

Collateral Inheritance and Succession Taxes.— These are also liens. See

supra, Chap. XXVII. Search should be made in the office of the State Comptroller to determine whether this tax has been fixed and paid.

Violations of Building and Tenement Laws, etc.—Where contracts specify that property is to be conveyed free of violations of law or municipal ordinances, search for notes or notices of such violations should be made in the local departments.

Swamp Lands.—Supra, p. 1003.

The Block System of Recording and Indexing Conveyances.— As to New York.— See Laws of 1889, Chap. 349, amd. L. 1890, Chap. 166.

This act provides for a system of block numbering and indexing, referring

to deeds, mortgages, leases, etc., recorded in the register's office.

L. 1893, Chap. 536, applies the same system to taxes, assessments, water rates and unexpired leases of city land and to statutory liens and claims upon land to be filed with the county clerk.

As to Kings County. - See Laws of 1894, Chap. 365, which also provides for re-indexing statutory liens and claims upon land for such period prior to the passage of the act as the county clerk shall determine.

Search need 1: made only in the block for instruments other than general conveyances, powers of attorney and contracts.

Title Company Searches.— Title companies are organized under the Insurance Law, G. L., Chap. XXXVIII, L. 1892, Chap. 690, Art. V. Section 170 authorizes said companies to make and guarantee the correctness of searches for all instruments, liens or charges affecting titles to real property and chattels real. And Code Civ. Proc., § 3256 (as amd. by L. 1895, Chap. 331), provides that searches affecting property situate in any county in which the office of county clerk or register is a salaried one, when made and certified to by title, insurance, abstract or searching companies, organized and doing business under the laws of this State, may be used in all actions or special proceedings, in which official searches may be used, in place of and with the same legal effect as such official searches, and the expense of searches so made by said companies shall be taxable at rates not exceeding the cost of similar official searches.

In places where the title companies have locality indices, diagram searches are often used, the title companies returning all deeds or incumbrances on property shown in diagram irrespective of ownership; in this way outstanding adverse titles are discovered and various instruments which are recorded or filed are brought to the notice of counsel, which in a search made against parties by name only might not appear.

CHAPTER XLIX.

TITLE REGISTRATION.

By the Law of 1908, Chap. 444, a system of land title registration based on the principles of the Torrens Law has been adopted in this state. The law is to be known as "The Land Title Registration Law" (§ 1), and goes into effect February 1, 1909 (§ 66).

In view of the importance of this law and the growing use that has been made of it elsewhere, a brief analysis is given here. Reference should be had, however, to the law for the details, as the briefest outline only is attempted here

The application for registration is by the filing of a verified complaint, praying for registration, with a "registrar" of the county in which the land or some portion of it is situated. Such application must be made by the owner in person, or an attorney duly authorized. A corporation may apply by its duly authorized officer or agent, and an infant or other person under disability by his guardian, trustee or committee. § 2.

The application is to the Supreme Court; and the proceedings have the effect of proceedings in rem. The issues shall be tried at Special Term. § 3. County clerks or registers shall be "registrars" of title in their respective

Official examiners of title are provided for, to be under the supervision of the Court of Appeals. Before application, examination and certification of title is required. § 9.

Provision is made as to what persons may make application. § 10.

And also in detail as to the contents of the application, and the filing

of any additional paper or evidence. § 11.

The examiner's certificate of title is also required to accompany the complaint as an exhibit and part thereof; the certificate to set forth the exact state and condition of the title sought to be registered and other particulars specified at length, and to be in the form prescribed. § 12.

A survey map or plan is also required to be filed. § 13.

Notice of application and pendency of action must also be filed in the manner prescribed by Code Civ. Proc., § 1670. § 14.

A "caution" is also provided for, being a written notice of claim of right or interest to be filed with the registrar by any person claiming such right or interest. § 15.

Nonresident applicants may appoint agents residing within the state. § 16. When the court is satisfied the plaintiff appears to have a title that should be registered, it shall make an order directing that the action to register such title be commenced by the issuance of the summons and a notice prescribed in the succeeding section. Provision is also made for service of the summons, personally and otherwise. § 17.

The form of the notice accompanying the summons is prescribed. A copy

of the complaint may be demanded and must be served. § 18.

Posting of a copy of the summons and notice on the land is also required. 19.

Guardian ad litem may be appointed of all minor parties.

Any person interested may appear and defend. § 21.

The court may find and decree in whom the title or any right or interest in the property or any part thereof is vested, and may remove clouds from the title; and may direct the registrar to register, with directions regarding the certificate of title to be issued. All taxes, water rents and assessments must be paid, or the title registered and certificate issued subject thereto. § 22.

The title must be free from reasonable doubt; and the judgment is to be

conclusive upon the State of New York and all persons. § 23.

As to fraud and action to set aside the judgment or to recover the property. § 24.

Registration must be made and a certificate issued and entered, after the final judgment is duly entered and filed in the registrar's office. § 25.

The form of the certificate is prescribed. § 26.

Also entry of certificates in the "Registration Book" is provided for by binding or recording them therein, with memorials and notations. § 27.

Duplicates must also be made and stamped. § 28.

The owner must give a receipt for the certificate. § 29.

The certificate is to include dealings pending registration. § 30.

The certificate as evidence of title. § 31.

Rights of registered owners, and the exceptions, aside from those incumbrances, etc., noted on the certificate. § 32.

Registered property is not subject to be acquired by prescription or adverse

possession. §. 33.

Except in case of fraud, and as otherwise provided in the act, inquiry is not required of person taking registered title. § 34.

Memorials and notations are to be carried forward on all certificates, until

canceled. § 35.

Registered property is to remain registered, by an implied agreement running with the land. § 36.

Registered property is subject to the same rights and burdens as unregis-

tered property. § 37.

Transfers are provided for in detail. § 38.

As to a transfer of part only. § 39.

A book of covenants, restrictions and forms is provided for, in which any person may have recorded any covenant; restriction or form he may present. § 40.

Filing, entering and indexing of papers is also prescribed in detail; and a "Tickler Certificate Book," wherein the registrar shall note all filed papers affecting property for which registration proceedings are pending, is provided for. § 41.

All papers filed by the registrar, and indexed and entered, shall be of equal effect as to notice, in the order of their filing, as are similar papers when recorded by county clerks or registers under the recording acts. § 42.

The addresses of interested parties are required to be indorsed in papers;

and provision is made for registrar's serving notices by mail. § 43

When a transfer is deemed to be registered. § 44.

New certificates are provided for on application made. § 45.

As to loss of owners duplicate. § 46.

Mortgages, leases and other liens and charges may be registered as provided 8 47

Proceedings for registering mortgage, lease or other lien or charge are

regulated. § 48.

Judgments, decrees, attachments, and other liens must be noted as prescribed in the registration book, and on the certificate. § 49.

The assignment of mortgage, lease or other lien or charge is provided for.

8 50.

Also the release, discharge or surrender of charge or incumbrance. § 51.

And the enforcement of the same. § 52.

Powers of attorney must be filed and registered. § 53.

Doubtful matters must be referred to the court,—as when the registrar is in doubt or the parties in interest fail to agree as to the proper memorial to be made in the registration book. § 54.

Provision is made for transfer in case of the death of a registered owner.

\$ 55.

Provision is made for registration certificates during the settlement of decedent's estates. § 56.

Also as to titles derived through execution of powers in wills. § 57.

An assurance fund is provided for. § 58.

Out of the assurance fund compensation may be made to persons who, without negligence, sustain loss or damage or are deprived of real property or of any estate, right or interest therein, after the original registration thereof, because of the registration of another person as owner of such property, or of any estate, right or interest therein, through fraud, or in consequence of any error, omission, mistake or misdescription in any certificate of title or in any entry or memorial in the registration book. § 59.

The action against the assurance fund provided for. § 60. Restrictions on claims against the assurance fund. § 61.

Penalties for fraudulent acts or false certificates and for forgery are provided for. §§ 62, 63.

And fees. § 64.

The act shall be construed literally, so far as may be necessary for the purpose of effecting its general intent. § 65.

Reference may also be had to similar statutes of the various jurisdictions in which title registration has been adopted, as follows:

Illinois.- L. 1895, p. 107 (held unconstitutional, People v. Chase, 165 III. 527); L. 1897, p. 141, as amd. by L. 1903, p. 121, and L. 1907, pp. 207, 208 (sustained, People v. Simon, 176 Ill. 527).

Ohio.— L. 1898, p. 220.

California .- L. 1897, Chap. 110.

Massachusetts.— L. 1898, Chap. 562, as amd. by L. 1899, Chap. 131; L. 1904, Chap. 448; L. 1905, Chaps. 195, 288; L. 1906, Chap. 344.

Minnesota.— L. 1901, Chap. 237, as amd. by L. 1902, Chap. 11; L. 1903,

Chap. 234; L. 1905, Chap. 65.

Oregon. L. 1901, p. 438, as amd. by L. 1905, p. 228; L. 1907, p. 282.

Phillipine Islands. Acts 1902, No. 496, as amd. by Acts 1903, Nos. 572, 627, 648, 659, 700, 829, 926, 979; Acts 1904, No. 1108; Acts 1906, No. 1484; Acts 1907, Nos. 1648, 1699.

Colorado. L. 1903, Chap. 139. Washington. L. 1907, Chap. 250.

Reference to some important decisions dealing with questions that have arisen elsewhere under similar acts may be of importance.

See Tyler v. The Judges, 175 Mass. 71, (appeal dismissed) 179 U. S. 405, holding the proceeding to be in the nature of a proceeding in rem, and that unknown parties may be barred by service by publication. Cf. Leigh v. Green, 193 U. S. 79; also State v. Guilbert, 56 Ohio St. 575.

The "Torrens Law" of California held constitutional. Robinson v. Ker-

rigan, Case No. 4659, May 5, 1907.

The amended Illinois statute held constitutional. People v. Simon, 176 Ill. 165; Glos v. Hollowell, 190 Ill. 65; Gage v. Consumers El. Light Co., 194 Ill. 30. Cf. the decision as to the earlier unamended law, People v.

Chase, 165 III. 527.

The Minnesota statute held constitutional, Ex rel Douglas v. Westfall, 85 Minn. 437; see also Nat. Bond & S. Co. v. Hopkins, 96 Minn. 119; Baart

v. Martin, 99 Minn. 197.

The Colorado statute sustained. People v. Crissman, Dec. 1907.

In connection with the foregoing statute the Court of Appeals has established the following rules, by order of December 9, 1908:

RULES RELATING TO APPLICATIONS TO PRACTICE AS OFFICIAL EXAMINERS OF TITLE.

I .- EXAMINATION OF APPLICANTS.

Any person duly admitted to practice as an attorney and counselor at law in the courts of record of this State, desiring to be licensed to practice as an official examiner of title, may apply to the State Board of Law Examiners for an examination as to his fitness. Examinations for this purpose shall be held by the board either at the same times and places as designated for the examinations for admission to the bar or at such separate times and places

as the board may specially designate.

Each applicant for examination must file with the secretary and treasurer of the board, at least fifteen days before the day appointed for holding the examination at which he intends to apply, a written application for examination, together with the fee of fifteen dollars and an affidavit stating his age, residence and office address, when and where he was admitted to practice as an attorney and counselor at law, the length of time during which he has practiced law, that he has duly filed in the office of the clerk of the Court of Appeals the oath or affirmation required by chapter 165 of the Laws of 1898, as amended, with the date of such filing, and stating the nature and amount of work that he has done in the examination of titles to real property.

II .- EXPERIENCED EXAMINERS OF TITLE.

Any person duly admitted to practice as an attorney and counselor at law claiming to be an experienced examiner of titles to real property may be licensed by the Appellate Division of the Supreme Court to practice as an official examiner of title without having passed the examination prescribed by Rule I, provided the fact of sufficient experience is found and certified to by the State Board of Law Examiners. For this purpose the applicant may submit at any time to the secretary and treasurer of the board, together with the fee of fifteen dollars, an affidavit stating his age, residence and office address, the date of his admission to practice as an attorney and counselor at law, his compliance with chapter 165 of the Laws of 1898, the length of time that he has practiced law, the nature and amount of work that he has done in the examination of titles to real property, which must have covered a period of at least five years, the number of titles that he has examined upon the transfer or mortgage of real property in this State, and specifying in detail the general location of the property and the names of one or more of the owners or mortgagors thereof.

The applicant shall also procure and file an affidavit of the register, clerk or deputy having charge of the records of the county in which the applicant resides or where his law office is situated, stating the nature and amount of his work in searching titles in such register's or clerk's office, together with an affidavit of at least two attorneys at law actually engaged in the practice of their profession in that judicial department for at least five years last past, who are personally acquainted with the applicant, stating their knowledge of his work as an examiner of titles and expressing their judgment as to his competency to discharge the duties of an official examiner of titles, which proof must be satisfactory to the State Board of Law Examiners.

III.— Bonds.

No person shall be licensed or admitted nor authorized or empowered to practice as an official examiner of titles until he has executed and filed a bond, joint and several in form, with two or more sufficient sureties, to the People of the State of New York, in the penal sum of not less than five thousand dollars, conditioned faithfully to perform and discharge the trust reposed in him as an official examiner of titles, to obey all lawful decrees and orders of the court touching the administration of his office, and to pay all loss or damage which the assurance fund created by chapter 444 of the Laws of 1908 may sustain through, or which may be occasioned to any person by,

any fraud, negligence, omission, mistake or misfeasance by him in his office

or position of examiner of titles as aforesaid.

The sureties upon said bond shall each make his affidavit, subjoined thereto, to the effect that he is a resident of and a householder or a freeholder within the State and is worth the amount of the penalty of the bond specified over all the debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution. Said bond shall be approved by the presiding or acting presiding justice of the Appellate Division of the department in which the applicant is licensed, and such justice may require the sureties to appear before him and to justify. The bond shall be filed in the office of the clerk of that court, and the obligors therein shall be liable for any loss or damage sustained thereunder by reason of any defect in any title certified by the examiner for the period of ten years from the date of such certificate of title. Such bond shall be renewed at least once in every five years, and any failure to renew the same within such period shall of itself operate as a revocation of the license. In case of the insolvency of either of the sureties the Appellate Division must order the renewal of the bond forthwith.

IV .- CERTIFICATE OF BOARD OF EXAMINERS.

If the State Board of Law Examiners, upon examination, finds an applicant qualified under Rule I, or finds an applicant to be an experienced examiner of titles under Rule II, it shall certify to the Appellate Division of the Supreme Court of the department in which the applicant resides or in which he has an office for the regular practice of law, the fact that the applicant has complied with the rules and requirements prescribed by the Court of Appeals as precedent to admission to practice as an official examiner of titles in this State.

V .- Suspension from Practice and Removal from Office.

An individual official examiner of title who is guilty of any deceit, malpractice, crime, misdemeanor or negligence as such examiner, or who is guilty of any fraud or deceit in the proceedings by which he was admitted to practice as such examiner, may be suspended from practice or removed from office and his license revoked by the Appellate Division of the Supreme Court by which he was licensed as an official examiner upon notice and hearing had.

Suspension from practice as an attorney and counselor at law shall of itself work a suspension from practice as such examiner, and his disbarment as an attorney and counselor at law shall of itself work a revocation of his

license as an examiner.

VI.— APPELLATE DIVISION RULES.

The justices for each Appellate Division may adopt for their several and respective departments such additional special rules for ascertaining the fitness of applicants as to such justices may seem proper.

VII .- BOARD OF EXAMINERS' RULES.

The State Board of Law Examiners may adopt such rules for carrying out and applying these rules as may be consistent therewith.

The whole title in which a subject sought, is found, should be looked over, as details are often so interwoven that a reference to a single page in many cases will not entirely exhaust the subject.

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